



Date and Time: Tuesday, October 17, 2023 9:46:00 AM CST

Job Number: 208208605

Documents (100)

1. [Gallant v. BOC Group, 886 F. Supp. 202](#)

Client/Matter: -None-

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2. [Addamax Corp. v. Open Software Found., 888 F. Supp. 274](#)

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3. [Concept Design Elecs. & Mfg. v. Duplitrronics, Inc., 1995 U.S. Dist. LEXIS 22987](#)

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4. [Roman v. Cessna Aircraft Co., 55 F.3d 542](#)

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5. [Traffic Scan Network v. Winston, 1995 U.S. Dist. LEXIS 7295](#)

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6. [Bonollo Rubbish Removal v. Town of Franklin, 886 F. Supp. 955](#)

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7. [Anell v. Freeport Minerals Corp., 1995 U.S. App. LEXIS 13529](#)

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8. [Storis v. GERS Retail Sys., 1995 U.S. Dist. LEXIS 7614](#)

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9. [G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762](#)

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10. [Manufacturers Life Ins. Co. v. Superior Court, 10 Cal. 4th 257](#)

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11. <u>Wallace v. Bank of Bartlett, 55 F.3d 1166</u>	
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12. <u>Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394</u>	
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13. <u>Pacific Gas & Electric Co. v. County of Stanislaus, 48 Cal. App. 4th 1393</u>	
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14. <u>Lucas Indus. v. Kendiesel, 1995 U.S. Dist. LEXIS 7979</u>	
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15. <u>Slagle v. ITT Hartford Ins. Group, 904 F. Supp. 1346</u>	
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16. [*Delta Life & Annuity Co. v. Freeman Fin. Servs. Corp., 1995 U.S. App. LEXIS 14897*](#)

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17. [*Solla v. New York State HMO Conf., 1995 U.S. Dist. LEXIS 21752*](#)

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18. [*Lago & Sons Dairy v. H.P. Hood, Inc., 892 F. Supp. 325*](#)

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19. [*SBC Communs. v. FCC, 56 F.3d 1484*](#)

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20. [*Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 U.S. Dist. LEXIS 8822*](#)

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21. [*Ambrose v. Blue Cross & Blue Shield, 891 F. Supp. 1153*](#)



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22. [In re Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497](#)

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23. [Johnson v. Nyack Hosp., 891 F. Supp. 155](#)

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24. [Pedrina v. Han Kuk Chun, 906 F. Supp. 1377](#)

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25. [Thompson Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317](#)

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26. [Abbott Lab. \(Ross Lab. Div.\) v. Segura, 907 S.W.2d 503](#)

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27. [Community Publrs. v. Donrey Corp., 892 F. Supp. 1146](#)

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28. [Addis v. Holy Cross Health Sys. Corp., 1995 U.S. Dist. LEXIS 21838](#)

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29. [Kambiz Ajir v. Exxon Corp., 1995 U.S. Dist. LEXIS 22758](#)

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30. [Howerton v. Grace Hosp., 1995 U.S. Dist. LEXIS 21123](#)

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31. [Three Crown Ltd. Partnership v. Salomon Bros., 1995 U.S. Dist. LEXIS 9961](#)

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32. <u>Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169</u>					
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33. <u>Verson Corp. v. Verson Int'l Group PLC, 899 F. Supp. 358</u>					
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34. <u>Leak v. Grant Medical Ctr., 893 F. Supp. 757</u>					
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35. <u>Israel Travel Advisory Serv. v. Israel Identity Tours, 61 F.3d 1250</u>					
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36. <u>K.M.B. Warehouse Distrib. v. Walker Mfg. Co., 61 F.3d 123</u>					
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37. [Four Way Plant Farm v. NCCI, 894 F. Supp. 1538](#)

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38. [Vinci v. Waste Management, Inc., 36 Cal. App. 4th 1811](#)

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39. [Jala v. Western Auto Supply Co., 1995 U.S. Dist. LEXIS 11028](#)

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40. [Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421](#)

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41. [Newman v. Associated Press, 1995 U.S. Dist. LEXIS 19588](#)

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42. [CENTURY SHOPPING CTR. FUND I v. MALONE & HYDE, INC., 197 Wis. 2d 117](#)



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43. [Saratoga Harness Racing v. Veneglia, 897 F. Supp. 38](#)

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44. [International Audiotext Network v. American Tel. & Tel. Co., 62 F.3d 69](#)

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45. [Paul E. Volpp Tractor Parts v. Caterpillar, Inc., 917 F. Supp. 1208](#)

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46. [United States v. Eastman Kodak Co., 63 F.3d 95](#)

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47. [Little Caesar Enters. v. Smith, 895 F. Supp. 884](#)

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48. [E.W. French & Sons v. General Portland, 1995 U.S. App. LEXIS 23773](#)

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49. [Nichols Motorcycle Supply v. Dunlop Tire Corp., 1995 U.S. Dist. LEXIS 12153](#)

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50. [Bathke v. Casey's Gen. Stores, 64 F.3d 340](#)

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51. [MCM Partners v. Andrews-Bartlett & Assocs., 62 F.3d 967](#)

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52. [Westport Taxi Serv. v. Westport Transit Dist., 235 Conn. 1](#)

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53. <u>Doctor's Hosp. v. Southeast Medical Alliance, 897 F. Supp. 290</u>					
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54. <u>FTC v. Onkyo U.S.A Corp., 1995 U.S. Dist. LEXIS 21222</u>					
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55. <u>Hialeah, Inc. v. Florida Horsemen's Benevolent & Protective Ass'n, 899 F. Supp. 616</u>					
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56. <u>Leslie v. Lloyd's of London, 1995 U.S. Dist. LEXIS 15380</u>					
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57. <u>Leonard v. J.C. Pro Wear, 1995 U.S. App. LEXIS 24340</u>					
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58. [Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Publications](#), 63 F.3d 1540

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59. [National Ass'n of Review Appraisers & Mortgage Underwriters v. Appraisal Found.](#), 64 F.3d 1130

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60. [United States v. Milikowsky](#), 65 F.3d 4

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61. [Associated Bodywork & Massage Professionals v. American Massage Therapy Ass'n](#), 897 F. Supp. 1116

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62. [Nichols Motorcycle Supply v. Dunlop Tire Corp.](#), 913 F. Supp. 1088

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63. [Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.](#), 1995 U.S. Dist. LEXIS 21032



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Practice Areas & Topics: Antitrust & Trade Law; Timeline:
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64. [Gunderson v. University of Alaska, 902 P.2d 323](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases

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

65. [Maric v. St. Agnes Hosp. Corp., 65 F.3d 310](#)

Client/Matter: -None-

Search Terms: "antitrust law"

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

66. [Tricom, Inc. v. Elec. Data Sys. Corp., 902 F. Supp. 741](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

67. [Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406](#)

Client/Matter: -None-

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Search Type: Natural Language

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

68. [Great W. Directories v. Southwestern Bell Tel. Co., 63 F.3d 1378](#)

Client/Matter: -None-

Search Terms: "antitrust law"



Search Type: Natural Language

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

69. [Caldwell v. American Basketball Ass'n, 66 F.3d 523](#)

Client/Matter: -None-

Search Terms: "antitrust law"

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

70. [Moore ex rel. Mississippi v. Abbott Lab., 900 F. Supp. 26](#)

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases

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

71. [Serfecz v. Jewel Food Stores, 67 F.3d 591](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases

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

72. [Cieri v. Leticia Query Realty, 80 Haw. 54](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type

Cases

Narrowed by

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

73. [Audell Petroleum Corp. v. Suburban Paraco Corp., 903 F. Supp. 364](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

74. [Laitram Mach. v. Carnitech A/S, 901 F. Supp. 1155](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

75. [RX Sys. v. Medical Technology Sys., 1995 U.S. Dist. LEXIS 14214](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

76. [Roma Constr. Co. v. aRusso, 906 F. Supp. 78](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

77. [Morsani v. Major League Baseball, 663 So. 2d 653](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

78. [Borgeson v. Archer-Daniels Midland Co., 909 F. Supp. 709](#)

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. [Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

80. [New York by Vacco v. Reebok Int'l, 903 F. Supp. 532](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

81. [Clark v. Esser, 907 F. Supp. 1069](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Narrowed by

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

82. [Total TV v. Palmer Communications, 69 F.3d 298](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type

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

83. [City of Cleveland v. United States Nuclear Regulatory Comm'n, 68 F.3d 1361](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

84. [United States v. Mercy Health Servs., 902 F. Supp. 968](#)



Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

85. [American Booksellers Ass'n v. Houghton Mifflin Co., 1995 U.S. Dist. LEXIS 21035](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

86. [Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194](#)

Client/Matter: -None-

Search Terms: "antitrust law"

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

87. [Coleman v. Cannon Oil Co., 911 F. Supp. 510](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

88. [Gibson v. Walco Co., 1995 U.S. Dist. LEXIS 16976](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

89. [Florida Seed Co. v. Monsanto Co., 915 F. Supp. 1167](#)

Client/Matter: -None-

Search Terms: "antitrust law"



Search Type: Natural Language

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

90. [Sportswear Design v. Canstar Sports USA, 1995 U.S. App. LEXIS 35556](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

91. [Khan v. State Oil Co., 907 F. Supp. 1202](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

92. [Hydranautics v. FilmTec Corp., 70 F.3d 533](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

93. [Scioto County Regional Water Dist. No. 1 v. Scioto Water, 916 F. Supp. 692](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

94. [State ex rel. Ieyoub v. Brunswick Bowling & Billiards Dover, 665 So. 2d 520](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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95. <u>Slimp v. Dep't of Liquor Control, 1995 Conn. Super. LEXIS 3331</u>					
Client/Matter: -None-					
Search Terms: "antitrust law"					
Search Type: Natural Language					
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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022				
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96. <u>Moore Corp. v. Wallace Computer Servs., 907 F. Supp. 1545</u>					
Client/Matter: -None-					
Search Terms: "antitrust law"					
Search Type: Natural Language					
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97. <u>Santiago v. Connecticare Inc., 1995 Conn. Super. LEXIS 3523</u>					
Client/Matter: -None-					
Search Terms: "antitrust law"					
Search Type: Natural Language					
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98. <u>American Chiropractic Clinics, P.C. v. Spence, 1995 Tex. App. LEXIS 3110</u>					
Client/Matter: -None-					
Search Terms: "antitrust law"					
Search Type: Natural Language					
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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022				
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99. <u>CSU Holdings v. Xerox (In re Independent Serv. Orgs. Antitrust Litig.), 910 F. Supp. 1537</u>					
Client/Matter: -None-					
Search Terms: "antitrust law"					
Search Type: Natural Language					
Narrowed by: <table border="0"> <tr> <td>Content Type</td> <td>Narrowed by</td> </tr> <tr> <td>Cases</td> <td>Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022</td> </tr> </table>		Content Type	Narrowed by	Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022
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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022				

100. [Caribbean Broadcast Sys., Ltd. v. Cable & Wireless Plc, 1995 U.S. Dist. LEXIS 19225](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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



Gallant v. BOC Group

United States District Court for the District of Massachusetts

May 17, 1995, Decided

CIVIL ACTION NO. 93-30081-MAP

Reporter

886 F. Supp. 202 *; 1995 U.S. Dist. LEXIS 6857 **; 1995-1 Trade Cas. (CCH) P71,033

NORMAN J. GALLANT, Plaintiff, v. BOC GROUP, INC., Defendant.

Disposition: [**1] Defendant's Motion for Summary Judgment ALLOWED as to Counts I, II, and III and DENIED as to Count IV.

Core Terms

antitrust, competitors, summary judgment, antitrust violation, anti trust law, alleges, damages, intentional infliction of emotional distress, termination, violations, consumers, customers, prices, workers' compensation, Clayton Act, unemployment, discharged, apportionment of damages, causal connection, plaintiff's claim, public policy, speculative, expenses, Counts

LexisNexis® Headnotes

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, Burdens of Proof

Summary judgment is appropriate where the record reveals 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\(c\)](#). A factual dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Although the court must view the record favorably to the nonmoving party, the nonmoving party must set forth specific facts sufficient to demonstrate that every essential element of its claim or defense is at least trialworthy. Trialworthiness necessitates that the evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

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

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

[HN2](#)[] Costs & Attorney Fees, Clayton Act

Section 4 of the Clayton Act, codified as [15 U.S.C.S. § 15](#) provides, in relevant part, that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

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

[HN3](#)[] Robinson-Patman Act, Claims

[15 U.S.C.S. § 13\(a\)](#) states that: It shall be unlawful for any person engaged in commerce either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality 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 benefits of such discrimination, or with customers of either of them.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

[HN4](#)[] Clayton Act, Claims

The Supreme Court holds that Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#) does not allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. Instead, the Court has established a comprehensive antitrust standing doctrine to determine which persons are entitled to bring suit under the Clayton Act. The factors include: (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. These factors must be evaluated and weighed on a case-by-case basis.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN5 **Private Actions, Standing**

Competitors or consumers are presumptively the favored plaintiffs to allege antitrust injury in the market in which the trade was restrained. Furthermore, employees of alleged antitrust violators are on the list of presumptively disfavored plaintiffs, i.e., persons who may be derivatively injured, but are denied standing to sue.

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

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

Antitrust & Trade Law > Clayton Act > General Overview

HN6 **Private Actions, Standing**

There may be some instances when presumptively disfavored plaintiffs do have standing to bring an antitrust action. Although competitors and consumers are presumptively favored, "presumptively" does not mean always; there can be exceptions, for good cause shown. The most obvious reason for conferring standing on a second-best plaintiff is that there may be no first best with the incentive to sue.

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN7 **Antitrust & Trade Law, Clayton Act**

Some courts extend standing to a third category of individuals whose injury is inextricably intertwined with the injury that the antitrust violators sought to inflict.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN8 **Remedies, Damages**

Courts are also required to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview

Labor & Employment Law > ... > Retaliation > Statutory Application > Whistleblower Protection Act

HN9 [Down] **Wrongful Termination, Whistleblower Protection Act**

The Pennsylvania Whistle Blowers Act (Act), 43 Pa. Cons. Stat. § 1423(a), provides that: no employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste. By its own terms, the Act's scope is limited to employees discharged from governmental entities or any other "public body" which is created or funded by the government. [§ 1422](#).

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

Governments > State & Territorial Governments > General Overview

HN10 [Down] **Local Governments, Duties & Powers**

"Public bodies" is defined as all of the following: (1) A State officer, agency, department, division, bureau, board, commission, council, authority or other body in the executive branch of state government; (2) A county, city, township, regional governing body, council, school district, special district or municipal corporation, or a board, department, commission, council or agency; (3) any other body which is created by commonwealth or political subdivision authority or which is funded in any amount by or through commonwealth or political subdivision authority or a member or employee of that body. [43 P.S. § 1422](#).

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

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Workers' Compensation & SSDI > Exclusivity

Workers' Compensation & SSDI > Exclusivity > General Overview

HN11 [Down] **Remedies Under Other Laws, Common Law**

The Workers' Compensation Act is the exclusive remedy for "any work related injury." The exclusivity provision of the workers' compensation statute provides, in relevant part, that liability of an employer under this act shall be exclusive and in place of any and all other liability on account of any injury or death. 77 Pa. Cons. Stat. § 481(a). Thus, an employee waives his right of action at common law with respect to any injury that is compensable under this chapter.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

886 F. Supp. 202, *202 1995 U.S. Dist. LEXIS 6857, **1

Workers' Compensation & SSDI > Exclusivity > Exceptions

Torts > Intentional Torts > General Overview

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Workers' Compensation & SSDI > Exclusivity

Workers' Compensation & SSDI > Exclusivity > General Overview

HN12 [blue icon] **Intentional Torts, Intentional Infliction of Emotional Distress**

Work related injuries arising out of intentional torts are no exception to the exclusivity provision. Thus, injuries arising out of intentional torts, including the intentional infliction of emotional distress, committed in the course of an employment relationship must be brought under the administrative scheme set forth in the worker's compensation statute and are precluded at common law.

Labor & Employment Law > ... > Sexual Harassment > Burdens of Proof > Employee Burdens of Proof

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

HN13 [blue icon] **Burdens of Proof, Employee Burdens of Proof**

In order to prevail under a common law theory of intentional infliction of emotional distress, a plaintiff must show that the conduct was so outrageous and extreme that it goes beyond all bounds of decency and would be regarded as atrocious and utterly intolerable in a civilized community. In Pennsylvania, it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to support a claim for intentional infliction of emotional distress.

Labor & Employment Law > Wrongful Termination > Public Policy

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > ... > Exceptions > Tort Exceptions > Public Policy Violations

Labor & Employment Law > Wrongful Termination

Labor & Employment Law > Wrongful Termination > General Overview

HN14 [blue icon] **Wrongful Termination, Public Policy**

Pennsylvania recognizes a common law cause of action for wrongful discharge, even of an employee-at-will, if the reason for the discharge offends a clear mandate of public policy. Thus, an employee may have a cause of action where he is discharged for refusing to violate the law. Pennsylvania's public policy exception to the at-will doctrine does not extend to cases in which an employee "reasonably believes" that his employer has requested him to perform an unlawful act and is discharged for objecting to the proposal he believes is unlawful.

Counsel: For NORMAN J. GALLANT, Plaintiff: Edward N. Marasi, Marasi & Franco, West Springfield, MA.

For BOC GROUP, INC., Defendant: Joan I. Ackerstein, Robin A. Schaja, Jackson, Lewis, Schnitzler & Krupman, Boston, MA.

Judges: MICHAEL A. PONSOR, U. S. District Judge

Opinion by: MICHAEL A. PONSOR

Opinion

[*205] MEMORANDUM REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Docket No. 37)

May 17, 1995

PONSOR, D.J.

I. INTRODUCTION

Former sales representative, plaintiff Norman Gallant, challenges the termination of his employment from defendant BOC Group, Inc. ("BOC") on March 18, 1991.¹ Plaintiff alleges that defendant wrongfully terminated his employment because he complained of antitrust violations and because he refused to participate in the alleged illegal scheme. In plaintiff's amended complaint, he asserts violations of the Robinson Patman Act, [15 U.S.C. § 13](#) and [Section 4](#) of the Clayton Act, [15 U.S.C. § 15](#) (Count I); a violation of the Pennsylvania Whistle Blowers Act, 43 PA. CONS. STAT. § 1423(a) (Count II); intentional infliction of emotional distress (Count III), and a discharge [*2] in violation of public policy (Count IV).

Defendant now moves for summary judgment on all four counts. For the reasons set forth below, the court will allow defendant's motion for summary judgment on Counts I, II, and III, and deny summary judgment on Count IV.

II. SUMMARY JUDGMENT STANDARD

[HN1](#) [↑] Summary judgment is appropriate where the record reveals 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\(c\)](#). A factual dispute is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [Oliver v. Digital Equipment Corp.](#), 846 F.2d 103, 105 (1st Cir. 1988), quoting [Anderson v. Liberty Lobby](#), 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Although the court must view the record favorably to the nonmoving party, the nonmoving party must set forth [*3] "specific facts sufficient to demonstrate that every essential element of its claim or defense is at least trialworthy." [Catrone v. Thoroughbred Racing Association](#), 929 F.2d 881, 884 (1st Cir. 1991). Trialworthiness necessitates that "the evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." [Mack v. Great Atl. & Pac. Tea Co.](#), 871 F.2d 179, 181 (1st Cir. 1989).

[*206] III. FACTUAL BACKGROUND

The facts, as alleged by plaintiff, are as follows. BOC Group, through its wholly owned division Airco Gases, is engaged in the business of selling bulk industrial gases. BOC is a private, for-profit company, and is not funded by the state of Pennsylvania. Gallant was employed as a technical sales representative for the defendant from January

¹ Plaintiff filed this action on March 1, 1993 in the Superior Court. BOC removed the action to this court on April 19, 1993.

1990 through March 1991. Plaintiff claims that while employed at BOC he had a good working relationship with his supervisor, James Brazelton, and was an outstanding salesperson.

Gallant alleges that in the course of his employment he became aware that defendant was engaged in price-fixing in violation of **[**4]** federal and state antitrust laws. Specifically, plaintiff alleges that BOC requested information about competitors' prices from potential customers and prospective employees and then agreed with its competitors not to compete with certain businesses. Gallant avers that he complained to his supervisor about the alleged antitrust violations orally and in writing and was terminated within weeks of making these complaints. Gallant further avers that BOC threatened that it would withhold payment of legitimate business expenses owed to him and would dispute the plaintiff's unemployment claim if he did not sign a separation letter releasing BOC from all claims. In fact, defendant did not pay the business expenses it owed and did contest his unemployment claim.

The Unemployment Board granted Gallant unemployment compensation, and the hearing examiner made a finding of fact that the plaintiff was a good sales representative and had no problems until he complained that Airco was violating state and federal law. Gallant maintains that he suffered serious emotional distress as a result of defendant's actions.

This court will now address each of plaintiff's four counts.

IV. DISCUSSION

[5] A. Antitrust Standing**

In Count I, plaintiff asserts an antitrust claim against BOC under [HN2](#) **Section 4** of the Clayton Act, codified as [15 U.S.C. § 15](#). This provision of the Clayton Act provides, in relevant part, that

any person who shall be injured in his business or property by reason of *anything forbidden in the antitrust laws* may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[15 U.S.C. § 15](#) (emphasis added).

Plaintiff claims that BOC committed an antitrust violation by violating subsection (a) of the Robinson Patman Act, [15 U.S.C. § 13](#). [HN3](#) Subsection (a) states that:

It shall be unlawful for *any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . 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 benefits of such discrimination, or with customers of either* **[**6]** *of them.*

[§ 13\(a\)](#) (emphasis added).

BOC maintains that Gallant lacks standing to bring an antitrust claim under the Clayton and Robinson Patman Acts. Thus, even assuming *arguendo* that defendant violated the antitrust laws, this court must first determine whether Gallant is the proper party to bring a private antitrust action. [Associated General 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).

[HN4](#) The Supreme Court has held that **Section 4** of the Clayton Act does not "allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." [Blue Shield of Va. v. McCready](#), 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982). Instead, the Court has established a comprehensive antitrust standing doctrine to determine which persons are entitled to bring suit under the **[*207]** Clayton Act. [Associated General](#), 459 U.S. at 529-35 (1983); [Sullivan v. Tagliabue](#), 25 F.3d 43, 45 (1st Cir. 1994). See also [SAS of Puerto Rico, Inc. v. Puerto Rico Telephone Co.](#), 48 F.3d 39 (1st Cir. 1995). The factors **[**7]** set forth in *Associated General* include: (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. [Sullivan, 25 F.3d at 46](#), citing [Associated General, 459 U.S. at 537-45](#).² These factors must be evaluated and weighed on a case-by-case basis. *Id.*

[**8] 1. Antitrust Injury

The court must first examine whether there is in fact an antitrust injury, that is, whether the alleged injury is of the type that the antitrust laws were designed to redress. [Associated General, 459 U.S. at 538, 540](#). The First Circuit has stated that consideration of antitrust injury is a central factor in the standing calculus. [Sullivan, 25 F.3d at 47](#). See, e.g., [Balaklaw v. Lovell, 14 F.3d 793, 797-98 & n.9 \(2d Cir. 1994\)](#); [Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 \(11th Cir. 1991\)](#).

In general, [HN5](#) "competitors" or "consumers" are presumptively the favored plaintiffs to allege antitrust injury in the market in which the trade was restrained. [SAS, 48 F.3d at 45](#). Gallant does not bring his claim as either a competitor or a consumer but as an employee whose injuries resulted from the loss of his employment. Furthermore, employees of alleged antitrust violators, such as Gallant, are on the list of presumptively disfavored plaintiffs, i.e., persons who may be derivatively injured, but are denied standing to sue. *Id.*

[HN6](#) There may be some instances when presumptively disfavored plaintiffs do have standing to bring an antitrust action. [**9] *Id.* In SAS, the court stated that although competitors and consumers are presumptively favored, "presumptively" does not mean always; there can be exceptions, for good cause shown." *Id.* This exception does not apply in this instance. The "most obvious reason for conferring standing on a second-best plaintiff is that . . . there may be no first best with the incentive to sue." *Id.*; cf. [Associated General, 459 U.S. at 542](#). In this situation, competitors and consumers have both the incentive and an ample opportunity to bring an antitrust claim. There is no reason to extend the doctrine of antitrust standing to Gallant, an individual incidentally connected to the antitrust violation.

[HN7](#) Some courts have interpreted the Supreme Court's decision in *Blue Shield v. McCready* as extending standing to a third category of individuals whose injury is inextricably intertwined with the injury that the antitrust violators sought to inflict. See [Ashmore v. Northeast Petroleum Div., 843 F. Supp. 759, 760-70 \(D. Me. 1994\)](#); [Ostroff v. H.S. Crocker Co., 740 F.2d 739 \(9th Cir. 1984\)](#). One year prior to *Associated General*, the *McCready* court held that a consumer of health [**10] services could sue under the antitrust laws to redress a supposed conspiracy between her insurance plan and Virginia psychiatrists. The plan excluded psychologists from receiving compensation under the plan. Although *McCready* was not the immediate target of the alleged boycott, she was a plan beneficiary who had used a psychologist and had been denied reimbursement. The Supreme Court said that *McCready*'s injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," and was granted standing. [McCready, 457 U.S. at 484](#). The Court further stated that [**208] *McCready* was the "necessary step in effecting the ends of the alleged illegal conspiracy." [Id. at 479](#).

It is doubtful that the language in *McCready* was ever intended as a legal test of standing. SAS, F.3d at 46. Moreover, in *McCready*, while standing was conferred to a plaintiff who was only derivatively injured, it is important to highlight that the plaintiff was a *consumer* in the very market directly affected by the antitrust violation. In adopting the antitrust standing doctrine, the Court in *Associated General* simply reinterpreted the [**11] *McCready* language as a legal conclusion; i.e., applying the "inextricably intertwined" standard to consumers and competitors.

² In *Associated General*, the Court found that two factors, the causal connection between the plaintiff's alleged injuries and the violation of antitrust laws, and the allegation of improper motive, supported a grant of standing, and that a consideration of the remaining factors necessitated the denial of standing. [Id. at 545](#).

See [SAS, 48 F.3d at 46](#). Although some courts have conferred standing on individuals who are neither consumers or competitors,³ in light of the analysis set forth in SAS, this court is not inclined to expand upon the doctrine of standing currently in place in this circuit.

Even under a broad reading of *McCready*, it is clear that Gallant's termination was not a necessary instrument to effectuate the alleged conspiracy. [McCready, 457 U.S. at 479](#). Here, plaintiff's sole involvement with BOC was as an employee, and, as such, he is not the appropriate plaintiff. See [SAS, 48 F.3d at 45](#). In this instance, termination of employment of a "second-best" [**12](#) plaintiff is not the type of injury the antitrust laws were enacted to protect. [SAS, 48 F.3d at 45](#).

2. Directness of Injury and Causal Nexus

Two additional and related factors set forth in *Associated General* are (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff and (2) the directness of the asserted injury. [Associated General, 459 U.S. at 542](#).

The first inquiry is whether there was a causal connection between BOC's alleged antitrust violation and Gallant's discharge. Plaintiff satisfies the first inquiry. Plaintiff contends that if not for the implementation of the allegedly illegal scheme, he would not have had to resist such conduct and, consequently he would not have been discharged. Clearly the two events are causally related.

However the existence of a causal connection alone is not enough. Any causal connection between the alleged violations and Gallant's discharge is not sufficiently direct to make the discharge itself an antitrust violation. [Reitz v. Canon U.S.A., Inc., 695 F. Supp. 552, 553 \(S.D. Fla. 1988\)](#). Gallant alleges that his loss of employment was a direct consequence of the alleged anticompetitive [**13](#) behavior. But the facts, even when viewed in the light most favorable to the plaintiff, do not support his contention. While Gallant claims that his loss of employment occurred in furtherance of defendant's illegal acts, the employment market was not the target of the alleged anticompetitive violations. The purpose of the alleged scheme was to prevent price competition for customers, not to prevent plaintiff's employment. Even assuming that plaintiff's allegations are true, the termination of his employment is only a "byproduct" of the agreement not to compete. [Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209, 211 \(6th Cir. 1989\)](#).⁴ More direct victims existed. Any injury to plaintiff is merely incidental to the alleged agreement to prevent price competition for customers. Moreover, plaintiff has made no showing that the price fixing scheme was intended to harm him in any way.

[**14](#) [*209](#) 3. Speculative Nature of Damages, Duplicative Recovery and Complex Apportionment of Damages

Under *Associated General*, [HN8](#)⁵ courts are also required to consider whether a "claim rests at bottom on some abstract conception or speculative measure of harm." [Associated General, 459 U.S. at 543](#), citing [McCready, 457 U.S. at 475, n.11](#). In his complaint, plaintiff asserts that he suffered compensatory damages due to his inability to get sales, lack of business, and wrongful termination. He also seeks treble damages as provided by the Clayton Act, punitive damages for wrongful termination, and attorney's fees and other costs and expenses. There is no question that many of the requested damages are quantifiable.

Although plaintiff's damages are not necessarily speculative, "if the court were to allow all indirect victims standing to sue, the dangers of duplicative recovery and complex apportionment of damages would become very real." See

³ [Ashmore v. Northeast Petroleum Div., 843 F. Supp. 759, 760-70 \(D. Me. 1994\)](#) (employees discharged in retaliation for their failure to violate the antitrust laws sustained "antitrust injury" and had standing to sue.)

⁴ In *Fallis*, the court held that a sales representative lacked standing to maintain an antitrust action against his former employer based on a claim that he was discharged because he refused to participate in a vertical price fixing scheme. The court stated that although the representative's alleged role as a "fulcrum" for employer's pressure on discounters weighed in favor of standing, this factor was outweighed by indirectness of his injury, existence of more direct victims, and resulting danger of double recovery or complex apportionment of damages. [Fallis, 866 F.2d at 212](#).

Fallis, 866 F.2d at 211-12, citing Province v. Cleveland Press Publishing Co., 787 F.2d 1047 (6th Cir. 1986). See also Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1087 ("Particularly, indirect injuries may render damages [**15] highly speculative or create situations of complexity that would foreclose an equitable determination and apportionment of damages."). This is so because remote and direct plaintiffs potentially would be asserting conflicting claims over a common fund.

In sum, even if plaintiff is correct in his allegations concerning defendant's conduct, his injury cannot be redressed under the Clayton and Robinson Patman Acts. The relevant factors -- the nature of Gallant's injury, the existence of more direct victims of the alleged violations and the risk of duplicative recovery and complex apportionment of damages -- weigh heavily against judicial enforcement of plaintiff's claims. Summary judgment will therefore be granted on this count.

B. Pennsylvania Whistle Blowers Act

Plaintiff alleges that BOC's conduct violated [HN9](#) the Pennsylvania Whistle Blowers Act, 43 PA. CONS. STAT. § 1423(a). The Act provides that:

no employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee . . . makes a good faith report or is about to report, verbally [**16] or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

By its own terms, the Act's scope is limited to employees discharged from governmental entities or any other "public body" which is created or funded by the government. [§ 1422](#).⁵ [**17] See also Kraisa v. Keypunch, Inc., 424 Pa. Super. 230, 622 A.2d 355 (Pa. Super. Ct. 1993). BOC is a private corporation and is not funded in any way by the Commonwealth of Pennsylvania. For this reason, the Pennsylvania Whistle Blower's Act is inapposite in the instant case.⁶ Summary Judgment will therefore be granted on Count II.

C. Intentional Infliction of Emotional Distress

Plaintiff's claim for intentional infliction of emotional distress is precluded by the exclusivity provision of the Pennsylvania Worker's Compensation Act, 77 PA. CONS. STAT. § 481(a). [HN11](#) The Workers' Compensation Act is the exclusive remedy for "any work related injury." Poyser v. Newman & Co., 514 Pa. 32, 36, [I*210](#) 522 A.2d 548 (1987), citing Kline v. Arden H. Verner Co., 503 Pa. 251, 253, 469 A.2d 158 (1983). The exclusivity provision of the workers' compensation statute provides, in relevant part, that "liability of an employer under this act shall be exclusive and in place of any and all other liability . . . on account of any injury or death . . ." § 481(a). Thus, an employee waives his right of action at common law with respect to any injury that is compensable under this chapter.⁷

[**18] [HN12](#)

⁵ [HN10](#) "Public bodies" is defined as all of the following:

(1) A State officer, agency, department, division, bureau, board, commission, council, authority or other body in the executive branch of State Government; (2) A county, city, township, regional governing body, council, school district, special district or municipal corporation, or a board, department, commission, council or agency; (3) any other body which is created by Commonwealth or political subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body. [43 P.S. § 1422](#).

⁶ Moreover, in the opposition to defendant's motion for summary judgment, plaintiff essentially concedes that the plaintiff is not entitled to protection under the Pennsylvania Whistle Blowers Act.

⁷ Pennsylvania courts have held that psychological or emotional harm is a compensable "injury" within the meaning of the Workers' Compensation Act. Stylianoudis v. Westinghouse Credit Corp., 785 F. Supp. 530, 532 (W.D.Pa. 1992), citing McDonough v. Workers' Compensation Appeal Bd., 80 Pa. Commw. 1, 470 A.2d 1099 (1984).

Work related injuries arising out of intentional torts are no exception to the exclusivity provision. [Poyser, 514 Pa. at 36.](#) Thus, injuries arising out of intentional torts, including the intentional infliction of emotional distress, committed in the course of an employment relationship must be brought under the administrative scheme set forth in the worker's compensation statute and are precluded at common law. [Whitney v. Xerox Corp., 1994 U.S. Dist. LEXIS 10845, 1994 WL 412429](#) at *5 (E.D. Pa. August 2, 1994) (employee's claim that he suffered severe emotional distress as a result of employer's actions to force his resignation was barred by the Workers' Compensation Act). Plaintiff's allegations that BOC refused to pay him certain expenses and threatened to contest his claim for unemployment arise out of their employment relationship and therefore are barred by the exclusivity provision of the worker's compensation act. Accordingly, BOC is entitled to judgment on Count III of plaintiff's complaint.

Moreover, [HN13](#) in order to prevail under a common law theory of intentional infliction of emotional distress, plaintiff must show that the conduct was "so outrageous and extreme that it goes beyond all bounds [**19] of decency and would be regarded as atrocious and utterly intolerable in a civilized community." [Gonzalez v. CNA Ins. Co., 717 F. Supp. 1087, 1088 \(E.D. Pa. 1989\)](#) (employee's claim that employer falsely accused him of sexually harassing employee insufficient to support a claim for intentional infliction of emotional distress); [Cox v. Keystone Carbon Co., 861 F.2d 390, 395 \(3rd Cir. 1988\)](#), *appeal after remand*, [894 F.2d 647 \(3rd Cir. 1990\)](#), cert. denied, 498 U.S. 811, 111 S. Ct. 47, 112 L. Ed. 2d 23 (1990) (employer's discharge of employee on first day back to work after triple bypass heart surgery insufficient to support a claim for intentional infliction of emotional distress). In Pennsylvania, "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to support a claim for intentional infliction of emotional distress." [Glickstein v. Consolidated Freightways, 718 F. Supp. 438, 441 \(E.D. Pa. 1989\)](#).

Defendant's refusal to allow plaintiff to obtain unemployment compensation or his legitimate expenses and its alleged demand that plaintiff sign a release, as a matter of law, do not rise to the required level of outrageousness.

For all these [**20] reasons, summary judgment will be granted on Count III.

D. Discharge in Violation of Public Policy

In Count IV, Gallant alleges that he was discharged for his refusal to violate antitrust laws in violation of public policy. [HN14](#) Pennsylvania recognizes a common law cause of action for wrongful discharge, even of an employee-at-will, if the reason for the discharge offends a clear mandate of public policy. [Brown v. Hammond, 810 F. Supp. 644, 646 \(E.D. Pa. 1993\)](#). Thus, an employee may have a cause of action where he is discharged for refusing to violate the law. See [Clark v. Modern Group, 9 F.3d 321, 331-32 \(3d Cir. 1993\)](#); [Woodson v. AMF Leisureland Centers Inc., 842 F.2d 699 \(3d Cir. 1988\)](#). Pennsylvania's public policy exception to the at-will doctrine does not extend to cases in which an employee "reasonably believes" that his employer has requested him to perform an unlawful act and is discharged for objecting to the proposal he believes is unlawful. [Clark, 9 F.3d at 330](#). Therefore, Gallant must demonstrate that the defendant's [*211] activities were indeed illegal under federal **antitrust law**. *Id.* at 332.

The Patman Act prohibits any discrimination where the effect [**21] may be to lessen competition, create a monopoly, or prevent competition with any person. Plaintiff alleges that defendant violated the antitrust laws by requesting information about competitors' prices from potential customers and prospective employees and by agreeing with its competitors not to compete for certain business. Gallant further claims that defendant restricted bids on certain business held by its competitors, controlled all the pricing given by the plaintiff, and ordered the sales representatives to delay bids past the allowable contract period so that the customer would not be able to accept the plaintiff's prices. In addition, Gallant claims that the defendant ordered "retaliatory strikes" to be executed against competitors who were not exercising "market integrity" -- i.e., fixing prices. These "retaliatory strikes" were intentional low bids on business held by certain competitors who were not behaving in conformance with the scheme. Furthermore, plaintiff claims that defendant ordered the plaintiff and others to obtain contracts, prices, and length of contracts from customers in order to control the market and the pricing of products.

The facts, viewed in the light [**22] most favorable to the plaintiff, are sufficient to allege a violation of the Robinson Patman Act. In other words, it would not be unreasonable for a juror to conclude that the activities of the defendant

were done to control the price, the market, and the competition within the industry. Of course, these facts will be contested at trial. But a reasonable juror could find that the defendant was engaged in illegal antitrust activities and that as a result of plaintiff's complaint about these activities, he was discharged in violation of public policy.

V. CONCLUSION

For the foregoing reasons this court hereby ALLOWS defendant's motion for summary judgment on Counts I, II, and III and DENIES the motion as to Count IV.

A separate order will issue.

MICHAEL A. PONSOR

U. S. District Judge

ORDER

May 17, 1995

PONSOR, D.J.

For the reasons stated in the accompanying Memorandum, Defendant's Motion for Summary Judgment is hereby ALLOWED as to Counts I, II, and III and DENIED as to Count IV.

MICHAEL A. PONSOR

U. S. District Judge

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Addamax Corp. v. Open Software Found.

United States District Court for the District of Massachusetts

May 19, 1995, Decided

CA. No. 91-11152-JLT

Reporter

888 F. Supp. 274 *; 1995 U.S. Dist. LEXIS 7805 **; 1995-1 Trade Cas. (CCH) P71,036

ADDAMAX CORPORATION, Plaintiff, v. OPEN SOFTWARE FOUNDATION, INC., DIGITAL EQUIPMENT CORPORATION, and HEWLETT-PACKARD COMPANY, Defendants.

Core Terms

technology, antitrust, operating system, sponsors, joint venture, anti trust law, summary judgment, anticompetitive, rule of reason, conspiracy, software, bid, market power, competitors, prices, defendants', monopsony, buyers, purchasing, relations, alleges, markets, buying, courts, purchases and sales, relevant market, market share, acquisition, genuine issue, lower price

LexisNexis® Headnotes

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

HN1[] Regulated Practices, Trade Practices & Unfair Competition

The underlying purpose of antitrust laws is to promote the efficient functioning of competitive markets.

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

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

HN2[] Summary Judgment, Entitlement as Matter of Law

In considering a motion for summary judgment, a court must view the record in the light most hospitable to a party opposing summary judgment, indulging all reasonable inferences in that party's favor.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

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

HN3 Regulated Industries, Higher Education & Professional Associations

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is in the hands of alleged conspirators, and hostile witnesses thicken the plot. However, antitrust suits are not immune from summary judgment, and [Fed. R. Civ. P. 56\(c\)](#) is routinely used in antitrust actions.

Antitrust & Trade Law > Sherman Act > General Overview

HN4 Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1 et seq.](#)

Antitrust & Trade Law > Sherman Act > General Overview

HN5 Antitrust & Trade Law, Sherman Act

The essence of every [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), claim is a combination or some form of concerted action between at least two legally distinct entities. [Section 1](#), in other words, does not apply to unilateral conduct on the part of a single person or enterprise.

Antitrust & Trade Law > Sherman Act > Claims

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 > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Antitrust & Trade Law > Sherman Act > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

HN6 Sherman Act, Claims

Not every agreement between two legally distinct entities constitutes a violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#) After establishing the existence of a contract, combination, or conspiracy, a plaintiff must establish that an agreement constitutes an unreasonable restraint on trade. To identify agreements that fail this test, courts have adopted two levels of analysis: per se and "rule of reason." A limited number of agreements are considered unreasonable per se and, therefore, are illegal as a matter of law. Per se treatment is limited to those cases in which the agreements are manifestly or patently unreasonable, and clearly serve no legitimate purpose. The agreements that typically fall into the per se category involve price fixing, boycotts, and tying arrangements.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN7 [] **Sherman Act, Claims**

Cases under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), that do not fall into the narrow per se niche proceed under the rule of reason. To establish a claim under the rule of reason, a plaintiff bears an initial burden of showing that a challenged action has had an actual adverse effect on competition as a whole in a relevant market. If a plaintiff meets this initial burden, a defendant can come back with evidence that an agreement was formed for legitimate business purposes which outweigh any anti-competitive effects. Finally, a plaintiff can prevail by showing that the legitimate ends of an agreement could have been accomplished through less restrictive alternatives.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN8 [] **Antitrust & Trade Law, Sherman Act**

Every [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), claim, whether per se or rule of reason, must satisfy two threshold requirements. First, a plaintiff must prove more than mere injury. A successful [§ 1](#) plaintiff must establish "antitrust injury." Second, a plaintiff must prove the existence of a conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

HN9 [] **Antitrust & Trade Law, Sherman Act**

Antitrust laws are aimed at protecting competition, not competitors. Not all business losses constitute the type of injury that antitrust laws were designed to prevent.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN10 [] **Private Actions, Remedies**

Antitrust plaintiffs under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), must prove antitrust injury, which is to say injury of the type 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 a violation or of anticompetitive acts made possible by a violation.

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

HN11 [] **Private Actions, Remedies**

Lower prices usually benefit consumers, and are not generally considered harmful to competition. For this reason, agreements to set prices at below-market rates do not ordinarily give rise to antitrust injury. However, when lower

prices input prices do not produce lower prices to consumers, courts have found antitrust injury in the presence of agreements to lower prices. This occurs when a colluding buyers possess market power on a downstream market. Only with control of a downstream market can a monopsonist decrease output and raise prices. Antitrust injury exists where a seller is a participant in the very market where competition is impaired.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Mergers & Acquisitions Law > Antitrust > Joint Ventures

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Joint Ventures > General Overview

Business & Corporate Law > Joint Ventures > Formation

HN12 [blue] Exemptions & Immunities, Exempt Cartels & Joint Ventures

While it is true that joint ventures are not unreasonable in and of themselves, it is also true that conspirators cannot gain immunity from antitrust laws by labeling their agreement a "joint venture." Joint venture agreements are addressed like any other agreement among competitors. The first step is to determine the nature and scope of an agreement. If a joint venture is unlawful in purpose and effect, a joint venture is treated like any other per se violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#) If, on the other hand, a joint venture is based on a lawful attempt to integrate resources, an agreement is measured according to the standard "rule of reason" analysis.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

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

HN13 [blue] Per Se Rule & Rule of Reason, Per Se Violations

Per se claims under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), enjoy significant advantages in matters of proof. The advantage to a plaintiff is that given a per se violation, proof of a defendant's power, of illicit purpose and of anticompetitive effect are all said to be irrelevant. A disadvantage is the difficulty of squeezing a practice into an ever narrowing per se niche. Per se treatment is appropriate only in the presence of agreements or practices which

because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Contracts Law > Defenses > Illegal Bargains

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

HN14 [↴] **Cooperatives, Formation**

Per se treatment under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), is reserved for those combinations whose purpose and effect is manifestly anticompetitive. Because joint purchasing agreements often produce legitimate economies of scale, courts have generally refused to find these agreements illegal under the per se standard. Rather, plaintiffs generally are required to make their case under the "rule of reason," by proving that the anticompetitive effect of a buying agreement outweighs any pro-competitive advantages. Per se analysis is avoided in novel contexts.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Initial Burden of Persuasion

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

HN15 [↴] **Sherman Act, Claims**

To state a Sherman Act, [15 U.S.C.S. § 1 et seq.](#), claim under the rule of reason, A plaintiff bears the initial burden of establishing that a defendant's actions have an actual adverse effect on competition as a whole in a relevant market. If a defendant then comes forward with a legitimate justification for the conduct, a plaintiff must show that the same legitimate purpose could have been obtained through less restrictive means. An essential element of every rule of reason claim is a showing that a defendant exercised market power in some relevant market.

Banking Law > Types of Banks & Financial Institutions > National Banks > Capitalization & Dividends

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

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Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN16 [blue icon] National Banks, Capitalization & Dividends

Section 7 of the Clayton Act, [15 U.S.C.S. § 18 \(Act\)](#), prohibits mergers or acquisitions that substantially lessen competition in a relevant line of commerce. The Act, by its own terms, applies only where there has been an acquisition of assets, stock, or other share capital. In keeping with the broad mandate of the antitrust laws, however, courts have generally adopted a flexible approach in measuring the scope of this language. In the context of § 7, the term "asset" may mean anything of value. Although control itself does not implicate the transfer of stock or share capital, the acquisition of control has been deemed acquisition of an asset for § 7 purposes.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN17 [blue icon] Intentional Interference, Elements

To recover on a theory of intentional interference with actual or prospective business relations, a plaintiff must prove (1) the existence of business relations; (2) a defendant's knowing interference with the relations; and (3) the harm to a plaintiff borne of a defendant's actions.

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Judges: Joseph L. Tauro, Chief United States District Judge

Opinion by: Joseph L. Tauro

Opinion

[*276] MEMORANDUM

May 19, 1995

TAURO, Ch.J.,

This dispute unfolds against the backdrop of the multi-million dollar market for operating systems, the machine language programs that coordinate the activities of a computer's hardware **[**2]** components.¹ Plaintiff Addamax Corporation, a producer of security systems for the computer industry, is suing Hewlett-Packard ("H-P"), the Digital Equipment Corporation ("Digital"), and the Open Software Foundation ("OSF"), alleging violations of federal and state antitrust laws. The complaint alleges that Digital and H-P led an attempt to influence the market for operating systems technology by illegally combining the buying power of the industry's largest competitors.

The defendants have moved for summary judgment, arguing that Addamax's case fails with respect to several elements essential to any antitrust claim. In applying an old statute to new technology, the court examines these issues with an eye to **HN1**² the underlying purpose of the antitrust **[**3]** laws: the efficient functioning of competitive markets. *Ocean State Physicians Health Plan, Inc. v. Blue Cross and Blue Shield of Rhode Island, 883 F.2d 1101, 1110 (1st Cir. 1989)* (citing *Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-49, 95 L. Ed. 239, 71 S. Ct. 240 (1951)*), cert. denied, 494 U.S. 1027 (1990); P. AREEDA, H. HOVENKAMP, J. SOLOW & D. TURNER, **ANTITRUST LAW**, P 104.

[*277] I. BACKGROUND

HN2³ In considering a motion for summary judgment, the court must view the record "in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." *Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990)*. The following statement of facts is drawn accordingly.

A. The Market for Operating Systems.

Operating systems coordinate the activities of the computer's hardware components, allowing it to "run" applications software. The systems are designed to "fit" specific hardware. Software is in turn manufactured to be compatible with certain operating systems. The industry's three-tier system (hardware, software, and operating systems) has produced a complex market shaped by licensing agreements **[**4]** and compatibility concerns.

The Babel-like character of the market for operating systems has produced periodic calls for the harmonization of operating system specifications. This lawsuit revolves around a joint venture, the Open Software Foundation, ostensibly formed for this purpose.

B. the Formation of the OSF Joint Venture.

The Open Software Foundation ("OSF"), was formed in 1988 by a group of eight computer manufacturers.² OSF exists as a not-for-profit joint venture, and is registered as such under federal law.³

¹ Operating systems coordinate the activities of the computer's hardware, allowing it to "run" applications software. Operating systems, like other programs, are considered intellectual property, and rights to operating systems are routinely bought, sold, and licensed.

² Only two of these companies, H-P and Digital, are named as defendants in this suit.

[**5] OSF membership is open to corporations, non-profits, academic institutions, governmental agencies, and "other business entities." (Defendants' Memorandum in Support, Appendix III, Tab 2, By-Laws of Open Software Foundation, Inc., Article 3). OSF by-laws provide for two classes of participation. The founding corporations are referred to as "sponsors." Sponsors retain exclusive voting rights in the foundation. All other participants, (some three hundred and fifty at the time this suit was filed) are referred to as "members."

OSF's sponsors include many of the major competitors in the market for computer systems. The list includes several of the largest computer companies in the world, including H-P, Digital, IBM, and Bull Systems. According to the complaint, these companies compete with one another in two separate markets. First, they compete in the purchasing of systems technology from independent developers like Addamax. Second, they compete in the sale of finished systems on the downstream market for operating systems. The sponsors, in other words, compete both "in markets where they are sellers and in markets where they are buyers." (Plaintiff's First Amended Complaint, P 20.)

[**6] OSF's statement of purpose indicates that the organization was formed to "undertake cooperative research, experimentation and development activities . . . to allow users to more easily mix and match computers and software from different suppliers." 53 Fed. Reg. 34594 (1988). To this end, OSF and the OSF Research Institute indicated an intent to engage in a wide array of activity, including "the production and marketing of the software or other proprietary information or technology produced through the venture including the granting of licenses." *Id.* at 34594.

C. OSF's Procurement Process.

OSF, in keeping with its corporate charter, became involved in the development of new operating systems. In developing its first such operating system, later baptized OS-1, OSF chose to assemble the package by fusing existing technology. As a result, most of OSF's efforts were directed towards purchasing [**7] and integrating existing component programs.

OSF gathered technology for the OS-1 system through a competitive bidding process called a Request for Technology, or "RFT." Companies specializing in a particular area were informed of the process and encouraged to submit bids.

With [**7] respect to Addamax, the bid involved a security program⁴ for the new operating system. Two companies responded to the bid: Addamax and SecureWare. After an evaluation of the competing bids, a panel of experts appointed by OSF selected the Secureworks package.

D. Addamax's Allegations

Addamax is now claiming that they lost the bid for reasons unrelated to the price and quality of their product. More importantly, Addamax is alleging that the entire OSF concept is an illegal joint venture designed to influence the market for operating systems technology.

³OSF is registered under the National Cooperative Research Act of 1984, [15 U.S.C. § 4301](#). The National Cooperative Research Act, designed to encourage cooperative research, offers some antitrust protection to joint ventures formed for specifically enumerated purposes. [15 U.S.C. § 4301\(a\)\(6\)](#).

OSF is also registered under the laws of Delaware as a not-for-profit membership corporation, and as the only member of the Open Software Foundation Research Institute also incorporated under Delaware law.

⁴The security component of an operating system "enables computer owners to prevent unauthorized individuals from obtaining access to their computer systems or authorized individuals from obtaining access to information beyond their individual security clearance." Plaintiff's First Amended Complaint, P 9.

Addamax makes two charges with respect to OSF's strategy. First, Addamax asserts that OSF has rigged its procurement system to favor specific [**8] companies and technologies. Second, Addamax claims that OSF forces suppliers to sell their product to OSF and its sponsors under disadvantageous conditions.

With respect to the Request for Technology process, Addamax asserts that OSF ran a suspect contest. Addamax claims that internal OSF documents named SecureWare as the security system component several months before the bids were submitted. (OSF Goethe Project Journal, July 7, 1989, Plaintiff's Appendix I, Volume II, Tab 107, at F055653).

With respect to OSF's effect on prices, Addamax alleges that the joint venture forced competitors to offer their products at below-market prices and under disadvantageous conditions.⁵ Companies are forced to do this, Addamax claims, because failure to win the bid excludes the developer from a huge segment of the market. The loser sees his technology left out of a new system that automatically becomes an industry standard. A firm that fails in an OSF bid loses the chance to sell its product, not only to OSF, but to all OSF members. In this way, Addamax claims, OSF functions as a joint purchasing agreement, or buyers' cartel.

[**9] On the basis of these alleged activities, Addamax brought suit against OSF and two of its sponsors, Digital and H-P. The complaint contains claims under federal and state anti-trust law, the state unfair trade practices act, and state common law. The defendants have moved for summary judgment with respect to each claim.

II. SUMMARY JUDGMENT IN ANTI-TRUST CASES

In Poller v. Columbia Broadcasting, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1961), the Supreme Court warned that HN3[↑] "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is in the hands of alleged conspirators, and hostile witnesses thicken the plot." Id. at 473 (citations omitted).

The admonition in Poller notwithstanding, antitrust suits are not immune from summary judgment, and rule 56(c) is routinely used in antitrust actions. See Capital Imaging, P.C. v. Mohawk Valley Medical Association, 996 F.2d 537, 541 (2nd Cir.), cert. denied, 126 L. Ed. 2d 337, U.S. __, 114 S. Ct. 388 (1993); Midwest Radio v. Forum Publishing, 942 F.2d 1294, 1296 (8th Cir. 1991).

[*279] III. OVERVIEW OF THE SHERMAN ACT, [**10] § 1.⁶

The Sherman Act, 15 U.S.C. § 1 et seq., prohibits:

HN4[↑] every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . .

15 U.S.C. § 1. This simple phrase reveals the basic components of every § 1 claim: a conspiracy and its anticompetitive effect.

HN5[↑] The essence of every § 1 claim is "a combination or some form of concerted action between at least two legally distinct entities." Capital Imaging, P.C. v. Mohawk Valley Medical Assoc., 996 F.2d 537 (2nd Cir.), cert.

⁵ Addamax maintains that OSF extracts major concessions from its suppliers in terms of both price and conditions-of-sale. Addamax claims that OSF's strategies secure software at a fraction of its market price, and in some instances at prices below those necessary to recoup research and development costs. In addition, Addamax claims that OSF forced suppliers into disadvantageous licensing agreements.

⁶ The "overview" portion of this memorandum is drawn largely from Capital Imaging, P.C. v. Mohawk Valley Medical Assoc., 996 F.2d 537 (2nd Cir.), cert. denied, 126 L. Ed. 2d 337, U.S. __, 114 S. Ct. 388 (1993).

denied, 126 L. Ed. 2d 337, U.S. __, 114 S. Ct. 388 (1993). Section 1, in other words, does not apply to "unilateral conduct on the part of a single person or enterprise."

HN6 Not every agreement, however, **[**11]** constitutes a violation of the Sherman Act. After establishing the existence of a contract, combination, or conspiracy, the plaintiff must establish that the agreement constitutes an "unreasonable restraint on trade." To identify the agreements that fail this test, courts have adopted two levels of analysis: *per se* and "rule of reason."

A limited number of agreements are considered unreasonable *per se* and, therefore, are illegal as a matter of law. *Per se* treatment is limited to those cases in which the agreements are manifestly or patently unreasonable, and clearly serve no legitimate purpose. The agreements that typically fall into the *per se* category involve price fixing, boycotts, and tying arrangements. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1984).

HN7 Cases that do not fall into "the narrow *per se* niche" proceed under the rule of reason. U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993). To establish a claim under the rule of reason, a plaintiff "bears the initial burden of showing that the challenged action has had an *actual* adverse **[**12]** effect on competition as a whole in the relevant market . . ." Capital Imaging, 986 F.2d 537 at 543. If the plaintiff meets this initial burden, the defendant can come back with evidence that the agreement was formed for legitimate business purposes which outweigh any anti-competitive effects. Finally, the plaintiff can prevail by showing that the legitimate ends of the agreement could have been accomplished through less restrictive alternatives.

IV. ANTITRUST INJURY; CONSPIRACY

HN8 Every section 1 claim, whether *per se* or rule of reason, must satisfy two threshold requirements. First, the plaintiff must prove more than "mere injury." The successful section 1 plaintiff must establish "antitrust injury." Second, the plaintiff must prove the existence of a conspiracy. The defendants challenge Addamax's case as insufficient in both respects.

A. Antitrust Injury

The defendants first major argument is that the plaintiff has failed to allege adequate antitrust injury.⁷ Courts have often noted that the **HN9** antitrust laws are aimed at protecting competition, not competitors, and that not all business losses constitute the type of injury that the antitrust laws were designed **[**13]** to prevent. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1976). **[*280]** Along these lines, the defendants note that to the extent that Addamax complains of lower prices for its product, this type of loss falls beyond the protection of the antitrust laws.

HN11 Lower prices usually benefit consumers, and are not generally considered harmful **[**14]** to competition. For this reason, agreements to set prices at below-market rates do not ordinarily give rise to antitrust injury.⁸

⁷ The seminal case on antitrust injury is Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). In Brunswick, the Court noted the type of damage required to state a claim under the Sherman Act:

[Antitrust] **HN10** 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 the anticompetitive acts made possible by the violation.

Brunswick Corp., 429 U.S. at 489.

⁸ An exception to this rule, not directly relevant here, occurs when the conspirators fix prices at "predatory" levels. A predatory price (price below cost) is designed to eliminate competition and ensure later monopoly profits.

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-338, 340, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1989); Kartell v. Blue Shield of Massachusetts, 749 F.2d 922, 930-931 (1st Cir. 1984), cert. denied, 471 U.S. 1029, 85 L. Ed. 2d 322, 105 S. Ct. 2040, 105 S. Ct. 2049 (1985) (antitrust laws protect against higher, not lower, prices).

But, when lower prices input prices do not produce lower prices to consumers, courts have found antitrust injury in the presence of agreements to lower prices. Vogel v. American Society of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984), citing Mandeville Island Farms, Inc. v. American Crystal Sugar Co., [**15] 334 U.S. 219, 223-24, 92 L. Ed. 1328, 68 S. Ct. 996 (1948). This occurs when the colluding buyers possess market power on a downstream market. Only with control of a downstream market can the monopsonist⁹ decrease output and raise prices. See J. Jacobson & G. Dorman, Joint Purchasing, Monopsony and Antitrust, THE ANTITRUST BULLETIN, 1, 17 (Spring, 1991); AREEDA ET AL., ANTITRUST LAW, P 574.¹⁰ Here, Addamax has made a threshold showing of the defendants' significant leverage on both relevant markets: the upstream market for inputs, and the downstream market for output. See infra Part V.B.1. (market power).

[**16] With respect to Addamax's standing as a plaintiff in this case, the court finds that Addamax has properly alleged that their injury "flowed from that which makes the defendants' act unlawful." Brunswick Corp., 429 U.S. at 489. In so doing, this court is mindful of the First Circuit's admonition that "even where a violation exists and a plaintiff has been damaged by it, the courts - for reasons of prudence - have sought to limit the right of private parties to sue for damages or injunctions." SAS of Puerto Rico, Inc. v. Puerto Rico Telephone Company, 48 F.3d 39, 39 (1st Cir. 1995).

Addamax's harm allegedly "flows directly from collusive activity that decreases competition among buyers." R. Blair & J. Harrison, Antitrust Policy and Monopsony, 76 CORNELL L. REV. 297, 337 (1991). Given these circumstances, the court holds that Addamax, as a seller to a collusive monopsony, has alleged sufficient antitrust injury, and has the standing necessary to bring this suit. SAS of Puerto Rico Inc. v. Puerto Rico Telephone Co., 48 F.3d 39, 44 (1st Cir. 1995) (antitrust injury exists where "the seller is a participant in the very market where competition is impaired").

B. Conspiracy [**17]

The defendants' second major argument is that OSF, as a joint venture, cannot constitute a contract, combination, or conspiracy within the scope of § 1. Whatever OSF did, the defendants argue, it did on its own, and unilateral action may not constitute a conspiracy.¹¹

⁹ Monopsony, the mirror image of monopoly, refers to "market power . . . on the buying side of the market." AREEDA ET AL., ANTITRUST LAW, P 574.

¹⁰ Areeda and Turner summarize the effect on prices as follows:

The monopsony buyer, unlike the competitive buyer, can reduce the purchase price by scaling back its purchases. Because the monopsonist ordinarily reduces its buying price by purchasing less, it sells less downstream. This reduction in its own output will, if it has market power on the selling side, mean higher prices for customers. Thus, lower buying prices upstream may translate into higher selling prices downstream.

AREEDA ET AL., ANTITRUST LAW, P 574 (footnotes omitted).

¹¹ The defendants' memorandum in support reads:

. . . the sole basis for Addamax's price-fixing claim is that OSF itself allegedly sought to purchase security software at a reduced price. However, a joint venture such as OSF is not a "walking conspiracy," and as a matter of law, neither OSF's simple existence nor its unilateral actions with respect to price is sufficient to establish a conspiracy among OSF and the Sponsors.

[*281] [HN12](#) While it is true that joint ventures are not unreasonable in and of themselves, [SCFC ILC. v. Visa USA, 36 F.3d 958, 964 \(10th Cir. 1994\)](#), it is also true that conspirators cannot gain immunity from the antitrust laws by labelling [*18] their agreement a "joint venture." [Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 95 L. Ed. 1199, 71 S. Ct. 971 \(1951\)](#).¹²

A review of the relevant case law suggests that joint venture agreements are addressed like any other agreement among competitors. E. KINTNER, FEDERAL **ANTITRUST LAW**, § 9.15 (listing cases); [SCFC ILC.](#), 958 F.3d at 964 (no "special treatment" for joint ventures under the antitrust laws). The first step is to determine the nature and scope of the agreement. If the joint venture is unlawful [*19] in purpose and effect, the joint venture is treated like any other *per se* violation of the Sherman Act. If, on the other hand, the joint venture is based on a lawful attempt to integrate resources, the agreement is measured according to the standard "rule of reason" analysis. AREEDA ET AL., **ANTITRUST LAW**, P 1478 *et seq.*

H-P and Digital probably had several legitimate reasons for launching the OSF joint venture. But, Addamax has produced evidence that H-P and Digital formed OSF at least in part to impair the progress of certain competitors. This evidence alone, in the form of internal memoranda and strategy papers discussed in more detail below, raises a genuine issue of fact as to whether the joint venture itself can be labelled a conspiracy for Sherman Act purposes.

V. ANALYSIS

A. Per Se Claims

Addamax has asked for *per se* scrutiny with respect to all of its state and federal antitrust claims.¹³ As the First Circuit noted in [U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589 \(1st Cir. 1993\)](#), [HN13](#) *per se* claims enjoy significant advantages in matters of proof: "the advantage to a plaintiff is that given a *per se* violation, proof of [*20] the defendant's power, of illicit purpose and of anticompetitive effect are all said to be irrelevant the disadvantage is the difficulty of squeezing a practice into the ever narrowing *per se* niche." [U.S. Healthcare, 986 F.2d at 593](#) (internal citations omitted).

The Supreme Court has held that *per se* treatment is appropriate only in the presence of:

agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed unreasonable and therefore illegal without elaborate inquiry as to the precise harm they [*21] have caused or the business excuse for their use.

[Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#).

Addamax's complaint alleges that the OSF agreement warrants *per se* treatment because OSF operates as a buyer's cartel, and because OSF's very purpose, the promotion of the Sponsors' technology, is anticompetitive.

1. price fixing and joint buyers' cartel.

¹² The Supreme Court in [Timken](#) made explicit reference to joint ventures in the antitrust context:

Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

Id. at 598 (citations omitted).

¹³ The scope of the Massachusetts Antitrust Act, 93 [M.G.L. ch. 93 § 4](#), is statutorily tied to its federal law analog, [§ 1](#) of the Sherman Act. See [M.G.L. ch. 93 § 1](#); [Winter Hill Frozen Foods and Services, Inc. v. Haagen-Dazs Co., 691 F. Supp. 539 \(D.Mass. 1988\)](#). Discussion of Addamax's state law claim is accordingly "subsumed" into the discussion of the applicable federal statutes. *Id. at 543 n.5*.

Addamax's complaint contains related price-fixing and joint buying claims. The [*282] essence of these charges is that OSF's purpose was to operate as a joint buying group in order to exercise control over the market for operating systems technology.

Addamax's allegations of "price fixing" turn largely on a series of statements made by an OSF representative, Doug Hartman, in the context of bid negotiations with Addamax's president, Peter Allsberg. In response to Allsberg's questions, Hartman indicated that OSF was not going to offer more than "six figures" for Addamax's technology. Plaintiff's Appendix II, Deposition of Peter A. Allsberg, 0143;15-19.

Allsberg recalls that when he told Hartman that the figure was far below Addamax's development costs, much less what they [**22] thought was a fair price, Hartman shrugged and told him that "the market has changed." Allsberg Dep. 0145;6-7. Allsberg then asked Hartman: "is what you are telling me I can sell to you at your price and get a little money out of the market now and have no future business, or you will buy from SecureWare at that price and I will get no money out of the market now and have no future business?" Hartman replied, "Well, you could look at it that way." Allsberg Dep. at 0145;9-23.

This evidence notwithstanding, the court finds Addamax's price fixing claim inappropriate for *per se* treatment. [HN14](#) Per *se* treatment is reserved for those combinations whose purpose and effect is manifestly anticompetitive. Because joint purchasing agreements often produce legitimate economies of scale,¹⁴ courts have generally refused to find these agreements illegal under the *per se* standard.¹⁵ See R. Blair & J. Harrison, Cooperative Buying, Monopsony Power, and Antitrust Policy, 86 NORTHWESTERN L. REV. 331, 343-345 (1992) (describing cases in which courts refused to apply *per se* standard in cooperative buying context). Rather, plaintiffs generally are required to make their case under [**23] the "rule of reason," by proving that the anticompetitive effect of the buying agreement outweighs any pro-competitive advantages.

[**24] With respect to this case, it is clear that the effects of market standardization on the computer industry are extraordinarily difficult to gauge. Moreover, without the benefit of expert opinion, it is nearly impossible to predict the specific effect of OSF's actions on competition within the industry. The sheer complexity of the industry cautions against a *per se* analysis here. See [M&H Tire Company, Inc. v. Hoosier Racing Tire Corporation](#), 733 F.2d 973, 977 (1st Cir. 1984)(avoiding *per se* analysis in "novel context").

2. unlawful purpose

Similar considerations compel the same caution with respect to Addamax's claim that OSF was formed for an anticompetitive purpose. Addamax alleges that OSF was formed "to thwart the nascent movement towards truly open systems by, among other things, collectively attacking the movement's two leading proponents and more efficient rivals, AT&T and Sun." Plaintiff's Memorandum in Opposition, 21.

There is substantial evidence, in the form of internal H-P and OSF memoranda, that OSF was formed specifically to combat Sun and AT&T. At H-P, officials met at a "Beat Sun" conference to discuss the possibility of joining other manufacturers in [**25] a UNIX consortium. The context of the discussions make it clear that the consortium was discussed as an answer to Sun and AT&T's aggressive moves on the market. Plaintiff's Appendix I, Volume I, Tab 37, HP-72173 ("Beat Sun" Offsite Minutes). These actions, unremarkable if taken by a single [*283] competitor, may be suspect when taken by a group of would-be competitors.¹⁶ The record contains ample evidence that Digital

¹⁴ A second reason for the more lenient treatment given joint purchasing agreements is a result of the relationship between the likely plaintiff and the likely defendant: the company alleging the violation is not a direct competitor of the companies forming the buying cartel.

¹⁵ There is one relevant exception to the "rule of reason" standard for buyer's cartels. A joint buying agreement will be illegal *per se* if "the buyer [is] . . . a 'sham' organization seeking only to combine otherwise independent buyers in order to suppress their otherwise competitive instinct to bid up price." [Kartell v. Blue Shield of Massachusetts](#), 749 F.2d 922, 925 (1st Cir. 1992). Again, however, Addamax has produced no evidence that OSF was formed to in order to suppress the sponsors' "competitive instinct to bid up price." Addamax's buyer's cartel claims do not warrant *per se* scrutiny.

and H-P, among others, communicated among themselves with regards to a collective "anti-Sun/AT&T" strategy. *Id.* at HP-72176.

Again, however, the context of this case makes it inappropriate for *per se* analysis. Despite some evidence of an anti-competitive motive, it is not clear that the OSF joint venture had an anticompetitive effect on the market. [**26] On the record before the court, it cannot be said that the OSF joint venture is so void of redeeming virtue that it must be "presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1957)*.

Having determined that the defendants are entitled to summary judgment with respect to each of the plaintiff's *per se* claims, the court turns to the rule of reason elements of the plaintiff's complaint.

B. Rule of Reason

HN15 To state a Sherman Act claim under the rule of reason, Addamax bears the initial burden of establishing that OSF's actions have "an actual adverse effect on competition as a whole in the relevant market." *Capital Imaging, 996 F.2d at 543*. If the defendant then comes forward with a legitimate justification for the conduct, the plaintiff must show that the same legitimate purpose could have been obtained through less restrictive means. *Id.*

1. market power

An essential element of every rule of reason claim is a showing that the defendants exercised market power [**27] in some relevant market.¹⁷ [**28] In this case Addamax has alleged that OSF and its sponsors possess significant market power in: (1) the market in which the defendants purchase security systems, and (2) the market in which the defendants sell operating systems. Conceding, for the purposes of this motion, the definitions of the relevant markets,¹⁸ the defendants argue that the plaintiffs cannot prove collective market power sufficient to prove a violation of the rule of reason.

The defendants argue that the calculation of market share in this case may include only purchases and sales attributable directly to OSF. The plaintiffs, however, argue that the defendants' collective market share must include the purchases and sales of the individual sponsors. The parties, in other words, disagree on whether the individual sponsors' shares of the markets should be included in gauging the joint venture's impact on the market.

The dispute is significant. As a percentage of the global market for operating systems, OSF's sales are so small as to be insignificant. The same may be said for OSF's purchases of security systems' technology. If, however, market share is calculated to include the purchases and sales made by the individual sponsors, the defendants [*284] collectively [**29] control significant shares of both markets.

¹⁶ The fact that OSF's alleged anticompetitive purpose was directed at Sun and AT&T, not Addamax, is not relevant to the analysis. It is sufficient that the harm to Addamax "flowed from" OSF's anticompetitive purpose. See part IV.A., *supra*.

¹⁷ For reasons discussed earlier in this memorandum, a seller to a collusive monopsony must establish that the conspiring defendants exercised market power on two relevant markets: the market for the seller's inputs and the market for the buyers' output.

The search for relevant markets here is complicated by several features unique to the computer industry. The market for computer systems is unlike the market for "widgets" that typically frames antitrust analysis. The technology at issue, by its very nature, is not sold in units. Sales agreements may be for licenses, royalties, or combinations of the two, and one company's choice of technology may have important repercussions on the industry as a whole. In addition, as noted earlier, systems are often assembled from existing technology, further complicating the search for the "relevant market" in antitrust terms.

¹⁸ The defendants' objection to Addamax's definition of the relevant markets is limited to a single footnote. Defendants' Memorandum in Support, 24 n.18. Without passing on the validity of Addamax's market definitions, the court limits its inquiry to the arguments fully developed in this motion for summary judgment.

The individual sponsors continue to make independent purchases and sales of security software and operating systems technology. As a result, OSF is merely an additional buyer of security systems technology and an additional seller of finished operating systems. Under these conditions, a court would not ordinarily consider the market power of the individual members of the joint venture in determining the market share of the alleged conspiracy. R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 619 F. Supp. 441, 451 n.8 (N.D. Cal. 1985).

The essence of Addamax's complaint, however, is that OSF affects the industry by establishing de-facto industry standards, and the volume of OSF's purchases and sales are not of particular concern to the alleged conspirators. The leverage of the conspiracy, Addamax argues, is not market power as measured in purchases and sales. It is, rather, the simple fact that OSF's choice of technology amounts to an unqualified endorsement of that technology by seven or eight giants of the industry. Once OSF has blessed a particular technology by including it in a operating system package, competing technologies become **[**30]** obsolete.

The nature of the anticompetitive behavior alleged, coupled with the unique and unexplored characteristics of the market at issue, lead to the conclusion that Addamax has raised a genuine issue of fact with respect to the monopsony power of the conspiring defendants. Whether or not it is appropriate to aggregate the market power of the defendants in assessing market share, Addamax has put forth evidence that H-P and Digital were aware of, and in fact counted on, OSF's ability to influence the relevant markets.¹⁹ This alone might suggest a triable issue of fact with respect to the sponsors' collective market power.

[31]** Finally, it is worth noting that market share is not always a reliable indicator of monopoly (or monopsony) power. AREEDA ET AL., ANTITRUST LAW, P 515. In this case, Addamax has put forth evidence that suggests that OSF's monopsony power extends beyond its immediate share of the market.

2. anti-competitive effect

Expanding upon its challenge to Addamax's allegations of antitrust injury, the defendants next argue that even if Addamax could show harm to itself, it cannot show harm to *competition*. As has already been noted, the defendants correctly assert that harm to competition, not competitors, is the hallmark of every antitrust claim. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1976).

The defendants argue that Addamax cannot prove that OSF's presence affects the market in any of the ways traditionally associated with harm to the competitive process: higher prices or lower output. Although Addamax has been unable to point to specific evidence of increased consumer prices or decreased product output, the court concludes that Addamax has established a genuine issue of fact as to OSF's effect on competition in the industry.

[32]** Addamax's complaint, combined with deposition transcripts and documents submitted by the parties, permit an inference that OSF, H-P, and Digital embarked in a course of conduct designed to confuse and paralyze the market.

The computer industry is characterized by market turbulence. This year's state-of-the-art may be next year's dinosaur. But, buyers nonetheless want assurances that their systems will remain viable in the future. The industry has coined a term to describe the market's preoccupation with the future of a particular technology. The term is "FUD," an acronym for "fear, uncertainty and doubt."

[*285] Addamax claims that the defendants used "FUD" as a weapon by fomenting questions about the future of industry standards. By announcing the formation of OSF, and promising new technology destined to become the

¹⁹ Several documents suggest that OSF's original sponsors recruited IBM and other computer companies in a conscious effort to increase OSF's leverage on the market. See Plaintiff's Appendix I, Volume II, Tab 61 at HP53240; Id. at Tab 72, F052024; Id., Volume I, Tab 37 at HP72176. This evidence, though not entirely unambiguous, supports the inference that the sponsors themselves believed that OSF could influence the market. These documents, particularly when viewed in the light most favorable to the nonmoving party, clearly raise genuine issues of fact with respect to the defendants' collective monopsony power.

industry standard, the Sponsors allegedly sought to paralyze the industry and deter users from committing to other systems.

Several pieces of documentary evidence support OSF's claim. An OSF interoffice memo suggests that the joint venture was developed at least in part because "our sponsors wanted a hammer, axe or two-by-four that could be used to beat [the competition] [\[**33\]](#) (Plaintiff's Appendix I, Vol. III, Tab. 110 at F30690). A Hewlett Packard memo, marked "company confidential," memorialized a discussion among HP executives:

Impact of FUD on Sun. It was asserted that an aggressive push by the consortium might cause software developers to reconsider their commitment to the nonstandard elements of the Sun OS, thereby slowing Sun's market momentum. A goal of the consortium might be to position the AT&T/Sun OS as the nonstandard Unix operating system and attempt to put them in a defensive position.

Plaintiff's Appendix I, Vol. I, Tab. 37, HP-72177.

According to Addamax, this evidence indicates that OSF was formed not to create a new product, but to "bully the market" into adopting certain standards for computer products. These standards were consistent with the Sponsors' interests, and inhibited competition in their purchases of operating system components.

Addamax's position also finds some support in evidence that OSF did very little in terms of actual research and development.²⁰ Roger Gourd, head of engineering at OSF, admitted in deposition testimony that he was unaware of any research into "new product offerings," (Plaintiff's [\[**34\]](#) Appendix II, Deposition of Roger S. Gourd, 153:8-20), and it is undisputed that OSF is managed and staffed by personnel otherwise tied to the Sponsors.

Addamax has presented evidence of OSF's structure, purpose and strategy sufficient to support an inference of anticompetitive effect. This evidence, combined with the plausible hypothesis that a collusive monopsony eventually raises prices and restricts output, is sufficient to withstand a motion for summary judgment on Addamax's rule of reason claims.

VI. OTHER CLAIMS

The plaintiff's suit also includes counts under the Clayton Act and under Massachusetts law. The defendants have moved for summary judgment on all of these claims, arguing that Addamax cannot raise genuine issues of fact with respect to essential elements of each of these claims.

A. Clayton Act.

Addamax's [\[**35\]](#) complaint alleges violations of § 7 of the Clayton Act, which [HN16](#)[↑] prohibits mergers or acquisitions that substantially lessen competition in a relevant line of commerce. See [15 U.S.C. § 18](#). The defendants argue that the transactions giving rise to this joint venture do not amount to a merger or acquisition, and are thus beyond the scope of the statute.

It is true that the Clayton Act, by its own terms, applies only where there has been an acquisition of assets, stock, or other share capital. *Id.* In keeping with the broad mandate of the antitrust laws, however, courts have generally adopted a flexible approach in measuring the scope of this language. [United States v. Philadelphia National Bank, 374 U.S. 321, 337-339, 10 L. Ed. 2d 915, 83 S. Ct. 1715 \(1963\)](#); [Mr. Frank, Inc. v. Waste Management, Inc., 591 F. Supp. 859, 866](#) (N.D. Ill., 1984)(noting that in the context of Section 7, the term "asset" may mean "anything of value.")(citations omitted).

²⁰ A general lack of activity suggests that the true purpose in joining forces is not to integrate resources, but rather to exploit its market power. [Timken, 341 U.S. at 597-98](#).

In this case, Addamax has submitted evidence indicating that the defendants acquired certain rights as a result of their contributions to the project. Some of these rights might properly be characterized as [*286] giving the Sponsors [**36] a degree of control over OSF.²¹ Although control itself does not implicate the transfer of stock or share capital, the acquisition of control has been deemed the "acquisition of an asset" for section 7 purposes. Mr. Frank, Inc., 859 F. Supp. at 866.

Finally, Addamax correctly notes that the OSF "Formation and Funding Agreement" signed by the sponsors could be construed as transferring a tangible asset. Plaintiff's [**37] Appendix I, Volume I, Tab 48 at HP36022. Section 2.5 of that document provides that the sponsors' capital contributions may eventually be treated "as prepaid credit against cash royalties which may in the future become due ..." Id. Without deciding whether or not this transaction constitutes the "acquisition of asset," the court is satisfied that Addamax has produced a genuine issue of fact with respect to its Clayton Act claim.

B. State Law Claims

In addition to the federal and state antitrust claims, Addamax's complaint contains a state law claim based on intentional interference with actual and prospective contractual relations.²² This claim is grounded upon the allegation that at least one of Addamax's customers, Convex Computer Corp., cancelled a contract with Addamax after OSF's selection of SecureWare was announced, and that other companies refused to enter into contracts with Addamax after learning that SecureWare, not Addamax, had secured the OSF bid. With respect to Convex, Addamax claims that OSF's actions caused Convex to breach an existing agreement with Addamax. Plaintiff's First Amended Complaint, P 93. According to the complaint "Convex's decision to [**38] breach its contract with Addamax stemmed directly from OSF's decision to select SecureWare as the OSF standard technology." *Id. at P 94.*

HN17 [↑] To recover on a theory of intentional interference with actual or prospective business relations, a plaintiff must prove (1) the existence of business relations; (2) the defendant's knowing interference with the relations; and (3) the harm to the plaintiff borne of the defendant's actions. See United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 551 N.E.2d 20, 21 (Mass. 1990); Comey v. Hill, 387 Mass. 11, 438 N.E.2d 811, 816 (Mass. 1982)(quoting J.R. Nolan, Tort Law § 72, at 87 (1979)); ELM Medical Laboratory, Inc. v. RKO General, Inc., 403 Mass. 779, 532 N.E.2d 675, 681 (Mass. 1989).

Addamax has shown an issue of fact with respect [**39] to each contested element. Addamax has presented evidence of a licensing agreement with Convex, (Plaintiff's Appendix II, Deposition of Randall J. Sandone, 3:115;19-21), and evidence of contractual negotiations with Tektronix, another potential customer. Id. at 3:113;6-7). Addamax has presented evidence that H-P and Digital knowingly interfered with these relations through illegal conduct.²³ Finally, Addamax has presented evidence that it was harmed by the defendants' actions. *Id. at 15-19;* 3:120;11-14.

²¹ The defendants submit that "the only indicia of Sponsorship is one seat on the Board of Directors." Defendants' Memorandum in Support, 30 & n.21. In fact, however, the Sponsors may have obtained considerably more in exchange for their initial cash contributions. The Formation and Funding Agreement, Plaintiff's Appendix I, Vol. I, Tab 48, and OSF's by-laws, plaintiff's Appendix III, Tab. 2, suggest that the Sponsors retain rights apart from and beyond their seat upon the board of directors. The Sponsors may, for example, alter, amend or repeal the by-laws without the consent of the board.

²² Having found that the defendants are not entitled to summary judgment on all state antitrust claims, the court finds it unnecessary to consider the defendant's motion with respect to Addamax's M.G.L. ch. 93A, § 11 claim.

²³ It is important to note, with respect to this element of Addamax's claim, that a plaintiff need not establish that the defendants' actions were motivated by malice towards the plaintiff. It is sufficient that Addamax show that (1) the defendants were aware of Addamax's business relations, and (2) that their illegal conduct interfered with these relations. United Truck Leasing, 406 Mass. 811, 551 N.E.2d 20, 23 (Mass. 1990).

The defendants argue that both Convex and Tektronix had entered into **[**40]** contracts with SecureWare before SecureWare was chosen by OSF. As a result, the defendants argue, OSF could not be to blame for these companies' choices. In making this argument, however, the defendants overlook the **[*287]** fact that Addamax need not establish that Convex and Tektronix chose SecureWare instead of Addamax. Addamax, rather, needs only to show that they had relations with these companies, and that the defendants knowingly interfered with them.²⁴ Addamax has met its burden with respect to these elements, and the defendants motion for summary judgment on Addamax's intentional interference with business relations claim must be denied.

VII. CONCLUSION

For the foregoing reasons, **[**41]** the defendants' motion for summary judgment is allowed as to all of Addamax's *per se* claims, and denied in all other respects.

An order will issue.

Joseph L. Tauro

United States District Judge

ORDER

May 19, 1995

TAURO, Ch.J.,

For the reasons stated in the accompanying Memorandum, the defendants' motion for summary judgment is allowed as to all to the *per se* claims in counts I, II, III, IV and V, and denied in all other respects.

IT IS SO ORDERED.

Joseph L. Tauro

United States District Judge

End of Document

²⁴ The timing of Addamax's several contractual relations may of course be relevant to the issue of whether or not the defendants interfered with Addamax's business relations. For the purposes of this motion, however, it is sufficient to note that the timing of the contracts, in and of itself, does not preclude Addamax's claim.



Concept Design Elecs. & Mfg. v. Duplitronics, Inc.

United States District Court for the Western District of North Carolina, Charlotte Division

May 19, 1995, Decided; May 19, 1995, Filed

C-C-90-368-P; C-C-91-169-P

Reporter

1995 U.S. Dist. LEXIS 22987 *

CONCEPT DESIGN ELECTRONICS AND MANUFACTURING, INC., Plaintiff and Counterclaim Defendant, vs. DUPLITRONICS, INC., Defendant and Counterclaim Plaintiff.

Prior History: [Concept Design Elecs. & Mfg. v. Duplitronics, Inc., 1995 U.S. App. LEXIS 848 \(Fed. Cir., Jan. 17, 1995\)](#)

Core Terms

surety, patents, attorney's fees, inequitable conduct, unenforceable, damages, final judgment, phase, unfair competition, district court, pertinent part, infringed, expenses, Appeals, invalid, argues, execution of a judgment, appeal bond, first trial, law firm, prevailing, recovered, unwarranted refusal, foreign judgment, money judgment, jury verdict, losing party, per annum, accommodation, bifurcated

Counsel: [*1] For Concept Design Electronics And Manufacturing, Inc., Plaintiff (3:90cv368): Gregory A. Madera, LEAD ATTORNEY, Fish & Richardson P.C., Boston, MA USA; J. William Blue, Jr., LEAD ATTORNEY, Northern Blue Little Rooks Thibaut and Anderson, Chapel Hill, NC USA; W. Thad Adams, III, LEAD ATTORNEY, Shumaker, Loop & Kendrick, LLP, Charlotte, NC USA.

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For William Britt, Consol Claimant (3:90cv368): Michael I. Rackman, LEAD ATTORNEY, Gottlieb Rackman & Reisman, P.C., New York, NY USA.

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Judges: ROBERT D. POTTER, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT D. POTTER

Opinion

MEMORANDUM OF DECISION AND ORDER

THIS MATTER is before the Court on the following Motions:

1. Motion by Concept Design to Enforce Liability Against Surety Pursuant to [Rule 65.1 of the Federal Rules of Civil Procedure](#), filed March 8, 1995. [Documents # 366 & # 359, respectively].¹
2. Concept Design's Motion for Supplemental Award of Attorney's Fees Incurred During Appeal, filed March 20, 1995. [Documents # 367 & # 360, respectively].
3. [*3] Motion by Duplitrronics to Stay Execution of Judgment and Enforcement of Liability on Appeal Bond to Permit Application to the Supreme Court for Certiorari, filed March 27, 1995. [Documents # 368 & # 361, respectively].
4. Hanover Insurance Company's (Surety) Response and Memorandum, filed March 28, 1995, in opposition to Plaintiff's [Rule 65.1](#) Motion and Motion to Stay, filed March 28, 1995. [Documents # 370 & # 363, respectively].
5. Duplitrronics' Motion to Prevent Execution of Judgment, filed April 4, 1995. [Documents # 374 & # 367, respectively].

DISCUSSION

I. Motion by Concept Design to Enforce Liability Against Surety Pursuant to [Rule 65.1 of the Federal Rules of Civil Procedure](#) and Hanover Insurance Company's Response and Motion to Stay (Motions 1 and 4 above)

A. [Rule 65.1](#)

[Rule 65.1](#) provides in pertinent part:

Rule 65.1 Security: Proceedings Against Sureties

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's [*4] liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. . . .

The Court will enforce the liability against Hanover Insurance Company (Hanover), in accordance with [Rule 65.1](#).

B. Hanover Insurance Company's Response to Plaintiff's [Rule 65.1](#) Motion and Motion to Stay

¹ "Document #" refers to corresponding Motions in case C-C-90-368 first and then case C-C-91-169.

Hanover argues that Hanover's liability may not exceed \$900,000, and that Concept Design may not collect the judgment from Hanover before Plaintiff has used reasonable diligence to collect from Duplitrronics.

1. The Amount of the Bond.

The Appeal Bond provides:

On November 17, 1993, judgement for \$900,000 was entered for Concept Design Electronics and Manufacturing, Inc. against Duplitrronics, Inc. from which Duplitrronics, Inc. has appealed to the Federal Circuit Court of Appeals.

We jointly and severally agree to pay to the above judgement creditor any part of the judgment which is not reversed, and interest, damages and costs.

The obligation of this bond is limited to \$900,000.

Duplitrronics, Inc.

By: __

As principal

The Hanover Insurance Company

By: __

Kay A. Hull, Attorney in Fact

Title 28, Section 1961(a) & (b) provides:

§ 1961. Interest

(a) Interest shall be allowed on any money judgment [*5] in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment. . . .

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

Thus, contrary to Duplitrronics' and Hanover's argument, ". . . interest shall be allowed on any money judgment in a civil case, recovered in a district court." This is a money judgment in a civil case recovered in the Western District of North Carolina.

As to the liability of Hanover, the bond was for the amount of the judgment (\$900,000) ". . . which is not reversed, and interest, damages and costs." No part of the judgment amount was reversed. The surety is therefore liable for the amount of the judgment plus interest as may be applicable.

Of the \$900,000, \$300,000 was compensatory damages and \$600,000 was the result of trebling the amount fixed by the verdict (\$300,000) pursuant to N.C. General Statute § 75-16.

N.C. General Statutes § 24-5(b) provides:

§ 24-5. Contracts, [*6] except penal bonds, and judgments to bear interest.

(a) . . .

(b) Other Actions. -- In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be the legal rate.

This action which resulted in the jury case was instituted November 29, 1990. Therefore, pursuant to [N.C. General Statute § 24-5](#), \$300,000 compensatory damages shall bear interest from that date at the rate of 7.28% per annum until paid. The remaining \$600,000 shall bear interest from the date of entry of the Final Judgment, November 17, 1993, at the rate of 3.57% per annum until paid, pursuant to [Title 28, § 1961 of the United States Code](#).

In [TVA v. Atlas Machine and Iron Works, 803 F.2d 794 \(4th Cir. 1986\)](#), Atlas gave a supersedeas bond in the exact amount of the judgment, \$200,300.20. On appeal, Atlas' liability was affirmed and the matter was remanded to the district court " . . . to direct entry of an order directing Fireman's Fund to pay TVA, with interest accruing from . . . the date of the filing of the bond and stay of execution of the original judgment." [Id. 799.](#)

The surety should be aware that [Section 1961\(a\)](#) allows the judge no discretion to deny the interest authorized [*7] by that section. In [Bell, Boyd & Lloyd v. Tapy, 896 F.2d 1101 \(7th Cir. 1990\)](#), a law firm asked for post-judgment interest. The Seventh Circuit held:

The issue of postjudgment interest remains to be addressed. In its motion for summary judgment, the law firm asked for postjudgment interest. The request was superfluous, [Lorenzen v. Employees Retirement Plan, 896 F.2d 228, 230 \(7th Cir. 1990\)](#), and in retrospect foolish. [Section 1961\(a\)](#) of the Judicial Code entitles the prevailing plaintiff in a federal suit (including a diversity suit) to postjudgment interest at a rate fixed in the statute, whether or not there is an award of interest in the judgment, [Clifford v. M/V Islander, 882 F.2d 12, 14 \(1st Cir. 1989\)](#), or even a request for interest in the complaint. [Fed.R.Civ.P. 54\(c\)](#); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2664, at pp. 159-60 (2d ed. 1983). Judge Norgle denied the request because the firm had failed to cite the statute. We do not agree with this disposition. Nothing in any local or other rule forfeits a statutory entitlement because of failure to mention the statute, and [section 1961\(a\)](#) allows the judge no discretion to deny the interest authorized by that section. (Citing cases).

[Id. at 1104.](#)

The limitation of \$900,000.00 in the bond does not negate agreement to pay the judgment plus interest.

2. Reasonable Diligence to Collect from Duplitrronics.

Hanover argues that Concept Design's Attempts to Collect from [*8] Hanover should be stayed pending reasonable attempts by Plaintiff to collect from Duplitrronics.

To support its argument, Hanover cites [Chapter 26 of the North Carolina General Statutes](#) (N.C.G.S.). [Chapter 26 of the N.C.G.S.](#) clearly refers to actions on contracts.

[Section 26-1](#) states:

In the trial of actions upon contracts either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the magistrate in his judgment, shall distinguish the principal and surety, which shall be endorsed on the execution by the clerk of superior court. (Emphasis added).

The following sections of Chapter 26 all have to do with the relationship of principal and surety in contract matters. This is illustrated by [Sections 26-11, 26-3.1, 26-5, and 26-12](#) which states in pertinent part:

Whenever a judgment shall be rendered in any court in accordance with the provisions of G.S. 26-1 and the surety, endorser or other person shown in said judgment to be secondarily liable thereon

This section indicates that Chapter 26 has to do only with actions on contracts. [Section 26-3.1](#) provides in pertinent part:

[§ 26-3.1. Surety's recovery on obligation paid; no assignment necessary.](#)

(a) A surety who has paid his principal's note, bill, bond or other written obligation, may either sue his principal [*9] for reimbursement or sue his principal on the instrument . . .

(b) The word "surety" as used herein includes a guarantor, accommodation maker, accommodation indorser, or other person who undertakes liability for the written obligation of another. (Emphasis added).

Section 26-5 provides in pertinent part:

§ 26-5. Contribution among sureties.

Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, such surety may have and maintain an action against every other surety for a just and ratable proportion of the same which may have been paid as aforesaid, whether of principal, interest or cost. (Emphasis added).

Section 26-12 provides in pertinent part:

§ 26-12. Joinder of debtor by surety.

(a) As used in this section, "surety" includes guarantors, accommodation makers, accommodation indorsers, or others who undertake liability on the obligation and for the accommodation of another.

(b) When any surety is sued by the holder of the obligation, the court, on motion of the surety may join the principal as an additional party defendant, . . . (Emphasis added).

All the sections in Chapter 26, as well as the sections cited [*10] above as examples, clearly indicate that Hanover's reliance on Chapter 26 to require any "due diligence" as required in that Chapter is misplaced. Chapter 26 has no bearing on the matter before this Court.

This construction is further reinforced by the holding in *Koehring Co. v. Seacrest Marine Corporation, 29 N.C. App. 498, 224 S.E.2d 654 (N.C. App. 1976)*. In *Koehring* the plaintiff moved for judgment against the surety, which argued that judgment should not have been entered against it on its stay bond prior to execution against the defendant. The trial court granted the motion and the surety appealed. The N.C. Court of Appeals rejected the surety's argument and held:

The stay bond executed by The Home Indemnity Company was for the explicit purpose of stopping execution against defendant on plaintiff's judgment. The bond specifically provides that The Home Indemnity Company guarantees that defendant "will pay the amount directed to be paid by the judgment" in the event "the appeal is dismissed." This constitutes a guarantee of payment of the judgment, not a guarantee of payment of such amount as execution against the defendant does not produce. The surety, if it wishes, can take an assignment of plaintiff's judgment after payment thereof and then issue execution against defendant. [*11] Having elected to deprive the judgment creditor of the opportunity of enforcing its claim by voluntarily, and presumably for a fee, execution the supersedeas bond, The Home Indemnity Company cannot now with propriety complain if it is required to live up to the terms of its undertaking. This argument is without merit.

Id. at 656. (Emphasis supplied).

In the case at bar, Hanover's bond provided in pertinent part:

On November 17, 1993, judgement for \$900,000 was entered for Concept Design Electronics and Manufacturing, Inc. against Duplitronics, Inc. from which Duplitronics, Inc. has appealed to the Federal Circuit Court of Appeals.

We jointly and severally agree to pay to the above judgement creditor any part of the judgment which is not reversed, and interest, damages and costs.

The obligation of this bond is limited to \$900,000.

It is clear that Hanover's argument is without merit, and Concept Design is entitled to recover on the bond under [Federal Rules of Civil Procedure 65.1](#) without any procedural preconditions.

II. Concept Design's Motion for Supplemental Award of Attorney's Fees Incurred During Appeal and Duplitrionics' Opposition (Motion 2)

A. Award of Attorney's Fees Incurred During Appeal

Concept Design is entitled to an award of attorney's fees for [*12] the trial and for the fees which were incurred in representing the Plaintiff-Appellee before the Federal Circuit.

[Section 75-16.1 of the N.C. General Statutes](#) provides:

§ 75-16.1. Attorney fee.

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the costs and payable by the losing party, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; . . .

This Court has previously awarded Concept Design an attorney's fee for the trial portion of the litigation. The appellee, Concept Design, now is asking this Court to award attorney's fees for the appellate phase.

Duplitrionics contends that this Court does not have authority to award attorney fees for the appellate phase, and that any such award must be by the Appellate Court.

Duplitrionics also contends that no award may be made because the appeal was not frivolous, and because there was not [*13] an unwarranted refusal to settle the appeal.

Duplitrionics argues that no award should be made because *Rule 38 of the Federal Rules of Appellate Procedure* authorize only appellate courts to award damages for frivolous appeals. That argument is of no avail to Duplitrionics because there has never been any claim by Concept Design that the appeal by Duplitrionics was frivolous, and the Federal Circuit did not find the appeal to be frivolous.

The argument by Duplitrionics that only the Federal Circuit and not this Court has the authority to award attorney fees under [N.C. General Statute 75-1.1](#) is not supported by any authority cited by Duplitrionics nor by any authority found by this Court. The appeal was from a judgment involving a State statute. The North Carolina cases, including [City Finance Co. v. Boykin, 86 N.C. App. 446, 358 S.E.2d 83 \(1987\)](#), cited by Duplitrionics hold that the trial court has authority to award attorney's fees for all phases of a case. The award or denial of attorney's fees is in the sole discretion of the trial judge. [Morris v. Bailey, 86 N.C. App. 378, 387, 358 S.E.2d 120 \(1987\)](#). (See Subparagraph (B) hereafter, for determination of fee.)

Duplitrionics argues that the North Carolina statute only authorizes an award of fees where there has been an unwarranted refusal to settle, (Duplitrionics' Response, Documents # 354 & # 347, respectively). [Rule 33 of the Federal Rules of Civil Procedure](#) provides:

Rule 33. Appeal Conferences [*14]

The Court may direct the attorneys, and in appropriate cases, the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.

Duplitronics continues its argument on page 5 of its response:

Counsel for Duplitronics initiated such discussions with counsel for Concept Design, and was told that Concept Design would not discuss settlement until this Court decided the then pending motion for fees. Thus, it was Concept Design, not Duplitronics, who refused to settle.

The Court believes that Concept Design's position as stated by Duplitronics (if that was in fact Concept Design's position) was reasonable.

Based on the history of this litigation [*15] both parties have been at loggerheads throughout this litigation.

However, the balance of unreasonableness seems to point more to the Defendant. As the Court found in its Order allowing the Plaintiff's counsel fees, (in discussing the [N.C. General Statute § 75-16.1](#) that the Court must find willfulness and an unwarranted refusal by the losing party to fully resolve the matter which constitutes the basis of the suit):

As to the second requirement, the unwarranted refusal by the party to resolve fully the matter, there is ample evidence that the Defendant consistently throughout the litigation refused without justification to engage in meaningful settlement negotiations. An example of this is the preposterous proposal by Duplitronics' "house counsel" that he and Mr. Binder confer with Mr. Britt, Concept Design's owner, out of the presence of Mr. Farrow, the President of Concept Design, or Mr. Adams, patent attorney for Concept Design. Another example is Mr. Binder's absurd statement that Duplitronics' damages for the unlicensed use of the technology Concept Design exceeded \$300,000,000.00.

The Court finds that a reasonable attorney fee is due Concept Design by Duplitronics under [N.C.G.S. § 75-16.1](#).

Therefore, Duplitronics' argument that [*16] the Plaintiff's Motion for Fees should be denied because Duplitronics' good faith attempts to fully resolve the matter were rejected by Concept Design fails.

(B) Determination of the Fee

In the Memorandum of Decision and Order filed October 31, 1994 [Documents # 361 & # 354, respectively] in connection with the fee allowed Plaintiff's counsel for the trial, pursuant to [N.C. General Statute § 75-16.1](#), the Court considered [Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 \(1983\)](#); [Lyle v. Food Lion, Inc., 954 F.2d 984, 988-989 \(4th Cir. 1992\)](#) and [Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 714-19 \(5th Cir. 1974\)](#).

Reiterating the decision in those cases, and the factors considered, would only add to the weight of an already voluminous record. Suffice it to say the Court has considered those cases in making its determination of the fee to be allowed Concept Design in the appellate phase.

Concept Design's account of its services in billing charges in connection with the appeal, commences on June 30, 1994, and concludes with a debit on February 28, 1995, with itemized billing hours in between.

There were three firms involved in the appellate portion of the litigation: W. Thad Adams, III; Northern, Blue, Rooks and Thibaut; and Fish & Richardson.

The Court has examined in great detail the charges by each firm, and has determined from such examination that the fees charged are reasonable, both as to the rate [*17] per hour and the number of hours for which a charge is made. It appears that all charges for matters other than related to the appeal have been deleted and, therefore, the Court finds that the summary submitted by the Plaintiff in its Memorandum of Points and Authorities in Support of Plaintiff's Motion for a Supplemental Award of Attorneys Fees, [Documents # 367 & # 360, respectively], filed March 21, 1995, indicates a total attorney fee of \$69,670.00 for the three law firms involved in the appeal. In light of all the information the Court has, the Court finds this to be reasonable and justified.

The total expenses submitted by all three firms is \$9,033.07. The Court also finds all the expenses to be allowable. Thus, the Court will allow \$69,670.00 as a fee for all three firms and \$9,033.07 in expenses for a total of \$78,703.07 fees and expenses to be paid the three law firms, involved in the appeal.

III. Duplitronics' Motion to Stay the Execution of Judgment and Enforcement of Liability on Appeal Bond to Permit Application to the Supreme Court for Certiorari, filed March 27, 1995 (Motion # 3 above)

BACKGROUND

On November 17, 1993, this Court entered Final Judgment against the Defendant [*18] Duplitronics, Inc. ("Duplitronics") and in favor of the Plaintiff Concept Design Electronics and Manufacturing, Inc. ("Concept Design") in the amount of Nine Hundred Thousand (\$900,000.00) Dollars, based on a jury verdict of \$300,000.00 which was trebled pursuant to [N.C. General Statute § 75-1.1](#).

On November 30, 1993, this Court granted a temporary stay conditioned on the giving of a bond in the amount of \$900,000.00. On December 2, 1993, Duplitronics executed an appeal bond in which Duplitronics and its surety, The Hanover Insurance Co. ("Hanover") agreed as follows:

We jointly and severally agree to pay to the above judgment creditor any part of the judgment which is not reversed, and interest, damages, and costs.

The obligation of this bond is limited to \$900,000.00.

On appeal, the United States Court of Appeals for the Federal Circuit entered an order affirming this Court's Final Judgment and the Mandate was issued on March 6, 1995, and Duplitronics' Motion to Stay Mandate was denied by the Federal Circuit on that same date.

On March 8, 1995, Concept Design moved this Court for an Order compelling payment by the surety of \$900,000.00 plus interest (Motion # 1 above) [Documents # 366 & # 359, respectively].

Duplitronics [*19] filed its Motion on March 27, 1995, pursuant to [Title 28, § 2101\(b\) of the U.S. Code](#) for an order staying execution on the Final Judgment for a reasonable period to permit application to the Supreme Court for a writ of certiorari.

For the reasons hereinafter, the Court will deny the Defendant's Motion to Stay [Documents # 368 and # 361, respectively].

After the United States Court of Appeals for the Federal Circuit affirmed this Court's Judgment for \$900,000 on January 17, 1995, Duplitronics filed a Motion for Rehearing and Suggestion for a Hearing En Banc, both of which were denied.

The United States Court of Appeals for the Federal Circuit, under the heading of "Background" in its opinion, outlines the procedural history of this case involving U.S. Patent 4,410,917 (the Newdol Patent) assigned to Duplitronics and U.S. Patent 5,021,893 (the Scheffler Patent) assigned to Duplitronics.

Briefly, this litigation began in November 1990 when Concept Design filed a declaratory judgment action to declare invalid and unenforceable the Newdoll Patent and a declaratory judgment action in June 1991 to declare the Scheffler Patent invalid and unenforceable. The suits involving the two patents were consolidated.

The first trial of these matters was held in March of 1993 in [*20] which the jury decided all issues for Concept Design, finding that Duplitronics' Newdoll and Scheffler Patents invalid, unenforceable and not infringed. Duplitronics moved for judgment as a matter of law, or alternatively a new trial pursuant to [Federal Rules of Civil Procedure 50\(b\)](#). This Court denied that motion.

A second jury trial was held in November 1993 on Concept Design's claim that Duplitronics had violated the North Carolina Unfair Competition law and to determine damages. This phase of the litigation had been bifurcated from the first at Duplitronics' request.

In the second trial, Concept Design presented two theories of unfair competition: (1) Duplitronics' alleged fraud on the Patent and Trademark Office ("PTO") during prosecution of the Scheffler Patent; and (2) Duplitronics' enforcement of the two patents allegedly with no reasonable belief that the patents were infringed. The jury in that trial found for Concept Design on the theory that Duplitronics had asserted the Scheffler and Newdoll Patents in bad faith and awarded \$300,000.00 in damages, which the Court trebled under the N.C. Unfair Trade Practices law. This Court entered final judgment both phases of the litigation, including a judgment that the two [*21] patents were unenforceable for inequitable conduct. This Court denied a motion for judgment as a matter of law and Duplitronics appealed.

Duplitronics argues in Footnote 2 that Concept Design is totally without a basis for an award of interest under the express terms of the Final Judgment.

That Final Judgment was filed in this Court on November 17, 1993 and Paragraph 8 provided:

8. Plaintiff Concept Design shall have and recover of the Defendant Duplitronics the sum of **NINE HUNDRED THOUSAND AND NO/100 (\$900,000.00) DOLLARS**, said sum being treble the amount fixed by the verdict of the jury, pursuant to [N.C. Gen. Stat. § 75-16](#);

Title 28, [§ 1961\(a\)](#) provides in pertinent part:

§ 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment. . .

Thus, the statute provides for interest without the necessity of including it in the judgment.

Duplitronics argues that there is a reasonable likelihood that [*22] certiorari will be granted (by the Supreme Court) in this matter contending: (1) that the original jury verdict on the patent validity issues determined that the patent at issue were unenforceable but only after the submission of a special issue which included two independent theories of invalidation: (a) inequitable conduct and (b) patent misuse, and there is no way to tell from the general verdict what theory the jury chose to find the patents unenforceable; (2) the Court made no finding of fact under [Rule 52\(a\) of the Federal Rules of Civil Procedure](#) to support the legal conclusions; and (3) the Court erroneously instructed the jury in the unfair competition portion of this trial that the patents were invalid and unenforceable in contravention of Duplitronics's right to enjoy a presumption of patent validity in several opinions of the Federal Circuit.

However, the Federal Circuit in its unpublished opinion number 94-1264 stated that in the March 1993 jury trial the jury found that Duplitronics' Newdoll and Scheffler patents were invalid, unenforceable and not infringed and that at a second jury trial, held in November 1993, Concept Design presented two theories of unfair competition at trial: (1)

Duplitronics' alleged fraud on the [*23] PTO during prosecution of the Scheffler patent and the re-examination proceeding concerning the Newdoll patent; and (2) Duplitronics' enforcement of the two patents, allegedly done with no reasonable belief that the patents were infringed. The jury in the second trial found for Concept Design on the theory that Duplitronics had asserted the Scheffler and Newdoll patents in bad faith and awarded damages of \$300,000.00 which was trebled by the Court.

The Federal Circuit pointed out that the two phases of the trial had been bifurcated at Duplitronics' request.

On November 17, 1993, this Court entered a final judgment on both phases of the litigation, including a judgment that the two separate patents were unenforceable for inequitable conduct.

Duplitronics argues that the second jury effectively acquitted it of inequitable conduct. The Federal Circuit pointed out that the jury in the first trial in March was asked to determine whether the patents were unenforceable on either of two separate grounds, misuse or inequitable conduct, that the March jury was instructed that a patent is rendered unenforceable by either inequitable conduct or misuse and that even though there was some ambiguity [*24] regarding the grounds on which the March jury reached its verdict of unenforceability that this Court in entering its final judgment on November 17, 1993 that the patents were unenforceable as a result of inequitable conduct, in spite of the ambiguity in the March jury's verdict that the decision respecting inequitable conduct, is a discretionary decision to be made by the judge on his own factual findings and that the district court had authority for its findings and judgment independent of the jury's verdict whichever theory it was based on.

The Federal Circuit further disagreed with Duplitronics' contention that this Court's rulings of inequitable conduct was clear error unsupported by the evidence, or otherwise in excess of the Court's discretionary power because the November jury found that Concept Design had not proven by clear and convincing evidence that Duplitronics committed fraud on the patent office. The Federal Circuit first noted that the litigation was bifurcated at the request of Duplitronics into the first phase addressing claims of invalidity, unenforceability and infringement, and a second phase addressing the unfair competition claim and damages. The Federal Circuit [*25] noted that Duplitronics acknowledged the two trials addressed different issues - - the first trial addressed inequitable conduct whereas the second addressed fraud on the PTO. The Federal Circuit concluded that the district court did not abuse its discretion by entering a final judgment of unenforceability due to inequitable conduct based on the evidence at the first trial, and further that the outcome of the unfair competition claim based on fraud, determined by the second trial, is simply irrelevant to the outcome of the inequitable conduct claim heard at the first trial.

The Federal Circuit determined that any other result would allow a party to try the same issue twice by requesting bifurcation, thereby violating the purpose of bifurcation, conservation of judicial resources and simplification of issues and that therefore Duplitronics is judicially estopped from first seeking separation, but later merger of those issues.

Secondly, the Federal Circuit noted that the Court's finding that Duplitronics committed inequitable conduct is not inconsistent with the second jury's finding that Duplitronics did not commit fraud because the legal standards for proving fraud are more stringent [*26] than for demonstrating inequitable conduct, stating:

In comparable circumstances we have stated:

When a party seeks to collect monetary damages from a patentee because of alleged violations of the antitrust law, it is appropriate to require a higher degree of misconduct for that damage award than when a party asserts only a defense against an infringement claim.

Hewlett-Packard Co. v. Bausch & Lomb Inc., 882 F.2d 1556, 1563, 11 USPQ2d 1750, 1756 (Fed. Cir. 1989), cert. denied, 493 U.S. 1076, 110 S. Ct. 1125, 107 L. Ed. 2d 1031 (1990); Argus Chemical Corp. v. Fibre Glass-Evercoat Co., 812 F.3d 1381, 1384-85, 11 USPQ2d 1971, 1973-74 (Fed. Cir. 1987) ("knowing and willful fraud . . . can mean no less than clear, convincing proof of intentional fraud involving affirmative dishonesty").

In answer to Duplitronics' assertion that the corresponding jury instructions in the two trials were almost identical and that therefore the second jury, found by necessary implication, that Duplitronics did not intend to deceive or knowingly conceal a material fact, the Federal Circuit stated:

Actually, the jury instructions properly differed in an important aspect. In the second trial, the court instructed the jury that "Concept Design must show fraud involving affirmative dishonesty." Consistent with the law of inequitable conduct, there was no such requirement in the jury instructions of the first trial. Thus, the two verdicts are consistent and the second cannot be said [*27] to alter the first.

The Federal Circuit, in disagreeing with Duplitronics' contention that this Court's ruling of inequitable conduct was clear error or otherwise in excess of the Court's discretionary power because the November jury found that Concept Design had not proven by clear and convincing evidence that Duplitronics' fraud on the patent office elucidated its third reason as follows:

Third, two separate juries reviewed different evidence to find different facts on different instructions. Although the parties disagreed at oral argument about the extent to which the evidence in the two trials overlapped, the fact that the evidence was not identical is sufficient by itself to justify the different verdicts on the related issues of unenforceability and fraud, making the two verdicts consistent. Even if the verdicts were not consistent, the jury verdict concerning fraud cannot alter the judgment concerning inequitable conduct when the two issues are decided in separate trials.

For these reasons and upon a review of the evidence, we hold that the district court did not abuse its discretion by entering judgment that the Newdall and Scheffler patents are unenforceable, as a matter of law, [*28] for inequitable conduct.

The Federal Circuit further responded to Duplitronics' other arguments that the jury verdicts on validity, infringement and unfair competition were unsupported by substantial evidence by stating:

Because we regard Duplitronics' arguments on these issues, like those concerning inequitable conduct, as unpersuasive in light of the record as a whole, we reject them.

Because this Court feels that the Federal Circuit's reasoning is sound and that there is little likelihood that certiorari will be granted, the Court will not stay execution of the judgment and enforcement of the liability on the appeal bond.

IV. Duplitronics' Motion to Prevent Execution of Judgment (Motion # 5 above)

This Court awarded the Plaintiff the sum of \$218,314.00 as attorney's fees in this case by Judgment entered October 31, 1994. Duplitronics filed Notice of Appeal as to attorney's fees on November 4, 1994 [Documents # 363 & 356, respectively].

On November 15, 1994, Concept Design commenced procedures to execute on the attorney's fee Judgment by recording in the Office of the Clerk of Court for Mecklenburg County, North Carolina, required as a precondition to recording in Illinois where Duplitronics [*29] is located. On November 18, 1994, Concept Design filed a Notice of Cross-Appeal, and on January 9, 1995, a Petition for Registration of Foreign Judgment in Cook County, Illinois.

Duplitronics, on January 26, 1995, filed a Motion in Illinois to Stay Enforcement of the Foreign Judgment.

Duplitronics' reliance on [*Tennessee Valley Authority v. Atlas Machine & Iron Works, 803 F.2d 794 \(4th Cir. 1986\)*](#) is misplaced.

TVA stands for the proposition that where the prevailing party in the lower court is the first to appeal, no supersedeas bond can be required of the losing party when it subsequently files its own appeal because the execution of the judgment has already been superseded by the prevailing party's appeal. [*Id. at 797*](#), citing [*Branson v. La Crosse R.R. Co., 68 U.S. \(1 Wall.\) at 410, 17 L. Ed 616*](#).

In this case, Judgment for Concept Design as to attorney's fees was filed October 31, 1994. Duplitronics filed Notice of Appeal on November 4, 1994. On November 15, 1994, Concept Design recorded its Judgment in the Office of the Clerk of Superior Court for Mecklenburg County, North Carolina as required by Illinois Uniform Enforcement of Foreign Judgment Act, [735 ILCS 5/12-654](#). There is then an automatic stay in Illinois before enforcement can be continued. [735 ILCS 5/12-653](#). (North Carolina Uniform Act is similar. [1C NC Gen. Stat. 1704\(b\)](#).)

Concept Design, on January 9, 1995, filed in the Circuit Court of [*30] Cook County, Illinois, a petition for registration of a foreign judgment.

On January 26, 1995, Duplitronics filed a Motion in Illinois to Stay Enforcement of the Foreign Judgment, which Concept Design had commenced on November 15, 1994.

Duplitronics was the losing party. Concept Design was the prevailing party. Duplitronics was the first to appeal on November 4, 1994. Concept Design commenced execution procedure on November 15 by filing its judgment in the Mecklenburg County Clerk's Office. Then Concept Design filed its Cross-Appeal on November 18, 1994.

Thus, Concept Design, the prevailing party, was not the first to appeal; Duplitronics, the losing party, was the first to appeal, and following the dictate of [Atlas](#), Duplitronics' Motion to Prevent Execution of Judgment will be denied.

CONCLUSION

NOW, THEREFORE, IT IS ORDERED:

- (1) Motion by Concept Design to Enforce Liability Against Surety Pursuant to [Rule 65.1 of the Federal Rules of Civil Procedure](#), filed March 8, 1995, [Documents # 366 & # 359, respectively], is **GRANTED**.
- (2) Concept Design's Motion for Supplemental Award of Attorney's Fees Incurred During Appeal, filed March 20, 1995, [Documents # 367 & # 360, respectively], is **GRANTED**.
- (3) Motion by Duplitronics to Stay Execution of [*31] Judgment and Enforcement of Liability on Appeal Bond to Permit Application to the Supreme Court for Certiorari, filed March 27, 1995, [Documents # 368 & # 361, respectively], is **DENIED**.
- (4) Hanover Insurance Company's (Surety) Response anat. d Memorandum in opposition to Plaintiff's [Rule 65.1](#) Motion and Motion to Stay, filed March 28, 1995, [Documents # 370 & # 363, respectively], is **DENIED**.
- (5) Duplitronics' Motion to Prevent Execution of Judgment, filed April 4, 1995, [Documents # 374 & # 367, respectively], is **DENIED**.
- (6) Plaintiff Concept Design is awarded a total fee of \$69,670.00 as attorney's fees for the three law firms involved in the appeal, and \$9,033.07 as expenses for the three law firms involved in the appeal to the Federal Circuit, for a total of \$78,703.07 fees and expenses for defending the Plaintiff's judgment in the Federal Circuit.

The Court will file a Judgment for the Attorney' Fees simultaneously with this Memorandum of Decision and Order.

This the 19th day of May, 1995.

/s/ Robert D. Potter

ROBERT D. POTTER

SENIOR UNITED STATES DISTRICT JUDGE

JUDGMENT

In accordance with the Memorandum of Decision and Order filed simultaneously with this Judgment,

IT IS ORDERED AND ADJUDGED:

1. That [*32] the Plaintiff have and recover of the Defendant the sum of **SEVENTY-EIGHT THOUSAND SEVEN HUNDRED THREE AND 07/100 (\$78,703.07) DOLLARS** as attorneys's fees and expenses with interest thereon at the rate of 6.28% per annum from the date of entry of this Judgment.
2. That the Plaintiff have and recover of the Defendant interest at the rate of 7.28% per annum on \$300,000.00 from November 29, 1990 until paid, and interest at the rate of 3.57% per annum on \$600,000.00 from November 17, 1993 until paid. [See Final Judgment, Documents # 328 & 321, respectively].

This the 19th day of May, 1995.

/s/ Robert D. Potter

ROBERT D. POTTER

SENIOR UNITED STATES DISTRICT JUDGE

End of Document



Roman v. Cessna Aircraft Co.

United States Court of Appeals for the Tenth Circuit

May 24, 1995, Filed

No. 94-3237

Reporter

55 F.3d 542 *; 1995 U.S. App. LEXIS 12593 **; 1995-1 Trade Cas. (CCH) P71,004

ROBERT ROMAN, Plaintiff-Appellant, v. CESSNA AIRCRAFT COMPANY and THE BOEING COMPANY, Defendants-Appellees.

Prior History: [\[**1\]](#) Appeal from the United States District Court for the District of Kansas. (D.C. No. 94-CV-1074). MONTI L. BELOT.

Core Terms

antitrust, allegations, anti trust law, hire, district court, defendants', employees

LexisNexis® Headnotes

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

[**HN1**](#) **[] Standards of Review, De Novo Review**

The appellate court reviews the sufficiency of a complaint de novo. It will uphold a dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#) only when it appears that the plaintiff can prove no set of facts in support of the claims that will entitle the plaintiff to relief. In making this determination, the appellate court must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.

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

[**HN2**](#) **[] Private Actions, Standing**

There are six factors that are relevant in ascertaining whether a plaintiff has standing to pursue an antitrust claim: (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's injury, that is, whether it is one intended to be redressed by the antitrust laws; (4) the directness or the indirectness of the connection between the plaintiff's injury and the market restraint resulting from the alleged antitrust violation; (5) the speculative nature of the damages sought; and (6) the risk of duplicative recoveries or complex damages apportionment.

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

[HN3](#) [down] Private Actions, Standing

Plaintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement that is directed at them as a particular segment of employees have suffered an antitrust injury under the governing standard.

Business & Corporate Compliance > ... > Readjustments > Formation > General Overview

Civil Procedure > ... > Justiciability > Standing > 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 > ... > Sales of Goods > Readjustments > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

[HN4](#) [down] Sales of Goods, Formation

Antitrust law addresses employer conspiracies, controlling employment terms because they tamper with the employment market and impair the opportunities of those who sell their services there. Just as **antitrust law** seeks to preserve the free market opportunities of buyers and sellers of goods, it also seeks to do the same for buyers and sellers of employment services. Courts have readily approved standing for professional athletes, challenging agreements among employers fixing employment terms and for brokers or magazine solicitors, challenging their employers' agreements against hiring switching employees. An employee overcomes the primary hurdle to standing when he shows that the alleged violation restrains competition in the labor market. He must still show injury-in-fact that is proximately caused by the violation and, in damage cases, that can be quantified without undue speculation.

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

[HN5](#) [down] Private Actions, Standing

Employees cannot establish an antitrust injury when they lose their employment as a result of some allegedly anticompetitive activity that is directed at or involving their employer. This rule does not apply when the anticompetitive practices are directed toward the employees themselves.

Counsel: Robert M. Beattie, Jr. of Beattie Law Office, Wichita, Kansas (James S. Phillips, Jr., of Phillips & Phillips, Chartered, Wichita, Kansas, with him on the briefs), for Plaintiff-Appellant.

Martha Aaron Ross (James D. Oliver, with her on the brief), of Foulston & Siefkin, Wichita, Kansas, for Defendant-Appellee.

John C. Nettels, Jr., of Morrison & Hecker, Wichita, Kansas, on the brief for Defendant-Appellee, Cessna Aircraft Company.

Judges: Before SEYMOUR, Chief Judge, ALARCON,* and HENRY, Circuit Judges.

Opinion by: SEYMOUR

Opinion

[*543] SEYMOUR, Chief Judge.

Robert Roman brought this antitrust action under [15 U.S.C. 1](#), [15](#) and state law, alleging that Cessna Aircraft Company and The Boeing Company conspired to restrain trade by agreeing not to hire each other's engineers. The district court granted defendants' motion under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim, ruling that Mr. Roman lacked antitrust standing. Mr. Roman appeals and we reverse.

I.

[**2] The complaint in this case alleges the following facts. Mr. Roman was "employed at Boeing as an airplane engineer via a contract with Butler Service Corporation." Aplt. App. at 2. While working at Boeing, Mr. Roman applied for a position at Cessna in which he would perform substantially similar work and receive more compensation. Initially Mr. Roman was told that Cessna needed workers with his experience and that he could expect a firm offer. However, he was subsequently told that Cessna would not offer him employment solely because of an agreement between Cessna and Boeing that they would not hire engineers away from each other. *Id.* at 3. The complaint further alleges specific facts which, if proven, would establish that such an agreement did exist and that it was the only reason for Cessna's refusal to hire Mr. Roman. Finally, the complaint alleges that

defendants are in the labor market for airplane engineers, that plaintiff was an airplane engineer and a part of that labor market, that defendants have conspired to avoid competition in that market in violation of the antitrust laws by horizontally dividing the market as between them by not hiring each others' engineers [**3] (a no-switching non-competition [sic] agreement), and alleges that as a direct and proximate cause of defendants' actions, plaintiff suffered damages to his business and property interests.

Id. at 5-6.

The district court concluded that Mr. Roman had failed to allege antitrust standing and dismissed the complaint. [HN1](#) We review the sufficiency of a complaint de novo. [Sharp v. United Airlines, Inc.](#), [967 F.2d 404, 406](#) (10th Cir.), cert. denied, [121 L. Ed. 2d 372, 113 S. Ct. 464](#) (1992).

"We will uphold a dismissal [under [Fed.R.Civ.P. 12\(b\)\(6\)](#)] only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief."

In making this determination, we must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff."

Id. (citations omitted).

II.

* The Honorable Arthur L. Alarcon, United States Senior Circuit Judge for the Ninth Circuit, sitting by designation.

HN2 [↑] We have enumerated six factors that are relevant in ascertaining whether a plaintiff has standing to pursue an antitrust claim:

(1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's [**4] injury -- i.e., whether it is one intended to be redressed by the antitrust laws; (4) the directness or the indirectness of the connection between the plaintiff's injury and the market restraint resulting from the alleged antitrust violation; (5) the speculative nature of the damages sought; and (6) the risk of duplicative recoveries or complex damages apportionment.

Sharp, 967 F.2d at 406-07.

In granting defendants' motion to dismiss, the district court concluded that Mr. Roman failed to allege a causal connection between the alleged antitrust violation and his antitrust injury. The court stated that because Mr. Roman was employed by Butler and worked at Boeing through a service contract between Butler and Boeing, the alleged agreement between Boeing and Cessna had no impact on Mr. Roman. In so holding, the court erroneously failed to take the complaint's factual allegations as true and construe them most favorably to Mr. Roman. Indeed the court's ruling is directly contrary to those allegations, which set out facts showing that the illegal agreement between defendants [*544] was the only reason Mr. Roman was not hired by Cessna.

The court rested its ruling on its conclusion [**5] that because Mr. Roman was not an "employee" of Boeing and the alleged agreement covered only employees, Mr. Roman had not made the requisite showing that he was a target of the alleged illegal agreement. This conclusion similarly fails to accept as true the allegations in the complaint setting out facts showing that the alleged agreement did cover and was directed at workers such as Mr. Roman who were indirectly employed with one of defendants through a service contract.¹ The district court therefore erred in granting defendants' motion to dismiss for the reasons the court gave.

On appeal, defendants contend that we may affirm the district court on the alternative ground that Mr. Roman failed to adequately allege an antitrust [**6] injury. The third factor we set forth in *Sharp* requires that a plaintiff's injury must be "intended to be redressed by the antitrust laws." *Sharp, 967 F.2d at 407.*

The gist of defendants' argument seems to be that Mr. Roman's injury does not flow from the alleged anticompetitive effect of the agreement because the market operated freely with respect to those employees who were not the target of that agreement. In other words, competition was not suppressed. The pertinent authority is to the contrary, however. The relevant cases hold that **HN3** [↑] plaintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement directed at them as a particular segment of employees have suffered an antitrust injury under the governing standard. See, e.g., *Radovich v. National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)* (football player subject to agreement blacklisting players who played in rival league stated claim for relief under antitrust laws); *Quinonez v. National Ass'n of Sec. Dealers, Inc., 540 F.2d 824 (5th Cir. 1976)* (employee subject to agreement under which a member would not hire person rejected or discharged by another member stated antitrust [**7] claim).

A leading antitrust authority has described antitrust injury in the employment context as follows:

HN4 [↑] **Antitrust law** addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as **antitrust law** seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object

¹ In addition to the allegations showing that Mr. Roman himself was not hired by Cessna because he worked at Boeing, the complaint also set out facts showing that another airplane engineer who worked for Cessna through an agency was covered by the alleged agreement. See Aplt. App. at 4.

of the law's solicitude and the persons most directly concerned--perhaps the only persons concerned--could not challenge the restraint.

Thus, the courts have readily approved standing for professional athletes challenging agreements among employers fixing employment terms and for brokers or magazine solicitors challenging their employers' agreements against hiring switching employees.

An employee overcomes the primary hurdle to standing when he shows that the alleged violation restrains competition in the labor market. Of course, he must still show injury-in-fact that was proximately caused by the violation and, in damage cases, that [**8] can be quantified without undue speculation.

II *Phillip Areeda & Herbert Hovenkamp, Antitrust Law* P 377c (rev. ed. 1995)(footnotes omitted).²

[**9] [*545] Mr. Roman has alleged that competition in the market for his services as an employee has been directly impeded by defendants' agreement not to compete for each others' employees. He further alleges that he was injured by that agreement because it prevented him from selling his services to the highest bidder. The measure of his alleged injury is the loss he suffered--i.e., the increase in compensation he would have obtained but for the illegal agreement. We believe this is sufficient to allege antitrust standing.

In sum, we conclude that the district court did not properly view the allegations in this complaint under the strict standard applicable to a motion for dismissal under [Rule 12\(b\)\(6\)](#). We further conclude that the allegations in the complaint, taken as true, are sufficient to state antitrust standing. Accordingly, we reverse the dismissal and remand for further proceedings in light of this opinion.

REVERSED AND REMANDED.

End of Document

²The facts alleged here are distinguishable from the circumstances present in cases such as [Sharp v. United Airlines, Inc., 967 F.2d 404 \(10th Cir. 1992\)](#). In *Sharp*, former employees of Frontier Airlines who lost their jobs when Frontier ceased operations brought suit against United Airlines seeking antitrust damages for their claim that they were injured by the anticompetitive practices United allegedly used to drive Frontier out of business. In denying standing, we held that [HNS](#) ↑ "employees simply cannot establish an *antitrust* injury when they lose their employment as a result of some allegedly anticompetitive activity directed at or involving their employer." [Id. at 408](#) (emphasis added). As we noted in *Sharp*, see [id. at 408 n.4](#), that case is to be distinguished from a case like the one before us in which the anticompetitive practices are directed toward the employees themselves.



Traffic Scan Network v. Winston

United States District Court for the Eastern District of Louisiana

May 24, 1995, Decided ; May 24, 1995, FILED, ENTERED

CIVIL ACTION NO. 92-2243

Reporter

1995 U.S. Dist. LEXIS 7295 *; 1995-1 Trade Cas. (CCH) P71,043

TRAFFIC SCAN NETWORK, INC. VERSUS MARC E. WINSTON, ET AL.

Core Terms

Traffic, Camera, pricing, radio station, advertising, predatory, defendants', radio, broadcast, reporting, station, expert report, programming, state law claim, Sherman Act, monopolize, summary judgment, gathered, summary judgment motion, below-cost, deposition, recoup, interstate commerce, plaintiff's claim, offering, circumstances, barriers, charges, costs, financial records

LexisNexis® Headnotes

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

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

When a court looks to matters outside the pleadings in considering a motion to dismiss, the motion is treated as a motion for summary judgment.

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

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

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

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

HN2 [down arrow] **Summary Judgment, Entitlement as Matter of Law**

Under [Fed. R. Civ. P. 56\(c\)](#), the moving party bears the initial burden of showing that there are no disputed issues of material fact and that it is entitled to judgment as a matter of law. The opposing party must then come forward with specific facts showing that there is a genuine issue for trial. [Fed. R. Civ. P. 56\(e\)](#). The court reviews the record as a whole to determine if 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 non-moving party, there is no genuine issue for trial.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Governments > Federal Government > US Congress

HN3 [down] Antitrust & Trade Law, Sherman Act

Congress intended to exercise its constitutional power to regulate interstate commerce to the fullest in enacting the Sherman Act. It is within the power of Congress to eradicate or dampen activities that pose a threat to the free flow of any aspect of interstate commerce, including that which might appear to be totally local in nature.

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN4 [down] Attempts to Monopolize, Elements

Section 2 of the Sherman Act, 15 U.S.C.S. § 2, makes it unlawful for any person to attempt to monopolize any part of trade or commerce. In order to prevail on such a claim, a plaintiff must prove that: (1) the defendants engaged in anticompetitive conduct; (2) the defendants had a specific intent to monopolize a relevant market; and (3) there was a dangerous probability that the defendants would sooner or later achieve their goal of obtaining monopoly power.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

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

HN5 [down] Anticompetitive & Predatory Practices, Predatory Pricing

Because predatory pricing and price competition involve the same operative conduct, i.e., lowering prices, the consumer ultimately suffers if the court mistakenly characterizes price competition as predatory pricing. For these reasons, a plaintiff in a predatory pricing case under Section 2 of the Sherman Act, 15 U.S.C.S. § 2, is required to prove that (1) the prices complained of were below an appropriate measure of defendant's costs, and (2) that the defendant had a reasonable prospect of recouping its investment in below-cost prices. Proof of the second element, that is, a reasonable prospect of recoupment, is a required part of the plaintiff's case because the investment in below-cost pricing does not make sense for the alleged predator unless it has a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.

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

[HN6](#)[] Actual Monopolization, Anticompetitive & Predatory Practices

The first element of a predatory pricing claim is proof of pricing below some appropriate measure of cost. In the United States Court of Appeals for the Fifth Circuit, in the absence of extremely high entry barriers, the appropriate measure of cost is a company's marginal or "average variable cost."

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

[HN7](#)[] Summary Judgment, Opposing Materials

A court cannot credit an expert report that is nothing but a conclusion unsupported by record facts. Expert testimony without a factual foundation cannot defeat a motion for summary judgment. 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. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.

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

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

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

[HN8](#)[] Actual Monopolization, Anticompetitive & Predatory Practices

A plaintiff must establish the relevant product and geographic markets in order to prevail on a claim of attempted monopolization by predatory pricing. Without an appropriate market definition, there is no context in which to determine whether the defendant is reasonably likely to obtain monopoly power. The boundaries of a product market are determined by eliminating from the market all products that are not reasonably interchangeable substitutes for the product manufactured or sold by the litigants. Products are reasonably interchangeable only if they compete with one another, that is, only if consumers will switch from one to the other in response to changes in price. The definition of the relevant product market is ordinarily a fact question left to the jury. However, as with all other issues of material fact, the burden is on the plaintiff to come forward with sufficient evidence upon which a jury could reasonably determine the relevant market.

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

[HN9](#)[] Actual Monopolization, Anticompetitive & Predatory Practices

A single brand of a particular product cannot constitute a product market absent exceptional circumstances.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN10 [💡] **Entitlement as Matter of Law, Appropriateness**

A proper expert report defining a product market in a manner proposed by a litigant can be sufficient to create a fact issue with regard to the relevant product market. On the other hand, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him. *Fed. R. Civ. P. 56(e)*. Unsupported expert opinion will not suffice to defeat summary judgment. Accordingly, a party may not avoid summary judgment on the basis of an expert's opinion that fails to point to specific facts from the record to support his conclusions. While an expert may give an ultimate opinion about an issue of fact in the case, that opinion must be supported by an adequate basis.

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

HN11 [💡] **Actual Monopolization, Anticompetitive & Predatory Practices**

While reliable measures of supply and demand elasticities provide the most accurate estimates of a relevant market, they are difficult to gather. For this reason, it is acceptable to rely on evidence such as usage patterns, industry and customer surveys, the distinct characteristics of the products, customers and vendors, and cross-industry price monitoring as surrogates for cross-elasticity data.

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN12 [💡] **Summary Judgment, Opposing Materials**

An expert witness' conclusions cannot be used to defeat a motion for summary judgment if they are not supported by a sufficient factual basis or are economically unreasonable in light of the undisputed facts of the case. When an

expert opinion is not supported by sufficient evidence 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.

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

HN13 **Actual Monopolization, Anticompetitive & Predatory Practices**

Barriers to entry are defined as either additional long-run costs that were not incurred by incumbent firms, but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.

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

HN14 **Actual Monopolization, Anticompetitive & Predatory Practices**

Evidence of a high market share does not require a district court to conclude that there is an antitrust violation. In fact, such a conclusion normally should not be drawn when the evidence also indicates that there is no barrier to entry into the relevant market.

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

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

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

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

HN15 **Sherman Act, Scope**

Although a vertical, maximum-price fixing agreement is unlawful under [§ 1](#) of Sherman Act, a competitor's lost business is not an antitrust injury unless it results from predatory pricing.

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

Governments > Courts > Judicial Comity

HN16 **Subject Matter Jurisdiction, Supplemental Jurisdiction**

When the only remaining claims pending before a federal district court were brought under state law, whether to retain jurisdiction over the state law claims is a matter within the court's discretion. In the usual case, judicial economy, convenience, fairness to the parties, and comity will point toward declining jurisdiction over the remaining state law claims. However, this rule is neither absolute nor automatic.

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For MARC E WINSTON, TRAFFIC CAMERA REPORTS, INC., MARCO OUTDOOR ADVERTISING, INC., WINSTON COMMUNICATIONS CORPORATION, WINSTON CAPITAL MANAGEMENT CORPORATION, defendants: Don M. Richard, Denechaud & Denechaud, New Orleans, LA.

Judges: Sarah S. Vance, UNITED STATES DISTRICT JUDGE

Opinion by: Sarah S. Vance

Opinion

MEMORANDUM AND ORDER

This matter is before the Court on defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Because the resolution of defendants' motion requires the [HN1](#) Court to look to matters outside the pleadings, their motion will be treated as a motion for summary judgment. [*Ware v. Associated Milk Producers, Inc., 614 F.2d 413, 414 \(5th Cir. 1980\)*](#). For the reasons stated herein, the Court grants summary judgment in favor of defendants on plaintiff's federal **antitrust law** claims and dismisses plaintiff's state law claims for lack of jurisdiction.

In its complaint, Traffic Scan Network, Inc. ("Traffic Scan") charges Traffic Camera Reports, Inc. ("Traffic Camera"), together with defendants Marc E. Winston, Marco Outdoor Advertising, Inc., Winston Communications, Inc., and Winston Capital Management Corporation, with violating [Sections 1](#) and [2](#) of the Sherman Act, as well as Louisiana state antitrust and unfair competition laws, by attempting to monopolize the New Orleans market "for the provision of traffic information to broadcasting media." Specifically, Traffic Scan [*2] contends that Traffic Camera engaged in predatory pricing by offering various incentives to Traffic Scan's subscribing radio stations and advertising clients. Traffic Scan further contends that after Traffic Camera succeeded in driving Traffic Scan to the brink of financial ruin, it offered to purchase Traffic Scan's assets for \$ 700,000 with the proviso that Traffic Scan release Traffic Camera from any liability arising out of its preacquisition conduct. According to Traffic Scan, it was forced to accept Traffic Camera's offer or go out of business. Because this matter is before the Court on defendants' Motion for Summary Judgment, the Court must view the evidence in the light most favorable to Traffic Scan. The parties, however, are in basic agreement concerning the central, historical facts.

I. BACKGROUND

In 1983, John Marshall incorporated Traffic Scan and set up operations in his garage. Besides Traffic Scan, another company offered traffic reports in the New Orleans area at this time. Within a few weeks, Marshall, nonetheless, obtained subscriptions from ten New Orleans radio stations to provide traffic reports during the morning and evening rush hours. Deposition [*3] of Anthony Buonagura, at p. 15. The terms of Traffic Scan's standard contract required a radio station to provide Traffic Scan with ten one-minute time slots in the morning and in the evening. In exchange, Traffic Scan gathered traffic information by contacting local law enforcement agencies and dispatching employees equipped with cellular phones to the highways leading into New Orleans. Traffic Scan would then broadcast the information it had gathered for approximately fifty seconds during each time slot.¹ Traffic Scan

¹ Traffic reports represented only a small percentage of the total programming offered by the subscribing stations.

generated revenues by packaging the remaining radio air time and selling it to advertising clients.² According to Traffic Scan,

The radio stations benefitted from this arrangement because they could provide traffic information to their listeners without any cash outlay. The arrangement was also cost effective for Traffic Scan's advertising clients because they were able to purchase advertising time on a number of different stations in a single package rather than buying the time piecemeal from each station.

Affidavit of Anthony Buonagura, at p. 2. As Traffic Scan grew, it expanded its coverage by leasing an airplane to gather traffic information. ^[*4] It also began to report weekday traffic conditions at noon.

By 1986, subscribing radio stations began to express their dissatisfaction with the arrangement that they had been operating under with Traffic Scan. Traffic Scan responded by offering compensation packages. As an incentive to subscribe to its traffic reporting service and to discourage radio stations from gathering traffic information on their own, Traffic Scan leased automobiles for its radio station clientele. Traffic Scan also offered other, smaller "perks," such as purchasing meals for station managers and donuts for station employees. Because Traffic Scan based the price of ^[*5] its advertising time on the number of listeners that subscribing radio stations reached, radio stations with higher rating points received greater incentives than radio stations with smaller audiences.

The compensation packages proved to be a successful device for maintaining and attracting radio station subscriptions. By 1987, Traffic Scan had accounts with 32 of the approximately 40 radio stations in the New Orleans area. Traffic Scan was also able to secure a contract with a local television station.³ The remaining radio and television stations either did not report traffic conditions to their listeners/viewers or gathered such information on their own.

Traffic Scan's success did not go unnoticed. Between 1987 and 1989, several national reporting services approached Traffic Scan and offered to purchase its ^[*6] assets. The offers were rejected, but the companies continued to communicate with each other, which led to additional offers. In January 1990, Traffic Scan received its most lucrative offer of \$ 2,000,000 from the largest national traffic reporting company. There were also new entries and several attempted entries into the market during this period. The most significant new entry was, of course, Traffic Camera.

Traffic Camera was established under a different name in 1988 by Jose and Polly Pollet. Neither Pollet nor his wife had business experience in the traffic reporting business.⁴ Although Traffic Camera was initially viewed as a minor competitor by Traffic Scan, it was able to secure several accounts, including a radio station with a significant listening audience.

^[*7] In 1989, Marc Winston, a businessman with media interests in the New Orleans area, learned that the Pollets were trying to sell Traffic Camera. Winston was interested in Traffic Camera because he had heard that it was gathering traffic information in an innovative fashion. Indeed, rather than adopt the typical method of gathering traffic information from an airplane, Traffic Camera had put together a system of cameras and microwave relays along the highways leading into New Orleans. The cameras transmitted a picture of traffic conditions into a studio. By all accounts, this system was more efficient than gathering information from an airplane, since airplanes were more expensive to operate and could report traffic conditions only about the area over which they were flying. Although Traffic Camera was losing money, Winston attributed Traffic Camera's poor earnings to the owners' lack

² In 1989, advertisers paid approximately \$ 25- \$ 40 per spot and were rotated among stations and time slots. Traffic Scan charged considerably less when it first entered the business and had less attractive stations to offer its advertising clients.

³ At some point before its acquisition by Traffic Camera, Traffic Scan also entered the traffic reporting business in Baton Rouge, Louisiana, Mobile, Alabama, Palm Beach, Florida, and Miami, Florida.

⁴ Pollet was employed as an engineer with a local radio station. He developed the technology used by Traffic Camera to gather traffic information. His wife was both the traffic reporter and salesperson. Winston described the two as "unsophisticated" and "understaffed."

of business experience. Winston ultimately purchased the company in January 1990 within twenty-four hours of first seeing its operations.⁵

[*8] Shortly thereafter, Traffic Camera began an aggressive marketing campaign to secure additional contracts with radio stations. In addition to matching Traffic Scan's incentive program for cars,⁶ Traffic Camera offered radio stations free billboard space, as well as to pay the legal expenses of any radio station that disputed certain contract provisions with Traffic Scan. The billboard space was provided to Traffic Camera by defendant Marco Outdoor Advertising, which was also owned by Winston. The other defendant companies were a source of capital to pay for the other incentives. The terms under which the affiliated companies provided funds and billboards to Traffic Camera is unclear, though defendant concedes that the affiliated companies were not immediately, if ever, reimbursed.

Traffic Camera was also successful at securing advertising clients. The terms under [*9] which Traffic Camera was able to attract advertisers is a matter of dispute between the parties. Plaintiff contends that Traffic Camera used defendant Winston Communication's ownership interest in a local radio station to offer free air time to Traffic Scan's advertising clients. Plaintiff further submits that Traffic Camera attracted advertising clients by offering below cost advertising rates, as low as seven dollars a spot. Marc Winston, on the other hand, testified at his deposition that Traffic Camera competed not only with Traffic Camera, but also with all the other sellers of commercial radio advertising time in establishing its advertising rates:

We weren't competing with Traffic Scan to get their advertisers. We were trying to get our own advertisers interested in advertising on the radio stations that we had, whether that happened to be advertisers that were already involved in traffic type advertising or whether they were fresh advertisers, and the price related to whatever the market would bear, and whatever the market would bear depended to a large degree on what stations we had, and to an even larger degree to what the rest of the radio market was charging for [*10] their commercial time. The radio market itself has a thirty million dollar market in New Orleans, and the traffic business is a small part of the radio business here, and when you go and sell traffic or traffic time, you are in effect competing with every other radio station attempting to sell radio time. So the prices were really set by the market as a whole, the radio market.

...

Of course, if we ran into an advertiser that was buying time [from] Traffic Scan, [that] put us in a jump ball situation, then we would have to meet the prices that Traffic Scan was charging.

Deposition of Marc Winston, at p. 39.⁷

[*11] Although Traffic Scan was still profitable in the summer of 1990,⁸ John Marshall arranged to meet with Marc Winston to discuss a potential merger. Marshall claims this was prior to any antitrust activity by Traffic Camera. Affidavit of John Marshall, at p. 4. According to Marshall, he did not believe that two traffic reporting services could

⁵ Winston described the deal as hurried because Traffic Camera's owners had already received several offers.

⁶ Plaintiff claims that Traffic Camera not only matched Traffic Scan's car incentive program but surpassed it by offering luxury automobiles.

⁷ In light of plaintiff's theory that the relevant product market is traffic reports, the relevance of its claims of below-cost advertising rates is not clear. Moreover, while Traffic Scan's evidence suggests that Traffic Camera charged a wide range of prices to advertisers, the circumstances surrounding the cited transactions were not discussed. Low advertising prices, without more, do not raise an inference of anticompetitive conduct. Indeed, representatives of both companies indicated that their spot rates were much lower when they had less attractive stations to offer advertisers. Moreover, John Marshall, former CEO of Traffic Scan, testified that market conditions often forced Traffic Scan to charge a wide variety of prices for advertising time. Marshall testified that Traffic Scan had sold advertising time for as little as \$ 1. When asked why the price had been so low, Marshall stated "Because I couldn't get two." Since Traffic Camera operated under the same market conditions as Traffic Scan, plaintiff's evidence is as consistent with the theory that the parties competed with a host of other suppliers of radio advertising time in a highly competitive market as it is with the theory that Traffic Camera was engaged in anticompetitive conduct.

⁸ This matter is in dispute between the parties. Defendants, however, have conceded the point for purposes of its motion.

"operate in the New Orleans area . . . at the high profit level Traffic Scan had grown accustomed to." *Id.* Marshall wanted to see if Winston would be willing to purchase Traffic Scan or, alternatively, if he would sell Traffic Camera to Traffic Scan. The meeting ended without an agreement. No further discussions were held until the fall of 1990.

It is undisputed that by October 1990 Traffic Camera had accounts with approximately half of the radio stations in the New Orleans area. Many of these accounts had been acquired at the expense of Traffic [*12] Scan. According to Traffic Scan, the loss of the radio station contracts had crippled its earnings. It is under these circumstances that negotiations between the two companies resumed during the latter part of October.⁹

In December 1990, the negotiations between Traffic Camera and Traffic Scan resulted in a sales agreement in which Traffic Camera agreed to purchase a significant portion of Traffic Scan's assets for approximately \$ 700,000. Under the terms of the agreement, Traffic Camera received \$ 200,000 at the time of closing. The remainder of the purchase price was to be paid in four installments over the next four years. The asset purchase agreement further provided that:

In the event that any station agreement involving stations, WEZB, WQUE, WWL, or WLMG are cancelled or substantially [*13] modified to the detriment of buyer through no fault of buyer, within two years of closing, then the purchase price shall be reduced by \$ 100,000

According to Traffic Scan, Traffic Camera also required Traffic Scan to execute a conditional settlement and release, which purported to release Traffic Camera from any liability arising out of its preacquisition conduct. Faced with imminent bankruptcy, Traffic Scan agreed to the terms of the purchase agreement and conditional settlement.¹⁰

[*14] Since its acquisition of Traffic Scan's assets, Traffic Camera has remained the leader in the provision of traffic information in the New Orleans area.¹¹ Traffic Scan remains in existence acting primarily as a receiver of payments due under the asset purchase agreement. Traffic Scan does not compete with Traffic Camera in the traffic reporting business in New Orleans. However, John Marshall, its former CEO, currently works for a Pennsylvania traffic reporting company in Covington, Louisiana, albeit on an "inventory control project." Traffic Camera's advertising rates have not increased materially since it purchased Traffic Scan's assets, although in some cases the incentives it provides radio stations have not been as lucrative as they were when it was competing with Traffic Scan.

[*15] II. DISCUSSION

Plaintiff's complaint charges the defendants with violating [Section 2](#) of the Sherman Act by attempting to monopolize the market for the provision of traffic information to broadcasters.¹² Plaintiff also charges that

⁹ Given Marshall's concession that Traffic Camera's antitrust activities had not commenced by the summer of 1990, Traffic Camera apparently contends that Traffic Camera brought about its demise in 3 to 6 months.

¹⁰ Although plaintiff claims that the asset purchase agreement and conditional settlement represented the culmination of Traffic Camera's predatory pricing scheme, this litigation did not follow immediately after the closing on the deal. Rather, plaintiff began complaining about defendants' conduct only after Traffic Camera notified Traffic Scan in February 1992 that it intended to exercise its right to reduce the purchase price due to a radio station's cancellation of its contract with Traffic Camera. This suit was commenced several months later.

¹¹ Traffic Camera apparently has accounts with 36 of approximately 40 radio stations in the New Orleans area. There has been at least one entry into the traffic reporting business by one of Traffic Camera's former officers, John Mikovich, doing business as Traffic Updates. Mikovich entered the business at the invitation of WWL, a powerful radio station, when its contract with Traffic Camera expired. Traffic Camera bought out Mikovich's contract for \$ 200,000.

¹² Plaintiff's complaint also mentions claims against defendants for a conspiracy to monopolize and for monopolization. Monopolization, an attempt to monopolize, and a conspiracy to monopolize are three separate legal claims under [Section 2](#) of the Sherman Act. Plaintiff could therefore have chosen to assert all three claims. However, in response to defendants' motion for

defendants violated [Section 1](#) of the Sherman Act by conspiring to engage in predatory pricing. Defendants seek summary judgment on both claims.

[*16] [HN2](#)[

Under [Fed. R. Civ. Pro. 56\(c\)](#), defendants bear the initial burden of showing that there are no disputed issues of material fact and that they are entitled to judgment as a matter of law. Plaintiff must then come forward with "specific facts showing that there is a genuine issue for trial." [Fed. R. Civ. Pro. 56\(e\)](#). The Court reviews the record as a whole to determine if 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 non-moving party, there is no genuine issue for trial." [Matsushita Elec. Industrial Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

Defendants' motion for summary judgment raises a host of arguments as to why plaintiff's Sherman Act claims should be dismissed. First, defendants contend that plaintiff cannot meet the interstate commerce requirement of the Sherman Act because Traffic Camera's conduct was local in nature. Second, defendants contend that plaintiff's proposed product market definition, that is the provision of traffic information to broadcasters, is too narrow. Third, defendants contend that plaintiff's [Section 1](#) conspiracy claim [*17] fails because the defendant companies are all owned by Marc Winston or his immediate family and the personal stake exception to the *Copperweld* doctrine is inapplicable. Fourth, defendants contend that the Conditional Settlement and Release entered into by the plaintiff precludes it from maintaining this action. Finally, defendants contend that once plaintiff's federal question claims are dismissed, the Court lacks jurisdiction over the remaining state law claims.

Plaintiff submitted written opposition to defendants' motion. In addition to opposing defendants' motion on its merits, plaintiff submits that the issues presented for review have been raised in prior motions and that the Court is bound by the decisions issued with respect to those motions. Plaintiff also seeks sanctions against the defendants for needlessly reurging issues previously addressed in its prior pretrial motions.

After reviewing the summary judgment record, the Court has determined that plaintiff's federal antitrust claims are fatally deficient and must be dismissed. Further, the Court lacks jurisdiction over the remaining state law claims, which are likewise dismissed. Plaintiff's motion for sanctions is [*18] denied. The reasons for the Court's decision are discussed below.

A. The Sherman Act's Interstate Commerce Requirement

Defendants' argument that plaintiff's claims fail to meet the Sherman Act's jurisdictional requirement that the alleged conduct affect interstate commerce has been rejected by another Section of this Court. In denying defendants' motion to dismiss, the Court found:

Assuming the truth of plaintiff's statements, Traffic Scan provided services to interstate travellers and to radio stations that broadcast across state lines. Additionally, it has out-of-state clients and the funds used in Traffic Camera's purchase crossed state lines. Thus, the court finds that Traffic Scan has demonstrated a sufficient nexus between the activities at issue and interstate commerce to defeat the motion to dismiss.

Order and Reasons, Rec. Doc. No. 97, at p. 3. In response to defendants' current motion, plaintiff submitted evidence to support each of the allegations previously relied upon by the Court to deny defendants' motion to dismiss. Additionally, plaintiff submitted evidence to suggest that Traffic Scan's advertising revenues were regularly generated [*19] from out-of-state advertisers.

summary judgment, plaintiff characterized its claim under [Section 2](#) as an attempt to monopolize claim among affiliated companies. See Plaintiff's Memorandum in Opposition, Rec. Doc. no. 116, at pp. 17, 28-29, 31. Plaintiff apparently chose to disavow the alternative theories of liability available under [Section 2](#) either to avoid the *Copperweld* issues raised by the defendants with respect to plaintiff's [Section 1](#) claim or in the mistaken belief that [Section 2](#) "has nothing to do with conspiracy or concerted action." *Id.* at 31. Since plaintiff has expressly chosen to pursue only an attempt to monopolize claim, the Court will treat this as an attempt to monopolize case.

It is now well established that [HN3](#)[↑] Congress intended to exercise its constitutional power to regulate interstate commerce to the fullest in enacting the Sherman Act. It is also well established that it "is within the power of Congress to eradicate or dampen activities which pose a threat to the free flow of any aspect of interstate commerce, including that which might appear to be totally local in nature." [Cowan v. Corley, 814 F.2d 223, 226 \(5th Cir. 1987\)](#). Considering the breadth of conduct "affecting commerce," plaintiff's evidence is more than sufficient to carry its burden of creating a disputed issue of material fact with regard to this issue. See [Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 \(1991\)](#) (complaint alleging conspiracy to exclude single ophthalmological surgeon from "the Los Angeles" market met Sherman Act's commerce requirement); [United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464, 69 S. Ct. 714, 716, 93 L. Ed. 805 \(1949\)](#) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."); [Cowan, 814 F.2d at 226](#) (provision [*20] of wrecker services on two interstate highways in single Texas county bore sufficient relationship to interstate commerce to implicate federal antitrust laws).

B. Attempt to Monopolize

[HN4](#)[↑] [Section 2](#) of the Sherman Act makes it unlawful for any person to attempt to monopolize any part of trade or commerce. [15 U.S.C. § 2 \(1988\)](#). In order to prevail on its claim, plaintiff must prove that: (1) the defendants engaged in anticompetitive conduct; (2) the defendants had a specific intent to monopolize a relevant market; and (3) there was a dangerous probability that the defendants would sooner or later achieve their goal of obtaining monopoly power. See [Spectrum Sports, Inc. v. McQuillan, U.S. , 113 S. Ct. 884 \(1993\)](#); [T.O. Bell v. Dow Chemical Co., 847 F.2d 1179, 1182 \(5th Cir. 1988\)](#).

Here, plaintiff alleges that defendants' anticompetitive conduct took the form of predatory pricing. The Supreme Court has observed that "predatory pricing schemes are rarely tried and even more rarely successful." [Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 589, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 \(1986\)](#). [HN5](#)[↑] Because predatory pricing and [*21] price competition involve the same operative conduct, i.e., lowering prices, the consumer ultimately suffers if the court mistakenly characterizes price competition as predatory pricing. [Id. at 594, 106 S. Ct. at 1360](#) ("cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."). For these reasons, the Supreme Court requires a plaintiff in a predatory pricing case under [Section 2](#) of the Sherman Act to prove that (1) the prices complained of were below an appropriate measure of defendant's costs, and (2) that the defendant had a reasonable prospect of recouping its investment in below-cost prices. [Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, U.S. , 113 S. Ct. 2578, 2587-88 \(1993\)](#). Proof of the second element, that is, a reasonable prospect of recoupment, is a required part of the plaintiff's case because the investment in below-cost pricing does not make sense for the alleged predator unless it has "a reasonable expectation of recovering, in the form of later [*22] monopoly profits, more than the losses suffered." [113 S. Ct. at 2588](#), quoting [Matsushita, 475 U.S. at 588-89](#).

In this case, plaintiff's predatory pricing claim is deficient for three reasons: (1) plaintiff has failed to put forward credible evidence of Traffic Camera's costs, thereby precluding a determination that defendant has engaged in below-cost pricing; (2) plaintiff's proposed market definition is unsupported by facts and is contradicted by other evidence in the record; and (3) the absence of entry barriers precludes a showing of recoupment, even if plaintiff's market definition were accepted.

C. Below-Cost Pricing

As stated, [HN6](#)[↑] the first element of a predatory pricing claim is proof of pricing below some appropriate measure of cost. [Brooke Group, 113 S. Ct. at 2588](#). In the Fifth Circuit, in the absence of extremely high entry barriers, the appropriate measure of cost is Traffic Camera's marginal or "average variable cost." [Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95, 99 n.4 \(5th Cir.\), cert. denied, 486 U.S. 1023, 108 S. Ct. 1996, 100 L. Ed. 2d 228 \(1988\)](#); [International Air Indus. v. American Excelsior Co., 517 F.2d 714 \(5th Cir. 1975\)](#), [*23] cert. denied, 424 U.S. 943, 47 L. Ed. 2d 349, 96 S. Ct. 1411 (1976).

Here, plaintiff claims that the relevant product market is the provision of traffic information to the broadcasting media. However, there is no evidence in the record of Traffic Camera's average variable cost of producing traffic reports. Nor is there any data on the relationship of cost to price. Indeed, the only mention of Traffic Camera's costs by the plaintiff was some discussion of the total annual cost of non-cash promotions that Traffic Camera provided broadcasters who subscribed to its traffic reporting service. Evidence of Traffic Camera's annual expenditures on non-cash promotions is of no value in the absence of additional evidence detailing Traffic Camera's other variable costs, as well as its total output.¹³

[*24] Plaintiff's expert report is of no help either. It states the broad conclusion that the expert's review of Traffic Camera's financial records suggests that Traffic Camera sold its product well below its variable cost of production. However, no specific elements of the cost of producing the traffic reports are identified; no cost amounts are identified; and no price-cost comparison is made.¹⁴

[*25] Moreover, none of the financial records relied on by the expert were made part of the record. The [HN7](#)[↑] Court cannot credit an expert report that is nothing but a conclusion unsupported by record facts. See [Brooke Group, 113 S. Ct. at 2598](#). As *Brooke Group* makes clear, expert testimony without a factual foundation cannot defeat a motion for summary judgment. "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. . . . Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Id.*; see also [Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191 \(3d Cir. 1995\)](#) (summary judgment appropriate when plaintiff was unable to produce any "direct evidence" that defendant offered its product at prices below any relevant measure of costs; conclusory expert report rejected). Plaintiff's failure to adduce evidence of a relevant measure of defendants' costs is a sufficient basis of itself to grant summary judgment on its predatory pricing claim. *Id.*

[*26] D. Relevant Product Market

[HN8](#)[↑] Plaintiff must establish the relevant product and geographic markets in order to prevail on a claim of attempted monopolization by predatory pricing. See [C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1244](#) (5th Cir.), cert. denied, 474 U.S. 1037, 88 L. Ed. 2d 583, 106 S. Ct. 604 (1985) (proof of relevant market is prerequisite of attempted monopolization claim under [Section 2](#)); *In re Beef Indus. Antitrust Litig.*, 713 F. Supp. 971, 979 (N.D. Tex. 1988), aff'd, [907 F.2d 510 \(5th Cir. 1990\)](#) (same). Without an appropriate market definition, there is no context in which to determine whether defendant is reasonably likely to obtain monopoly power. See [Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 \(1965\)](#); [Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 711](#) (7th Cir.), cert. denied, 445 U.S. 917, 100 S. Ct. 1278, 63 L. Ed. 2d 601 (1980). For the purposes of their motion, defendants have conceded that the relevant geographic market is the New Orleans metropolitan area. The Court thus limits its inquiry into whether plaintiff has created a triable issue with [*27] regard to its proposed product market definition.

The boundaries of a product market are determined by eliminating from the market all products that are not reasonably interchangeable substitutes for the product manufactured or sold by the litigants. [United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 \(1956\)](#). Products are reasonably interchangeable only if they compete with one another, that is, only if consumers will switch from one to the other in

¹³ If anything, the evidence in the record suggests that Traffic Camera had a cost advantage in producing traffic reports in that its camera technology was much cheaper than the airplanes used by Metroscan. Marc Winston Deposition at 47-48.

¹⁴ As noted earlier, plaintiff contends that Traffic Camera priced its *advertising* below its costs. This does not assist plaintiff's predatory pricing claim, however, because plaintiff claims that the relevant product was the provision of *traffic reports to broadcasting media*, not advertising to advertisers. Thus, the plaintiff must establish that Traffic Camera priced the traffic reports to the radio stations below its average variable cost, which it has failed to do. Moreover, the testimony of principals from both Traffic Camera and Traffic Scan indicated that Traffic Camera sold advertising in competition with the radio stations themselves, which is a far broader market than plaintiff claims. Obviously, if all 40 radio stations selling advertising time in the New Orleans area are included in the relevant market, plaintiff's monopolization theory could never be sustained.

response to changes in price. *Id.*; [*Brown Shoe Co. v. United States*, 370 U.S. 294, 326, 82 S. Ct. 1502, 1524, 8 L. Ed. 2d 510 \(1962\)](#); [*H.J., Inc. v. IT&T*, 867 F.2d 1531, 1538 \(8th Cir. 1989\)](#) (discussing cross-elasticity of demand); [*General Indus. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 \(8th Cir. 1987\)](#).

The definition of the relevant product market is ordinarily a fact question left to the jury. [*T.O. Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1184 \(5th Cir. 1988\)](#). However, as with all other issues of material fact, the burden is on the plaintiff to come forward with sufficient evidence upon which a jury could reasonably determine the relevant market. *Id.*

While conceding [*28] that radio stations broadcast a variety of programs, plaintiff contends that the product market is limited to traffic report programming to broadcast media. According to the plaintiff, traffic report programming is distinct from all other programming because the information provided in traffic reports is unique. Plaintiff argues that news, music, talk shows, and other programming broadcast on radio and television are therefore not reasonable substitutes for a consumer who desires information about traffic conditions. To support its argument, plaintiff relies exclusively on two expert reports created by the same economist. In both reports, the economist states that the relevant product market is "the provision of traffic information to broadcasters My reason for defining the product market as I have done is that there are no alternative products reasonably substitutable for traffic information sold to broadcasters." See Plaintiff's Exhibits G & J.

Defendants dispute plaintiff's characterization of the product market. In their view, the relevant product market is all radio programming. According to the defendants, a radio station broadcasting a traffic report is competing [*29] with other radio stations for listeners because it cannot prevent a listener from changing the station. In support of their argument, defendants cite deposition testimony suggesting that traffic reports account for a small portion, approximately 7-1/2%, of radio advertising revenues generally. Defendants also rely on the Fifth Circuit's decision in [*Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487 \(5th Cir. 1984\)](#), in which the court held that [**HN9**](#) a single brand of a particular product cannot constitute a product market absent exceptional circumstances.

[**HN10**](#) A proper expert report defining a product market in a manner proposed by a litigant can be sufficient to create a fact issue with regard to the relevant product market. On the other hand, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him." [*Fed. R. Civ. Pro. 56\(e\)*](#) (emphasis added). Again, we need look no further than to the Supreme Court's most recent [*30] decision on predatory pricing for the proposition that unsupported expert opinion will not suffice to defeat summary judgment. [*Brooke Group*, 113 S. Ct. at 2598](#) (As useful as expert testimony might be in interpreting market facts, "it is not a substitute for them."). Accordingly, a party may not avoid summary judgment on the basis of an expert's opinion that fails to point to specific facts from the record to support his conclusions. See [*ADVO, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191 \(3d Cir. 1995\)](#); [*Evers v. General Motors Corp.*, 770 F.2d 984, 986 \(11th Cir. 1985\)](#); [*Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc.*, 647 F. Supp. 292 \(S.D. Tex. 1986\)](#) ("While an expert may give an ultimate opinion about an issue of fact in the case, that opinion must be supported by an adequate basis.").

In his report, plaintiff's expert states that the relevant product market is the provision of traffic information to broadcast media. The expert further states that he reached this conclusion, as well as the other opinions contained his expert report, based on an analysis of (1) largely unidentified "financial records" of Traffic Camera's; (2) the parties' [*31] radio station contracts; (3) the deposition of Marc Winston; and (4) largely unidentified financial records of Traffic Scan's.¹⁵ The expert does not, however, cite any specific facts allegedly contained in those documents to support his ultimate conclusion regarding the product market. Nor does he point to particular documents that would support his opinion. Without such information, plaintiff's expert report is nothing but a factual conclusion lacking in foundation and substance.

¹⁵ Of these documents, the only one made part of the record is Marc Winston's deposition. An expert report's conclusions are only probative if based on evidence in the record. The Court could thus disregard plaintiff's expert report on this basis alone.

It is true that [HN11](#)¹⁵ while reliable measures of supply and demand elasticities provide the most accurate estimates of a relevant market, they are difficult to gather. For this reason, it is acceptable to rely on evidence such as usage patterns, industry and customer surveys, the distinct [*32] characteristics of the products, customers and vendors, and cross-industry price monitoring as surrogates for cross-elasticity data. See [Brown Shoe Co., 370 U.S. at 326, 82 S. Ct. at 1524](#); [U.S. Healthcare, 986 F.2d 589 at 599](#); [U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 995 \(11th Cir. 1993\)](#). This Court is without a clue, however, as to how the financial documents and contracts reviewed by plaintiff's expert could or did provide any of this type of information. There is no record evidence, for example, on whether the radio industry or public recognize traffic programming as distinct from other types of programming. Nor is there evidence disclosing whether traffic reports are uniquely attractive to a certain segment of the population or whether traffic reports generate an audience uniquely attractive to advertisers.¹⁶ See [NCAA v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 \(1984\)](#). Nor is there evidence that would disclose what the radio stations viewed as substitutes for traffic information or how they would react to a significant and sustained price increase in the cost of traffic information.

[*33] Plaintiff's expert also relies upon the deposition of Marc Winston. However, nowhere in his deposition did Winston testify that traffic reports were not reasonably interchangeable with other radio programming. Rather, he testified that: "The radio market itself has a thirty million dollar market in New Orleans, and the traffic business is a small part of the radio business here, and when you go and sell traffic or traffic time, you are in effect competing with every other radio station attempting to sell radio time." Deposition of Marc Winston, at p. 39. This testimony lends support not to the plaintiff's characterization of the market, but to the defendants' proposed product market definition.

Plaintiff's expert report also fails to account for other economic realities under which Traffic Scan and Traffic Camera operated. Radio stations did not pay a premium price for this supposedly unique product. To the contrary, Traffic Scan and Traffic Camera spent a considerable amount of money to encourage the radio stations to maintain their subscriptions by offering "compensation packages." The take-it-or-leave-it position of the radio stations supports each of the following conclusions [*34] regarding market conditions: (1) consumer demand for traffic reports was limited; (2) radio stations did not view traffic reports as an essential part of their daily programming; and (3) radio stations were confident that they could provide traffic information themselves or obtain it from other sources. Further support for these market conditions can be found in defendants' evidence suggesting that traffic reports constitute only a small portion of radio programming, and in evidence suggesting that radio stations can and have produced traffic reports themselves. None of the evidence in the record is consistent with plaintiff's proposed market definition. Rather, it suggests that plaintiff's proposed product market is artificially constricted and self-serving.

In sum, [HN12](#)¹⁷ an expert witness' conclusions cannot be used to defeat a motion for summary judgment if they are not supported by a sufficient factual basis or are economically unreasonable in light of the undisputed facts of the case. [Brooke Group, 113 S. Ct. at 2598](#) ("When an expert opinion is not supported by sufficient evidence to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render [*35] the opinion unreasonable, it cannot support a jury's verdict."). The Court has found plaintiff's expert report to suffer from both flaws. Since plaintiff has submitted no other evidence to support its proposed market definition, there is no evidence from which a jury could begin to measure the boundaries of the relevant product market. Absent a relevant product market, the jury would also be unable to measure defendants' capacity to monopolize. Plaintiff has thus failed to carry its burden of creating a triable issue with respect to its attempt to monopolize claim.

E. Predatory Pricing

¹⁶ Although not discussing the product market, plaintiff's expert states elsewhere in his report that "there is likely some significant product uniqueness" generated by the multiple-station packaging offered to advertisers by traffic reporting services. Plaintiff's expert does not cite any evidence in support of this statement. Moreover, plaintiff claims that the relevant product is traffic reporting, not advertising, and it has not produced any evidence to suggest that this product is unique.

Even if plaintiff had been able to create a triable issue on the definition of the relevant product market, its attempt to monopolize claim would, nonetheless, have failed because the record reveals that plaintiff is unable to prove that defendants engaged in predatory conduct. As noted, plaintiff faces a heavy burden when charging a competitor with attempting to monopolize a market by means of predatory pricing. The Court has already found that plaintiff has failed to establish the first element of that claim, i.e., that the alleged predator was pricing its product or services below [*36] an appropriate measure of costs. *Brooke Group, 113 S. Ct. at 2592-93*. The Court further finds that plaintiff flounders on the second element, i.e., that the predator had a reasonable prospect of producing sustained supracompetitive pricing in the relevant market to recoup its predatory losses. *Id.* Without competent evidence to support the existence of these market conditions, the alleged predatory conduct does not pose an authentic threat to competition. *Id.* It is therefore not a basis of liability under the antitrust laws. *Id.*

In the present case, no inference of recoupment is sustainable on the summary judgment record. This follows because the undisputed facts establish that there are no barriers to entry into the business of providing traffic information to media broadcasters in New Orleans, and there are numerous potential entrants with the capability and economic incentive to enter the New Orleans traffic reporting business.¹⁷ Under these circumstances, *Brooke Group* teaches that summary judgment on plaintiff's predatory pricing claim is warranted. *113 S. Ct. at 2589*.

[*37] The evidence is clear on ease of entry. Working out of John Marshall's garage, plaintiff successfully entered the business in ten months with a small number of employees and limited equipment and capital outlay. It had 10 radio stations within weeks, and within four years, plaintiff had obtained contracts with nearly all of the radio stations in the New Orleans area. Despite its success and large number of stations, plaintiff could not prevent the Pollets--an unsophisticated, mom and pop operation--from setting up their own traffic reporting business and securing a contract with a major radio station. Moreover, after Winston acquired Traffic Camera, he was able to drive Traffic Scan to the "brink of financial ruin" in only 3 to 6 months. Finally, it is undisputed that Traffic Scan operated, and Traffic Camera continues to operate, under the continuing threat that subscribing radio stations will join other stations in the New Orleans market that have gathered traffic information from in-house sources.

Further, there is significant evidence to suggest that any effort by Traffic Camera to raise prices above a competitive level for a sustained period of time would be met by new entry. [*38] Plaintiff's success attracted attention and several purchase offers from national reporting companies. Additionally, John Marshall currently works in Covington, Louisiana for a Pennsylvania traffic reporting company. While Marshall says he is currently working on an "inventory control project," this company, through Marshall, may well be able to enter the business in the New Orleans area. Further, a powerful station like WWL can induce entry as it did with Traffic Updates if Traffic Camera attempts to exert muscle over prices. See *supra* note 11. When there are no barriers to entry and potential entrants abound, recoupment is implausible.¹⁸

[*39] Although not cited by the plaintiff on this point, plaintiff's expert stated in his report that Traffic Camera:

¹⁷ **HN13** [↑] Barriers to entry are defined as either "additional long-run costs that were not incurred by incumbent firms, but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." ARREDA & HOVENKAMP, *ANTITRUST LAW* P 409, at 509-10 (1992 Supp).

¹⁸ At oral argument, plaintiff's counsel stated that companies were always coming in and going out of the traffic reporting business. In a supplemental brief to the Court, plaintiff's counsel retreats from this statement by arguing that there has been only one entry into the market since 1990. He argues that Traffic Camera immediately bought out that entry for \$ 200,000 so as to be able to continue to recoup its losses. However, simply because Traffic Camera acquired the assets of one new entrant does not mean that Traffic Camera could continue to do this indefinitely. Rather, Traffic Camera simply would not be able to afford to buy out new entries continually. To illustrate, plaintiff stated at oral argument that the profit margin for the dominant firm in the traffic reporting business was \$ 60,000 - \$ 80,000 annually. If we assume Traffic Camera's range of profitability is something in the same order of magnitude (no evidence of its profits or losses before or after its acquisition of plaintiff having been submitted), it would take nearly six years to make up the purchase price of the new entrant, not to mention the losses it allegedly sustained by driving Traffic Scan out of business. Nor does plaintiff's theory account for any future losses that would be incurred in order to eliminate other new entrants. Cf. *Advo, Inc., 51 F.3d 1191* ("High prices will attract a stream of competitors who will eventually sap the predator's bank account.").

evidently has been able to limit [entry by potential competitors] since becoming the sole market producer. Given [it's prior predatory conduct], and [Traffic Camera's] willingness to resume these activities when threatened by potential entrants, it is unlikely that a rational entrant would seek to compete in this market. Further, as an existing monopolist, [Traffic Camera] can engage in behavior unavailable to potential entrants (e.g., entry-limiting pricing).

Because there are simply no structural barriers to entry into the traffic programming business, the expert's conclusions are unreasonable. See [Los Angeles Land Co. v. Brunswick Corp.](#), 6 F.3d 1422, 1427 (5th Cir.), cert. denied, 127 L. Ed. 2d 658, ___ U.S. ___, 114 S. Ct. 1307 (1993) (Anticompetitive conduct by one firm against another is not an "entry barrier."); [United States v. Syufy Enters.](#), 903 F.2d 659, 664 n.6 (9th Cir. 1990) (HN14) Evidence of a high market share does not require a district court to conclude that there is an antitrust violation. In fact, such a conclusion, [*40] normally should not be drawn when the evidence also indicates that there is no barrier to entry into the relevant market."). In fact, the Third Circuit recently rejected a similar argument that an alleged predator could strategically deter entry sufficiently to scare off all potential entrants. [ADVO, Inc. v. Philadelphia Newspapers, Inc.](#), 51 F.3d 1191 (3d Cir. 1995). There, the court stated that "potential competitors will recognize that at some point the predatory firm will be unable or unwilling to charge below-cost prices and absorb further losses, since nobody's pockets are bottomless." *Id.* at 9.

In sum, the traffic reporting business, even if it were a "market," is not a business where entry is limited or deterred by government regulation, onerous front-end investments, dependence on a scarce commodity, or a network of exclusive contracts or distribution arrangements. *Syufy Enterprises*, 903 F.2d at 667. To the contrary, the record discloses "a rough and tumble industry," marked by companies with humble beginnings, fluid relationships with customers and an ample and continuous supply of product. See *id.*

In a supplemental brief to the Court, plaintiff argues [*41] that Traffic Camera's ability to recoup is evidenced by rising prices in the post-acquisition market. Plaintiff bases its claim on its expert report. Plaintiff's expert report states that "Financial records and Affiliation Agreements of [Traffic Camera] indicate that after early 1991 [Traffic Camera] has been utilizing its monopoly position in the market to raise prices." As stated previously, the financial records and affiliation agreements have not been submitted as evidence in this case. See *supra* note 15 and accompanying text. Further, the expert report does not elaborate on the circumstances, amount or duration of the claimed price increase. Nor does it state whether the price increase was for traffic reports or advertising. The Court therefore is unable to determine whether the expert opinion is supported by facts. While the post-acquisition record does contain some indication that Traffic Camera's radio station customers are in certain instances receiving less lucrative "extras" besides the traffic reports, given the lack of evidence of below-cost pricing, this does not prevent summary judgment.

Plaintiff argues that it is not required to prove the elements of a predatory [*42] pricing scheme because Traffic Camera's individual acts, including offering free billboard space and cash incentives to radio stations, below-cost pricing, and accepting capital infusions from affiliated companies, each constitute anticompetitive behavior. Below-cost pricing is simply not actionable under the antitrust laws absent evidence of the capacity to recoup. Similarly, there is simply nothing anticompetitive about affiliated companies engaging in coordinated activity as long as the conduct does not harm competition. As already explained, access into the business of traffic reporting is too easily had for defendants' conduct to have harmed competition. Finally, plaintiff complains that Traffic Camera's conduct was anticompetitive because it offered more valuable incentives than Traffic Scan. Again, unless defendants' conduct was likely to harm competition, it is not a basis for liability under the antitrust laws, even if Traffic Scan was ultimately driven out of business because of its inability to match Traffic Camera's incentives. [Brooke Group](#), 113 S. Ct. at 2588-89. Defendants' motion for summary judgment with respect to plaintiff's [Section 2](#) claim is therefore granted.

[*43] F. Unreasonable Restraint of Trade

Plaintiff's [Section 1](#) claim charges that defendants engaged in a horizontal conspiracy to engage in predatory pricing. Defendants rely on their largely common ownership to argue that plaintiff's claim fails as a matter of law

under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) (parent and wholly-owned subsidiary incapable of conspiring under Section 1 of Sherman Act).

The Court holds that the absence of evidence of below-cost pricing and of the ability to recoup is a sufficient basis upon which to grant summary judgment on plaintiff's Section 1 claim. This follows because even if the defendants' alleged agreement had been unlawful under Section 1, unless the agreement resulted in predatory pricing, Traffic Scan did not suffer an antitrust injury from defendants' pricing practices. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338-41, 110 S. Ct. 1884, 1893, 109 L. Ed. 2d 333 (1990) (HN15↑) although vertical, maximum-price fixing agreement is unlawful under § 1 of Sherman Act, competitor's lost business is not antitrust injury unless it results from predatory pricing.); [*44] *Matsushita*, 475 U.S. at 584 n.7, 106 S. Ct. 1354 n.7. Accordingly, the Court need not reach the *Copperweld* issue, and defendants' motion for summary judgment with respect to plaintiff's Section 1 claim is granted.

G. State Law Claims

Plaintiff's HN16[4] remaining claims were brought under state law. Whether to retain jurisdiction over these state law claims is a matter within the Court's discretion. *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989). In the usual case, judicial economy, convenience, fairness to the parties, and comity will point toward declining jurisdiction over the remaining state law claims. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 619 n.7, 98 L. Ed. 2d 720 (1988). However, this rule is neither absolute nor automatic.

Plaintiff contends that the Court should retain jurisdiction over its state law claims because their dismissal would prejudice the parties and result in a waste of judicial resources. In support of its argument, plaintiff relies on the fact that the case is substantially ready for trial and has been pending in this district for over two years. Plaintiff further argues that the circumstances [*45] of this case are "on all fours" with the facts in *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302 (5th Cir. 1991).

In *Newport Ltd.*, the Fifth Circuit ruled that a district court abused its discretion when it dismissed the plaintiff's pendent state law claims on the eve of trial after four years of litigation. The court reasoned that the district court should have retained jurisdiction because there were no novel state law issues presented by the plaintiff's unfair trade practice and breach of contract claims, and substantial public and private resources had already been invested into the case. *Id. at 308*.

Despite plaintiff's contentions to the contrary, the circumstances of this case are not identical to those in *Newport*. Unlike *Newport*, the trial in this matter is still several weeks away, and the Court has not invested a substantial amount of time in this case. Additionally, while discovery is complete and several pretrial motions have been filed, the pretrial practice here does not compare to the pretrial practice conducted in *Newport*, where "four years of litigation produced 23 volumes and thousands of pages of record, the preparation of a pretrial [*46] order exceeding 200 pages, over a hundred depositions, and . . . nearly two hundred thousand pages of discovery production." *Id. at 307*. More significantly, plaintiff's theory of recovery has not yet been tested under Louisiana's unfair trade practice laws and therefore cannot be routinely and readily resolved by this Court.

After a careful consideration of the circumstances of this case, the Court concludes that the balance of relevant factors point toward the dismissal of plaintiff's state law claims. Although some public and private resources have already been invested by the parties and the Court, the discovery already completed is readily transferrable to a state court proceeding. Plaintiff's claims of prejudice are therefore overstated. Additionally, comity dictates that the courts of Louisiana have an opportunity to address the novel questions of law presented by plaintiff's theory of recovery. Plaintiff's state law claims are thus dismissed without prejudice for lack of jurisdiction.

Since its rulings dispose of this case in its entirety, the Court does not reach defendants' arguments concerning the preclusive effect of the receipt and release entered into by Traffic Scan. Since the Court found defendants' motion to be meritorious, plaintiff's motion for sanctions against the defendants for filing their motion for summary judgment is denied. Accordingly,

IT IS ORDERED that plaintiff's Section 1 & 2 claims under the Sherman Act are hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED that plaintiff's state law claims are DISMISSED without prejudice.

The Clerk of Court is directed to enter judgment in accordance herewith.

New Orleans, Louisiana, this 24th day of May, 1995.

Sarah S. Vance

UNITED STATES DISTRICT JUDGE

End of Document

Bonollo Rubbish Removal v. Town of Franklin

United States District Court for the District of Massachusetts

May 26, 1995, Decided

94 Civ. 10808 (MEL)

Reporter

886 F. Supp. 955 *; 1995 U.S. Dist. LEXIS 7804 **; 1995-1 Trade Cas. (CCH) P71,039; 40 ERC (BNA) 1943

BONOLLO RUBBISH REMOVAL, INC., Plaintiff, v. TOWN OF FRANKLIN, ET AL., Defendants.

Core Terms

by-law, solid waste, municipality, trash, disposal, haulers, collected, ordinance, immunity, deliver, tipping, prices, rights, antitrust claim, residential, supervision, damages, anti trust law, state action, contracts, injunction, revoke, allegations, antitrust, predatory, haul, moot, state action doctrine, summary judgment, transported

LexisNexis® Headnotes

Environmental Law > Solid Wastes > Flow Control

Governments > Local Governments > Licenses

Environmental Law > Solid Wastes > Permits > General Overview

Environmental Law > Solid Wastes > Permits > Transportation

HN1[] Solid Wastes, Flow Control

Franklin, Mass., Code § 151.2(A) (amended) (permit issuance restrictions) provides in part: No permit for the removal of solid waste from residential buildings (a residential trash collection permit) shall be issued by the Board of Health of the Town of Franklin pursuant to [Mass. Gen. Laws ch. 111, § 31A](#), unless the following conditions are attached to said permit: (1) All residential trash collected in the Town of Franklin shall be caused to be delivered to the Wheelabrator Millbury Incinerator in Millbury, Massachusetts, or to such other disposal facility as may be designated, in writing by the town administrator, in the name of and to the tonnage account of the Town of Franklin. (2) If the permit holder receives direct payment from a customer for the collection of residential trash, the permit holder shall reimburse the town in full, on a weekly basis and at the town's contracted rate schedule, for tonnage caused to be delivered to the town's designated disposal facility in the name of and to the tonnage account of the Town of Franklin. The permit holder shall submit a copy of weight scale receipts to the town on a weekly basis.

Environmental Law > Solid Wastes > Flow Control

Governments > Local Governments > Finance

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Environmental Law > Solid Wastes > Permits > General Overview

Environmental Law > Solid Wastes > Permits > Transportation

Governments > Local Governments > Licenses

HN2 Solid Wastes, Flow Control

Franklin, Mass., Code § 151.2 (amended) provides that holders of residential trash collection permits must submit a performance bond to secure the town's obligation to pay tipping fees and bars permit holders from delivering trash collected from other towns to the designated incineration facility.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN3 Tolling of Statute of Limitations, Discovery Rule

Statutes of limitation generally begin to run when a plaintiff discovers, or through reasonable diligence should have discovered, the facts giving rise to its cause of action. However, the usual rule is preempted when the conduct complained of constitutes a continuing violation of the plaintiff's rights, including systemic violations stemming from a policy or practice violative of plaintiff's rights that continues into the limitations period. The hallmark of a systemic violation is the presence of actual continued injury to the plaintiff. Thus, if both the offending policy or practice and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Immunity

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

HN4 Affirmative Defenses, Immunity

Although qualified immunity is an affirmative defense, a government official is presumed to be immune from suit provided that the court does not find that the official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Waiver & Preservation of Defenses

Commercial Law (UCC) > ... > Attachment, Effectiveness & Rights > Attachment & Effectiveness > Security Agreement Requirements

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN5 Defenses, Demurrs & Objections, Waiver & Preservation of Defenses

While it is true that constitutional rights may be waived, such a waiver must be made knowingly.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6 Exemptions & Immunities, Parker State Action Doctrine

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, even if those activities would violate the Sherman Act if they were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Legislatures

HN7 Antitrust & Trade Law, Exemptions & Immunities

A municipality is immune from suit under federal antitrust statutes if the state legislature delegated to the municipality the authority to take action that foreseeably will result in anticompetitive effect. For a municipality to enjoy such immunity, the state legislature need not enact a specific, detailed legislative authorization of anticompetitive action. Rather, the municipality must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8 Antitrust & Trade Law, Exemptions & Immunities

A private party engaged in a challenged activity pursuant to a contract with, or authorization from, a state or local government is entitled to state action immunity if it can show that it is subject to active state supervision.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Local Governments > Claims By & Against

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Antitrust & Trade Law > Sherman Act > General Overview

[**HN9**](#) [L] Antitrust & Trade Law, Exemptions & Immunities

Antitrust immunity extends to municipalities which contract with a private party to the exclusion of the private party's competitors, even when there might have been conspiratorial activity between the municipality and the private party with which it has contracted.

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

[**HN10**](#) [L] Exemptions & Immunities, Noerr-Pennington Doctrine

Under the 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 > Parker State Action Doctrine > General Overview

[**HN11**](#) [L] Exemptions & Immunities, Parker State Action Doctrine

It is enough if suppression of competition is the foreseeable result of what a statute authorizes.

Environmental Law > Solid Wastes > Permits > Transportation

Governments > Local Governments > Licenses

Environmental Law > Solid Wastes > Permits > General Overview

[**HN12**](#) [L] Permits, Transportation

Mass. Gen. Laws [§ 31A](#) (permit for removal or transportation of garbage) provides, in part: No person shall remove or transport garbage, offal or other offensive substances through the streets of any city or town without first obtaining a permit from the board of health for such city or town. An application for such permit shall be in such form and contain such information, on oath, as such board shall require.

Environmental Law > Solid Wastes > Permits > General Overview

[**HN13**](#) [L] Solid Wastes, Permits

Mass. Gen. Laws [§ 31B](#) (rules and regulations for removal of garbage) provides: Boards of health shall, from time to time, make rules and regulations for the control of the removal, transportation or disposal of garbage, offal or other offensive substances.

Environmental Law > Solid Wastes > General Overview

[**HN14**](#) [L] Environmental Law, Solid Wastes

Mass. Gen. Laws ch. 44, § 28C(g) reads in part: In addition to any other power conferred by law, a city or town may from time to time contract for the operation by others of any solid waste facility or facilities financed or to be financed by such city or town in whole or in part and may contract with any such operator for the disposal or refuse, garbage or waste. All other cities, towns and other public agencies and private parties are also authorized from time to time to contract with such city or town or with any such operator for the disposal of refuse, garbage, and waste. Such contracts may be for such periods as agreed upon by the parties and, without limiting the generality of the foregoing, may include provisions for the delivery of minimum amounts of refuse, garage and waste and payments for the use of the facilities to be based thereon. Any contract with a city or town for the operation by others of any solid waste facility or facilities shall contain such provisions as may be deemed necessary to protect the public interest, including but not limited to provisions as to the rates to be charged. In entering into contracts for the operation of the facility or facilities, the city or town is directed, insofar as practicable, to provide for just and equitable rates and a fair but not excessive return to the operator.

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

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN15 [blue icon] Exemptions & Immunities, Parker State Action Doctrine

The state action doctrine and the Commerce Clause are not mutually exclusive.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

HN16 [blue icon] Protection of Rights, Section 1983 Actions

Responsibility for ascertaining the constitutionality of enacted legislation will ordinarily rest with the legislating body. Absent factors such as bribe-taking or other criminal misconduct, considerations of free speech normally militate against finding the basis for § 1983 damages in the advocacy of programs and legislation, even if the programs or statutes are themselves unconstitutional.

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

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN17 [blue icon] Price Discrimination, Competitive Injuries

To sustain a claim of predatory pricing under 15 U.S.C.S. § 13A, a plaintiff must (1) prove that the prices complained of are below an appropriate measure of the defendant rival's costs, and (2) demonstrate that its rival had a reasonable prospect of recouping its investment in below-cost prices -- that is, that competition would be injured as a result of the defendant's scheme.

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Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

HN18 [] Antitrust & Trade Law, Exemptions & Immunities

Mass. Gen. Laws ch. 93A, § 11 provides that the determination of what constitutes unfair methods of competition shall be guided by the Massachusetts Antitrust Act (Act). A provision of that Act, Mass. Gen. Laws. ch. 93, § 7, provides that activities which are not actionable under federal antitrust law (except for the fact that they do not involve interstate commerce) are immune from suit under state antitrust law.

Counsel: [**1] McCORMICK & MAITLAND, Norfolk, MA, Attorney for Plaintiff, Of Counsel: EDWARD J. McCORMICK, III, ESQ.

MARK J. LANZA, ESQ., Franklin, MA, Attorney for Defendant Town of Franklin.

GOODWIN, PROCTER & HOAR, Exchange Place, Boston, MA, Attorneys for Defendants WMX Technologies, Inc., Waste Management, Inc., Wheelabrator Millbury, Inc., Of Counsel: STEVEN J. COMEN, ESQ., JAMES J. DILLON, ESQ., J. ANTHONY DOWNS, ESQ.

Judges: Morris E. Lasker, U.S.D.J.

Opinion by: Morris E. Lasker

Opinion

[*957] LASKER, D.J.

In C & A Carbone, Inc. v. Town of Clarkstown, New York, 128 L. Ed. 2d 399, U.S. , 114 S. Ct. 1677 (1994), the Supreme Court declared that a municipal ordinance which required trash haulers to deliver solid waste to a specified transfer station, thereby forbidding them from depositing the waste out of state, violated the Commerce Clause of the United States Constitution. In December 1987, the town of Franklin, Massachusetts, through its Board of Health, enacted a by-law which fit the *Carbone* pattern. Bonollo Rubbish, Inc., the plaintiff in this case, was a trash hauler in and from Franklin.

In this action, Bonollo sues Franklin, officials of the Franklin Board of Health [**2] (collectively with the town itself, the "Town Defendants"), WMX Technologies, Inc., Waste Management, Inc. and Wheelabrator Millbury, Inc. (the last three, collectively, the "Corporate Defendants"), alleging violations of the Commerce Clause of the U.S. Constitution, the antitrust laws and the civil rights laws. Several motions are pending. Bonollo moves for summary judgment against the Town Defendants to declare the Franklin by-law invalid and to enjoin its enforcement. The Town Defendants cross-move to dismiss or, in the alternative, for summary judgment on Bonollo's Commerce Clause claims and its claims that the Town Defendants are liable for damages under 42 U.S.C. § 1983. The Corporate Defendants move to dismiss the complaint as to them.

Bonollo's motion to declare the by-law invalid is granted, but the request for injunctive relief against the town of Franklin is denied as moot. However, because the by-law did violate Bonollo's rights before it was amended in February 1995, the Town Defendants' motion is denied as to Bonollo's claim for damages under 42 U.S.C. § 1983 (that is, as to Count 6 of the complaint). The individual Town Defendants' cross-motion is granted as to all [**3] claims against them on the grounds of qualified immunity.

The Corporate Defendants' motion for summary judgment dismissing the complaint as to them is granted and Bonollo's motion to amend its complaint a second time to incorporate additional antitrust allegations against the Corporate Defendants is denied.

I.

This case stems from Franklin's efforts to dispose of its solid waste in an environmentally sound but cost-effective manner. As [*958] the Supreme Court observed in *Carbone*, "as solid waste output continues apace and landfill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment." [114 S. Ct. at 1680](#). Franklin is no exception.

Since 1987, the cornerstone of the town's trash control system has been a contract between it and Wheelabrator Millbury, by which the town has agreed to ship its solid waste to Wheelabrator Millbury's waste to energy facility in Millbury, Massachusetts. The contract provides for a set "tipping fee" per ton of solid waste delivered to the facility and requires Franklin to deliver a minimum number of tons of solid [**4] waste per year. Waste Management -- a commercial hauler of solid waste -- is a sister corporation of Wheelabrator Millbury. WMX Technologies, Inc. is the parent of both companies.

To coordinate the collection and removal of solid waste effectively and comply with the minimum tonnage requirement contained in the Wheelabrator Millbury contract, Franklin -- through its Board of Health -- enacted a series of by-laws outlining the requirements which haulers are obligated to meet to be eligible to haul trash in Franklin.¹ The regulatory scheme devised by the Franklin Board of Health divides haulers of residential solid waste into two categories based on the number of dwelling units contained in the residential buildings served by the hauler. Solid waste generated by residential buildings containing less than three dwelling units can be removed and transported only by a hauler who is under contract with the town of Franklin. Solid waste generated by residential buildings with three or more dwelling units is generally also removed and transported by haulers who are under contract with the town. However, persons not under contract (so-called "alternate haulers") are allowed to transport [**5] solid waste from buildings with three or more units if they acquire a permit from the town. As enacted in December 1987 and amended in July 1990, § 151.2 of Franklin's local code, the by-law at issue in the case at hand, provided:

[HN1](#)[] § 151.2 Permit issuance restrictions

A. No permit for the removal of solid waste from residential buildings (a residential trash collection permit) shall be issued by the Board of Health of the Town of Franklin pursuant to [M.G.L. c. 111, § 31A](#), unless the following conditions are attached to said permit:

(1) All residential trash collected in the Town of Franklin shall be caused to be delivered to the Wheelabrator Millbury Incinerator in Millbury, Massachusetts, or to such other disposal facility as may be designated, in writing by the Town Administrator, in the name of and to the tonnage account of the Town of Franklin.

(2) If the permit holder receives direct payment from a customer for the collection of residential trash, the permit holder shall reimburse the Town in full, on a weekly basis and at the Town's contracted rate schedule, for tonnage caused to be delivered to the Town's designated disposal facility in the name of and [**6] to the tonnage account of the Town of Franklin. The permit holder shall submit a copy of weight scale receipts to the Town on a weekly basis. . . .

Thus, to acquire a permit, would-be alternate haulers were required to agree, among other conditions, to use the Millbury facility exclusively for the disposal of trash collected in Franklin and to pay the tipping fees specified in the contract between Franklin and Wheelabrator Millbury. [HN2](#)[] The by-law also provided that permit holders must submit a performance bond to secure Franklin's obligation to pay tipping fees and barred permit holders from delivering trash collected from other towns to the Wheelabrator facility. The latter requirement was intended to prevent non-Franklin trash from being counted toward Franklin's minimum tonnage requirement.

¹ All parties agree that under Massachusetts law the town had the authority to enact the by-law. See [M.G.L. c. 111, §§ 31A](#) and [31B](#) (granting cities and towns in the Commonwealth wide authority to regulate the removal and transportation of solid waste that originates in their jurisdiction). Franklin's right to enact by-laws in this area generally is therefore not at issue.

[**7] [*959] On or about November 28, 1990, Bonollo Rubbish applied for and received an alternate hauler permit to transport and remove residential solid waste from buildings with three or more dwelling units, subject to the by-law and the conditions outlined above. On April 27, 1994, the Franklin Board of Health revoked Bonollo's permit, effective June 30, 1994. The Board's stated reason for taking this action was Bonollo's failure to meet several conditions listed in the by-law, including the requirement that Bonollo deliver all waste collected in Franklin to the Wheelabrator Millbury facility. Bonollo does not contest the fact that it had been delivering waste collected in Franklin to other sites, including a facility located in Johnston, Rhode Island which charged a tipping fee of \$ 42.00 per ton, as compared to the \$ 59.76 per ton charged by Wheelabrator Millbury.

Upon the Board's decision to revoke its permit, Bonollo filed this suit, alleging that Franklin's actions violated rights guaranteed it by the Commerce Clause and seeking damages under 42 U.S.C. § 1983. Bonollo moved simultaneously for a preliminary injunction against the Town Defendants enjoining them from taking any action [***8] to rescind or revoke its residential trash permit.

It seems likely that the *Carbone* decision effectively dictated the parties' actions after May 14, 1994. On June 1, Judge Stearns issued an order stipulated to by the parties granting a preliminary injunction. On June 15, 1994, the Franklin Board of Health voted to reverse its April 27 decision and struck from Bonollo's permit the requirement that Bonollo deliver waste to the Wheelabrator Millbury facility. On February 15, 1995, the Franklin Town Council amended the by-law to provide that the requirement to deliver trash collected in Franklin to the Wheelabrator facility applies only to haulers operating under a contract with the town of Franklin (i.e., non-alternate haulers). Thus, the by-law no longer applies to Bonollo and Bonollo's alternate hauler permit was never actually revoked.

The original complaint named the Town Defendants only. On June 24, 1994, Bonollo filed an amended complaint restating its claims against the Town Defendants and alleging for the first time that the Corporate Defendants' actions had violated federal antitrust laws, specifically 15 U.S.C. §§ 1, 2 and 14, as well as the civil rights statute, 42 U.S.C. [***9] § 1983.

II.

Both the Town and Corporate Defendants move to dismiss the complaint as time-barred. The parties agree that the appropriate limitations periods are three years under M.G.L. c.260, § 2A for claims grounded in alleged violations of the Commerce Clause and 42 U.S.C. § 1983, and four years under 15 U.S.C. § 15b for the antitrust claims. The defendants contend that the limitations period began running when the injuries Bonollo complains of originated -- that is, when the by-law was enacted in its final form in 1990, in the case of the Town Defendants, and when the waste supply agreement between Wheelabrator Millbury and the town was consummated in 1987, in the case of the Corporate Defendants. Bonollo takes the position that the clock did not start running until May 2, 1994, the day the Franklin Board of Health informed it that its permit was being revoked effective June 30, 1994.

As the Town Defendants correctly point out, HN3[] statutes of limitation generally begin to run when a plaintiff discovers, or through reasonable diligence should have discovered, the facts giving rise to its cause of action. Holmberg v. Armbrecht, 327 U.S. 392, 396-97, 90 L. Ed. 743, 66 S. Ct. [***101] 582 (1946). However, the usual rule is preempted when the conduct complained of constitutes a continuing violation of the plaintiff's rights, including systemic violations stemming from a "policy or practice [violate of plaintiff's rights that] continues into the limitations period." Jensen v. Frank, 912 F.2d 517, 523 (1st Cir. 1990). The hallmark of a systemic violation is the presence of actual continued injury to the plaintiff. Thus, "if both [the offending policy or practice] and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends." Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179, 183 (1st Cir. 1989).

[*960] This case charges systemic violations of the Constitution and the antitrust laws. Bonollo maintains that it sustained damages by being legally compelled to deliver solid waste to the Wheelabrator facility, and therefore pay that facility's higher tipping fee. While Bonollo did now and then haul trash to its preferred site in Rhode Island in violation of the by-law, at other times it did comply by delivering solid waste to Wheelabrator Millbury. To the extent Bonollo can prove that it paid higher tipping fees [***11] as a result of the enactment of the by-law, those fees represent systemic violations of Bonollo's rights under the Constitution and the antitrust laws in light of the

conclusions reached below because, unlike in *Jensen* or *Mack*, the plaintiff's injury here (the higher fees) continued for as long as the practice or policy complained of (the by-law) was in existence. Therefore, if Bonollo can show that it patronized Wheelabrator Millbury within the last three years, its claims would be timely.

III.

With regard to the Town Defendants, Bonollo contends that the by-law violated rights guaranteed it under the *Commerce Clause*, that the by-law should therefore be declared void and the Town Defendants held liable under [42 U.S.C. § 1983](#). Bonollo has moved for summary judgment on its direct *Commerce Clause* claims but has not moved on its claims under [§ 1983](#).

A.

The Town Defendants do not dispute that, under *Carbone*, the by-law violated the *Commerce Clause* and there is no question that it did. Franklin appears to have realized the decision's impact immediately and acted accordingly: the by-law was never actually applied to Bonollo, Bonollo's permit was amended in June 1994 to [**12] release it from the obligation to ship solid waste to Wheelabrator Millbury and, in February 1995, the by-law was amended so as to render inoperative the provisions Bonollo complains of. While the *coup de grace* has already been delivered, however, the allegation that the by-law violated the *Commerce Clause* is a necessary element of Bonollo's claim for damages incurred prior to the by-law's repeal.

B.

The Town Defendants contend that Bonollo's causes of action under both the *Commerce Clause* and [§ 1983](#) are moot because the by-law has been repealed. They are correct to the extent that Bonollo seeks injunctive relief: there is no longer a by-law to enjoin, so the claim for an injunction is moot by definition and is accordingly dismissed.

It does not, however, follow, that Bonollo's claim against the town for damages is moot. Bonollo claims that it was forced under the by-law to pay higher tipping fees than it otherwise would have paid in Rhode Island. If this is true, then Bonollo's claim for damages under [§ 1983](#) grounded in that violation is not mooted by the fact that the by-law was repealed after the injury occurred. Bonollo has not moved for summary judgment on its [§ 1983](#) [**13] claims, so whether it is entitled to damages cannot be established at this time. The Town Defendants' motion to dismiss the damage claims under [§ 1983](#), however, is denied.

C.

The Town Defendants next move to dismiss all of the claims against DeBaggis, Hunchard and Edge, who collectively comprise the Franklin Board of Health, and Slein, an agent of the Board, because no allegation is made against any of them in their individual capacities and each is entitled to qualified immunity.

HN4 [↑] Although qualified immunity is an affirmative defense, a government official is presumed to be immune from suit provided that the court does not find that the "official 'knew or reasonably should have known' that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or . . . he took the action with the *malicious intention* to cause a deprivation of constitutional rights or other injury" *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) (quoting *Wood v. Strickland*, 420 U.S. 308, 322, [\[*961\]](#) 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975)) (emphasis in original).

Here, the only concrete injury [**14] that Bonollo alleges -- the higher tipping fees -- was caused by the enactment of the by-law in its final form in 1990. Bonollo does allege as well that the Board of Health's decision to revoke its permit caused it additional injury, but has offered no evidence whatsoever or proffered any theory as to how that decision could have damaged it, given that the Board's decision to revoke Bonollo's permit was reversed before the revocation took effect. Moreover, Bonollo does not allege that the Board members adopted the by-law or voted to revoke the permit maliciously.

Since the alleged offending event occurred at the latest in 1990, the individual Town Defendants cannot be charged with the responsibility of knowing that the by-law violated the Commerce Clause, because the earliest they could reasonably have done so was 1991, when the Court of Appeals of this Circuit summarily affirmed Judge Torres' decision in Stephen D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corporation, 770 F. Supp. 775 (D.R.I. 1991), aff'd 947 F.2d 1004 (1st Cir. 1991). In *DeVito*, Judge Torres granted a preliminary injunction suspending the enforcement of a resolution adopted by RISWMC, [**15] a quasi-public agency having broad authority to regulate the collection and transportation of solid waste in Rhode Island. As in the case at hand, the resolution required haulers collecting solid waste in the state to deliver it to a particular disposal site, thereby having the effect of preventing solid waste collected in Rhode Island from being transported to disposal sites in other states. *Id.* at 777-78. Relying primarily on City of Philadelphia v. New Jersey, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978), Judge Torres found that the RISWMC resolution had the purpose and effect of "directly and completely eliminating" interstate commerce in order to confer an economic benefit on Rhode Island interests. *DeVito, 770 F. Supp. at 783*, and that each of the local purposes put forth by RISMWC to justify the resolution² was either illegitimate or could have been served by less discriminatory means. *Id. at 783-85*.

[**16] *DeVito* was not decided until 1991 and Bonollo's contention that the result in *Carbone* was a logical extension of earlier decisions -- most notably *Philadelphia v. New Jersey* -- is undermined by the argument of the three dissenters in *Carbone* that *Carbone* in fact represented a significant departure from previous decisions. Justice Souter wrote:

"The ordinance [struck down in *Carbone*] falls outside that class of tariff or protectionist measures that the Commerce Clause has traditionally been thought to bar States from enacting against each other, and when the majority subsumes the ordinance within the class of laws this Court has struck down as facially discriminatory (and so avails itself of our 'virtually *per se* rule' against such statutes . . .), the majority is in fact greatly extending the Clause's dormant reach."

114 S. Ct. at 1692 (Souter, J., dissenting) (citations omitted). In sum, the state of the law in 1990 was not such as to put a reasonable Board of Health member on notice that the Franklin by-law constituted a violation of the Commerce Clause of the U.S. Constitution -- assuming that the Board member had ever heard of that [**17] Clause. The individual Town Defendants therefore enjoy qualified immunity and the complaint is dismissed as to them.

D.

Finally, the Town Defendants contend that Bonollo waived its right to challenge [*962] the constitutionality of the by-law by agreeing to the conditions contained in the security agreement it executed pursuant to its application for a permit to haul solid waste in Franklin.

² Those local purposes were:

1. maximization of the rate of recycling and recovery;
2. protection and conservation of public resources and the public health;
3. prevention of the illegal disposal of solid waste;
4. elimination of the possibility of state agency or municipal liability for the illegal disposal of hazardous waste in the event that such waste was accidentally commingled with solid waste shipped to out of state facilities;
5. facilitation of planning for solid waste transportation; and
6. facilitation of overall long term planning.

Id. at 783-85. The Town Defendants have not argued that these -- or any -- local purposes motivated its decision to enact the by-law, and have not pointed to any specific state policy served thereby.

HN5 While it is true that constitutional rights may be waived, such a waiver must be made knowingly. The security agreement signed by Bonollo does specify that Bonollo agreed to comply with the requirement contained in the by-law that solid waste collected in Franklin be delivered to Wheelabrator Millbury. However, the agreement made no mention of the possibility, or even hinted, that by signing it the permittee would waive its constitutional rights. The language therefore cannot form the basis of a waiver of Bonollo's claims.

IV.

Bonollo also sues the affiliated group of corporations ³ which contracted to operate the waste to energy facility which the Franklin By-law required alternate haulers in Franklin to utilize, alleging that the Corporate Defendants are liable for creating a monopoly in violation **[**18]** of [15 U.S.C. § 2](#), tying in violation of [15 U.S.C. § 14](#) and price fixing in violation of [15 U.S.C. § 1](#). Bonollo also claims that the Corporate Defendants are liable under [42 U.S.C. § 1983](#).

Aside from claiming that Bonollo's causes of action are not timely (an issue addressed above), the Corporate Defendants assert that Bonollo has not -- and cannot -- plead the requisite elements of the three antitrust claims, that they are protected from suit under the antitrust laws by the state action and *Noerr-Pennington* doctrines and that violations of the antitrust laws cannot, as a matter of law, be repleaded under the rubric of [§ 1983](#).

A.

Bonollo's antitrust claims are so cursory as to court dismissal for failure to state a claim. However, Bonollo's antitrust claims founder **[**19]** on principles which would trump those claims even Bonollo was able to establish *prima facie* cases of monopolization, tying and price fixing.

In [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#), the Supreme Court held that **HN6** 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," even if those activities "would violate the Sherman Act if [they] were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." [Id. at 350-51](#).

Following the rationale of *Parker*, the Court ruled in [Town of Hallie v. City of Eau Claire, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 \(1985\)](#), that **HN7** a municipality is immune from suit under federal antitrust statutes if the state legislature delegated to the municipality the "authority to take action that foreseeably will result in anticompetitive effect." [Hallie, 471 U.S. at 39](#). The *Hallie* Court added that for a municipality to enjoy such immunity, the state legislature need not enact a "specific, detailed **[**20]** legislative authorization" of anticompetitive action, [Id. at 39, 41-42](#). Rather, the municipality "must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy." [Id. at 40](#).

In [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#), the Court held that **HN8** a private party engaged in a challenged activity pursuant to a contract with, or authorization from, a state or local government is entitled to state action immunity if it can show that it is subject to active state supervision. [Id. at 105-06](#).

In [Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 \(1991\)](#), **HN9** the Court, extended antitrust immunity to municipalities which contract with a private party to the exclusion of the private party's competitors, even when **[*963]** there might have been conspiratorial activity between the municipality and the private party with which it has contracted. [Id. at 379](#). The *Omni Outdoor Advertising* Court held further that, **HN10** under the *Noerr-Pennington* doctrine formulated in [Eastern R.R. Presidents Conference v. Noerr Motor Freight, **\[**21\]** Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#) and [Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#), "the federal antitrust laws . . . do not regulate

³ Bonollo has sued Wheelabrator Millbury, its parent, WMX Technologies, Inc. and its sister corporation, Waste Management, Inc. However, only Wheelabrator Millbury is explicitly alleged to have done anything injurious to Bonollo's interests.

the conduct of private individuals in seeking anticompetitive action from the government." *Omni Outdoor Advertising, 499 U.S. at 379-80.*

In *Tri-State Rubbish v. Waste Management, Inc., 998 F.2d 1073 (1st Cir. 1993)*, a case which, like the one at hand, involved a contract for the receipt and disposal of solid waste, the Court of Appeals of this Circuit affirmed the dismissal under the state action doctrine of antitrust claims against a Maine municipality and Waste Management of Maine, the plaintiff's private competitor. The defendant city and several other Maine municipalities had formed the Mid-Maine Waste Action Corporation ("MMWAC") for the purpose of constructing a waste to energy plant, as the municipalities were explicitly authorized to do under Maine law. *Id. at 1075*. In much the same way as Franklin, each municipality passed a local ordinance requiring waste haulers to deliver solid waste, collected within its jurisdiction, to the plant and to pay a set tipping fee [**22] per ton delivered. *Id. at 1075*. These ordinances were authorized by a Maine statute, which provided that a municipality could "require that 'solid waste' generated within its boundaries be delivered to a 'designated disposal or reclamation facility.'" *Id.*

A contract between MMWAC and Waste Management of Maine provided that Waste Management would operate a temporary processing facility for the MMWAC member municipalities' waste. As compensation, Waste Management received from MMWAC a fee per ton of solid waste which was slightly less than the tipping fee that MMWAC charged customers hauling waste from its member towns. Tri-State Rubbish sued Waste Management, MMWAC and the Maine municipality from which Tri-State was prevented from hauling trash by the MMWAC-Waste Management agreement, claiming, among other things, that the city's ordinance requiring haulers to deliver trash to the MMWAC site and MMWAC's contract with Waste Management combined to constitute a monopolization of trash disposal services in the region, an illegal restraint of trade and predatory pricing. *Id. at 1076*.

Citing *Hallie* and *Omni Outdoor Advertising*, the Court of Appeals held that MMWAC's [**23] status was that of a municipality and that, accordingly, MMWAC was immune from antitrust liability in light of Maine's clear authorization of both the municipal ordinances mandating the use of the temporary facility and the defendant city's contract with the private defendant. *Id. at 1077-78, 1078 n.3*. As to the plaintiff's antitrust claims against the private defendant, the court agreed with the district court that the provision in MMWAC's agreement with the city requiring compliance by the private defendant with all pertinent laws constituted adequate state supervision; that is, that adequate municipal supervision, embodied by the contractual provision, was legally equivalent to adequate state supervision, and that, accordingly, under the state action doctrine, the private defendant was immune from suit. *Id. at 1078-79*. The court therefore affirmed the dismissal of the antitrust claims against the private defendant, the city and MMWAC. *Id. at 1079-81*.

Although these decisions would appear to dispose of Bonollo's antitrust claims, Bonollo attempts to distinguish the case at hand. First, Bonollo contends that the Corporate Defendants have not established that Massachusetts [**24] has enacted a policy of replacing competition with regulation in the solid waste disposal field, a requirement set forth in *Hallie, 471 U.S. at 40*. However, in *Omni Outdoor Advertising*, the Court explicitly rejected "the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition." *499 U.S. at 372*. Rather, *HN11*[] "it is enough . . . if suppression of competition is the 'foreseeable [*964] result' of what the statute authorizes." *Id. at 373* (citation omitted).

M.G.L. c. 111, §§ 31A and *31B*⁴ [**25] grant cities and towns in Massachusetts broad authority to enact ordinances and grant permits with respect to the collection and disposal of solid waste. See *Tri-State Rubbish, 998*

⁴ These provisions read in pertinent part:

HN12[] *§ 31A* Permit for removal or transportation of garbage

No person shall remove or transport garbage, offal or other offensive substances through the streets of any city or town without first obtaining a permit from the board of health for such city or town An application for such permit shall be in such form and contain such information, on oath, as such board shall require.

HN13[] *§ 31B* Rules and regulations for removal of garbage

[F.2d at 1077-78](#) ("waste disposal . . . is a traditional local-government function"). In addition, [M.G.L. c.44, § 28C\(g\)](#)⁵ explicitly authorizes contracts of the type between Franklin and Wheelabrator Millbury.

[**26] Franklin's enactment of the by-law was clearly a foreseeable result of this statutory scheme. The legislature has granted cities and towns in the Commonwealth the unequivocal right to determine who may haul solid waste from their jurisdictions and under what rules and conditions they may do so. Massachusetts cities and towns are also authorized to contract for the disposal of solid waste at facilities of their choosing, such contract specifying the rate to be charged by the disposal facility, subject only to a fairness requirement which Bonollo has not alleged was violated. Implicit in -- indeed, necessary to -- this scheme is a local government's right to require entities which haul trash from the town to use the facility with which the town has contracted. A municipality would be hard pressed to find a waste to energy facility willing to agree to accept its trash (and set a rate for doing so) purely on the chance that the arrangement might be profitable. The by-law is consistent with the legislature's apparent judgment -- embodied in [M.G.L. c.111, §§ 31A](#) and [31B](#) and [M.G.L. c.44, § 28C\(g\)](#) -- that local governments in the Commonwealth should have discretion to arrange for the disposal [**27] of solid waste in their towns in any manner they deem to be cost effective and in furtherance of the public health. It is entirely foreseeable that the exercise of such discretion could entail a displacement of competition in the market for trash disposal services.

Bonollo contends further that the Corporate Defendants have failed to show that they are subject to active state supervision, as they must if, as private actors, they are to be eligible for state action immunity. See [Midcal, 445 U.S. at 105-06](#) (articulating the active state supervision requirement for private entities). *Tri-State Rubbish* clearly disposes of this contention. Assuming Wheelabrator Millbury must prove adequate state supervision, that requirement is met by virtue of § 17(2) of the Waste Supply Agreement dated August 10, 1987 between Franklin and Wheelabrator Millbury, in which Wheelabrator Millbury agreed to "comply with all federal, state and local laws, rules, ordinances, regulations and all administrative and judicial positions known to it." This is a mirror image of the provision [*965] between MMWAC and its member municipalities which the *Tri-State Rubbish* court held conferred immunity on the private [**28] defendant before it. See [998 F.2d at 1079](#). Indeed, the case is even stronger for the Corporate Defendants here because they have directly obligated themselves to abide by applicable laws and regulations, whereas in *Tri-State Rubbish* the private defendant's obligation was indirect only.

Moreover, the *Tri-State Rubbish* court held that the private defendants before it need not be subject to state supervision because "the choice to make such payments [i.e., tipping fees] was that of MMWAC and its actions are protected as state action." *Id.* The court wrote further: "to treat the mere receipt of such authorized payments as wrongful would undermine the *Parker* protection afforded [state and local governments] and misstate the purpose of the supervision requirement, which is to prevent the unregulated licensing of *private* anticompetitive conduct." *Id.* (emphasis in original). This rationale applies with equal force to the case at hand.

Boards of health shall, from time to time, make rules and regulations for the control of the removal, transportation or disposal of garbage, offal or other offensive substances.

⁵ [HN14](#) [↑] [M.G.L. c.44, § 28C\(g\)](#) reads in pertinent part:

In addition to any other power conferred by law, a city or town may from time to time contract for the operation by others of any solid waste facility or facilities financed or to be financed by such city or town in whole or in part . . . and may contract with any such operator for the disposal or refuse, garbage or waste. . . . All other cities, towns and other public agencies and private parties are also authorized from time to time to contract with such city or town or with any such operator for the disposal of refuse, garbage, and waste. . . . Such contracts may be for such periods as agreed upon by the parties and, without limiting the generality of the foregoing, may include provisions for the delivery of minimum amounts of refuse, garage and waste and payments for the use of the facilities to be based thereon. . . .

Any contract with a city or town for the operation by others of any solid waste facility or facilities under this section . . . shall contain such provisions as may be deemed necessary to protect the public interest, including but not limited to provisions as to the rates to be charged. . . . In entering into contracts for the operation of the facility or facilities, the city or town is directed, insofar as practicable, to provide for just and equitable rates and a fair but not excessive return to the operator. . . .

(emphasis added).

Third, Bonollo asserts that the *Noerr-Pennington* doctrine is inapplicable because the doctrine only immunizes efforts to influence government action, not actual anticompetitive behavior which results from the exercise of that [**29] influence. The argument is meritless. A *Noerr-Pennington* doctrine which shielded a private party in its attempt to secure a benefit from the government but left the party open to suit if the benefit was actually received would not serve the interests of free speech and open access to government that the *Noerr* and *Pennington* Courts intended to protect.

Finally, Bonollo argues that a defense grounded in the state action doctrine is unavailable to the Corporate Defendants because the state action in question -- the by-law -- was itself unconstitutional. Put another way, Bonollo contends that when state action immunity "conflicts" with the *Commerce Clause*, the immunity must yield.

The weakness of this argument is that [HN15](#)↑ the state action doctrine and the *Commerce Clause* are not mutually exclusive. One of the activities complained of in *Omni Outdoor Advertising* was passage of a municipal ordinance affecting the plaintiff's billboard business which a state court later found to violate the [*U.S. Constitution*](#). [499 U.S. 365, 368, 111 S. Ct. 1344, 113 L. Ed. 2d 382](#). The Court concluded that both the municipality which enacted the ordinance and the private party who allegedly conspired with public officials to ensure [**30] its enactment were entitled to state action immunity, which was held to be appropriate even if the ordinance at issue is "substantively or even procedurally defective," [*Id. at 370-73*](#); see also [*Preferred Communications, Inc. v. Los Angeles*, 754 F.2d 1396, 1415 \(9th Cir. 1985\)](#), aff'd, [476 U.S. 488, 90 L. Ed. 2d 480, 106 S. Ct. 2034 \(1986\)](#) (unconstitutionality of city ordinance does not affect state action doctrine defense to antitrust claims); [*Lease Lights, Inc. v. Public Service Company of Oklahoma*, 849 F.2d 1330, 1334 \(10th Cir. 1988\)](#), cert. denied, [488 U.S. 1019, 102 L. Ed. 2d 807, 109 S. Ct. 817 \(1989\)](#).

Moreover, even if the determination that the by-law was unconstitutional negated the Corporate Defendant's state action defense, the Corporate Defendants would still be shielded by the *Noerr-Pennington* doctrine. See [*Omni Outdoor Advertising*, 499 U.S. at 379-80, 383-84](#) (*Noerr-Pennington* doctrine applied despite a state court's holding that the municipal ordinance which formed the basis of the challenged contract between the private defendant and the city violated plaintiff's *First Amendment* rights).

B.

Bonollo asserts claims against the Corporate [**31] Defendants under [42 U.S.C. § 1983](#), although, as an initial matter, there is confusion as to which of Bonollo's rights the Corporate Defendant's are accused of violating. Count 26 of the complaint, which is against Wheelabrator Millbury but is representative of the [§ 1983](#) claims against the other two Corporate Defendants, alleges in part that Wheelabrator Millbury "conspired . . . to decrease competition, restrain trade, put competition out of business and . . . create a monopoly." This sounds for all the world like an antitrust suit brought as a claim [[*966](#)] under [§ 1983](#). In [*Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 69 L. Ed. 2d 435, 101 S. Ct. 2615 \(1981\)](#), the Supreme Court held that where, as here, a party is "alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under [§ 1983](#). [*Id. at 20*](#) (internal quotations and citations omitted). Bonollo claims, however, that its [§ 1983](#) claims are actually predicated on the Corporate Defendants' alleged violation of its *Commerce Clause* rights, although the words [**32] "[Commerce Clause](#)" appear nowhere in the relevant portions of the complaint.

Even taking Bonollo at its word, however, the claim still fails. As the Court of Appeals of this Circuit stated in [*Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506 \(1st Cir. 1987\)](#), [HN16](#)↑ "responsibility for ascertaining the constitutionality of enacted legislation will ordinarily rest with the legislating body. Absent factors such as bribe-taking or other criminal misconduct, considerations of free speech normally militate against finding the basis for [§ 1983](#) damages in the advocacy of programs and legislation, even if the programs or statutes are themselves unconstitutional." [*Id. at 519*](#). This rule stems from the same *First Amendment* considerations that gave rise to the *Noerr-Pennington* doctrine -- considerations that have as much force in the context of an action under [§ 1983](#) as they do in the context of an antitrust suit. Again, this result is in no way in "conflict" with the *Commerce Clause*, which would have been given full effect in invalidating the by-law had the bylaw not been repealed.

V.

Bonollo has moved to amend the complaint to include further factual allegations in connection with [\[**33\]](#) its existing claims and to add predatory pricing claims under [15 U.S.C. § 13A](#) and claims for "unfair and deceptive methods of competition, actions and practices" in violation of M.G.L. c.93A. The Corporate defendants oppose this motion on numerous grounds. The motion is denied.

A.

To the extent the proposed amendments are intended to buttress Bonollo's existing antitrust claims against the Corporate Defendants, they would not alter the result reached above. Even if the additional allegations made the claims more legally tenable in and of themselves (and they don't much), the state action and *Noerr-Pennington* doctrines are still dispositive.

As for the counts which Bonollo proposes to add, [HN17](#)[↑] to sustain a claim of predatory pricing under [15 U.S.C. § 13A](#), a plaintiff must (1) "prove that the prices complained of are below an appropriate measure of [the defendant] rival's costs," [Brook Group, Ltd. v. Brown & Williamson Tobacco, U.S. , 113 S. Ct. 2578, 2587 \(1993\)](#) (citations omitted) and (2) demonstrate that its rival "had a reasonable prospect . . . of recouping its investment in below-cost prices," [Id. at 2588](#) (citations omitted) -- that is, that competition [\[**34\]](#) would be injured as a result of the defendant's scheme. [Id. at 2588-89](#).

The proposed amendments do not make the necessary allegations as to the Corporate Defendants' costs, prices in the contracts entered into with other towns or even whether those contracts ever actually came into being. Moreover, the new claims are severely implausible. As the Corporate Defendants note, it is difficult to imagine how they could ever recoup their investment in predatory prices when tipping fees are fixed in the contract. See [Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#) (plaintiff alleging an economically implausible predatory pricing scheme faces a heightened burden).

Finally, it is doubtful whether Bonollo's claims meet the criteria of *Tri-State Rubbish* for pleading a predatory pricing cause of action. There, a predatory pricing claim analogous to those at issue here was held sufficient because the plaintiff's pleadings contained reasonably specific allegations, both as to prices and contracts that were [\[*967\]](#) actually shown to exist. [998 F.2d at 1080-81](#). The proposed amendments here contain neither. In addition, [\[**35\]](#) the *Tri-State Rubbish* court was reluctant to apply the state action doctrine when it had no evidence that MMWAC exercised any control over the prices charged by the private defendants. [Id. at 1080](#). Here, Wheelabrator Millbury's prices are regulated by its agreement with Franklin or any other town that contracts with it pursuant to [M.G.L. c.111, §§ 31A and 31B](#). Here, therefore, unlike in *Tri-State Rubbish*, adequate state supervision is not a concern.⁶

B.

[HN18](#)[↑] [M.G.L. c.93A, § 11](#) provides that the determination of what constitutes unfair methods of competition shall be guided by the Massachusetts Antitrust Act. A provision of that Act, [M.G.L. c.93, § 7](#) provides that activities which are not actionable under federal [antitrust law](#) (except [\[**36\]](#) for the fact that they do not involve interstate commerce) are immune from suit under state [antitrust law](#). These provisions together mandate dismissal of Bonollo's proposed M.G.L. c.93A claims.

* * *

Bonollo's motion for summary judgment declaring the by-law unconstitutional is granted. Its motion for injunctive relief is denied as moot and its motion to amend the complaint as to the Corporate Defendants is denied.

⁶ On remand, the district court in Maine recently granted summary judgment to the defendants, dismissing the predatory pricing claim that was restored by the Court of Appeals. See [Tri-State Rubbish, Inc. v. Waste Management, Inc., 875 F. Supp. 8 \(D.Maine 1994\)](#).

886 F. Supp. 955, *967 1995 U.S. Dist. LEXIS 7804, **36

The town of Franklin's motion to dismiss the complaint as to it as moot is granted to the extent of Bonollo's request for injunctive relief and is otherwise denied. The motion of the individual Town Defendants to dismiss the complaint as to each of them on the grounds of qualified immunity is granted.

The motion of the Corporate Defendants to dismiss the complaint as to each of them is granted.

It is so ordered.

Dated: Boston, Massachusetts

May 26, 1995

Morris E. Lasker

U.S.D.J.

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Anell v. Freeport Minerals Corp.

United States Court of Appeals for the Ninth Circuit

May 11, 1995, Submitted, San Francisco, California ; May 31, 1995, FILED

No. 93-15687, 93-15787

Reporter

1995 U.S. App. LEXIS 13529 *

WILLIAM ANELL AND ARDITH ANELL, Plaintiffs-Appellants, v. FREEPORT MINERALS CORPORATION, a Delaware corporation, et al., Defendants-Appellees. WILLIAM ANELL AND ARDITH ANELL, Plaintiffs-Appellees, v. FREEPORT MINERALS CORPORATION, a Delaware corporation, Defendant, BASIC, INCORPORATED, a Delaware corporation, Defendant-Appellant.

Notice: [*1] RULES OF THE NINTH 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: 56 F.3d 70, 1995 U.S. App. LEXIS 19860.

Prior History: Appeal from the United States District Court for the District of Nevada. D.C. No. CV-92-317-ECR. Edward C. Reed, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

antitrust, sanctions, district court, cross-appeals, plaintiffs'

Judges: Before: CUMMINGS, ** SCHROEDER and RYMER, Circuit Judges.

Opinion

MEMORANDUM *

William and Ardith Anell appeal the dismissal of their complaint. Due to a slew of late voluntary dismissals of parties only one defendant, Basic, Inc., and one claim, a Sherman Act violation, remain in this appeal. Defendant cross-appeals for sanctions. We have jurisdiction, and we affirm.

I.

The district court dismissed plaintiffs' complaint [*2] under [Fed. R. Civ. P. 12\(b\)\(6\)](#). We review this dismissal *de novo*. [Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 \(9th Cir. 1988\)](#). This court, like the district court, must

** Honorable Walter J. Cummings, United States Circuit Judge for the Seventh Circuit, sitting by designation.

* 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](#).

accept as true all well-pleaded factual allegations contained in the complaint, and must not uphold the dismissal unless the plaintiff can prove no set of facts in support of his claim. [Oscar v. University Students Co-op Ass'n, 965 F.2d 783, 785](#) (9th Cir.) (en banc), cert. denied, 121 L. Ed. 2d 581, 113 S. Ct. 655 (1992).

Plaintiffs allege a violation of federal **antitrust law** stemming from Basic, Inc.'s involvement with some land known as Paradise Peak. Their complaint states no facts under which Basic, Inc., could be guilty of antitrust violations. Moreover, the only act which Basic is alleged to have committed--the formation of a monopolistic "property" unit in the region--occurred in 1982, and is thus barred by the statute of limitations from serving as the predicate for an antitrust claim. [15 U.S.C. § 15b.](#)

II.

Basic, Inc., cross-appeals for attorneys' fees and costs, claiming that the district judge impermissibly failed to impose these after stating in his Order that plaintiffs' conduct warranted [*3] sanctions. However, the Order does not explicitly call for sanctions and none will be ordered at this time. The district court's order thus is AFFIRMED.

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Storis v. GERS Retail Sys.

United States District Court for the District of New Jersey

May 31, 1995, Decided

Civil Action No. 94-4400

Reporter

1995 U.S. Dist. LEXIS 7614 *; 1995 WL 337100

STORIS, INC., Plaintiff, v. GERS RETAIL SYSTEMS, INC., Defendants.

Notice: [*1] NOT FOR PUBLICATION

Core Terms

tortious interference, plaintiff's claim, customers, monopolization, allegations, antitrust, software, dismissal without prejudice, disparagement, pricing, market share, Sherman Act, prospective economic advantage, defense motion, further order, Robinson-Patman Act, predatory, brochure, intentional interference, relevant market, antitrust case, damages, seller

Counsel: For Plaintiff: JAMES M. ANDREWS, ESQ., LINDSEY H. TAYLOR, ESQ., FRIEDMAN SIEGELBAUM, Roseland, NJ.

For GERS Retail Systems, Inc., Defendant: DAVID J. MOLTON, ESQ., MOLTON & MEEKINS, Montclair, NJ. KENNETH G. ROBERTS, ESQ., New York, NY.

Judges: ALFRED M. WOLIN, U.S.D.J.

Opinion by: ALFRED M. WOLIN

Opinion

OPINION

WOLIN, District Judge

This matter is before the Court on the motion of defendant to dismiss the complaint in its entirety pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for failure to state a claim upon which relief can be granted. For the reasons set forth herein, defendant's motion is granted, in part, and is denied, in part.

BACKGROUND

Plaintiff Storis Inc. ("Storis") is a New Jersey corporation, with its principal place of business in New Jersey. Defendants GERS Retail Systems Inc. ("GERS") is a California corporation with its principal place of business in California. Therefore, this Court has jurisdiction based on the diversity of citizenship of the parties. [28 U.S.C. §](#)

1332. In addition, this Court has jurisdiction because plaintiff's claims arise under federal antitrust law. 28 U.S.C. § 1331.

Both plaintiff and defendant [*2] are in the business of developing, marketing and manufacturing computer software that aids retail stores in the United States. Storis and GERS are two of the largest businesses in the market for the type of software they distribute. Storis and GERS presently maintain a 15% and 25% share of the market, respectively. (Complaint, P 8). GERS calls its software "Sequel."

In April 1994, GERS distributed by mail, to Storis customers only, a brochure which stated:

If you're looking for the most advanced retail system and you don't think your Storis system is it, then do we have a great deal for you! . . . Trade-in your Storis software for free Sequel system software . . . and if you'd like one of our optional modules that you don't already have -- we'll give it to you for 50% off!

(Complaint, Exhibit A). The brochure also offered Storis customers free electronic conversion, free first year support service and free comprehensive training. The brochure went on to list the comparable advantages of GERS software to Storis software. Critically, this offer was not available to non-Storis customers.

Storis filed this lawsuit alleging that the GERS offer violated the Robinson-Patman [*3] Act, 15 U.S.C. § 2, which prohibits discriminatory pricing.¹ [*4] Storis also alleged that the brochure was an attempt by GERS to monopolize the relevant market in violation of the Sherman Act, 15 U.S.C. § 2.² Storis also brought state law claims for tortious interference with contractual relationships and prospective business advantage, as well as product disparagement. Storis seeks and injunction and damages for lost profits, which can be trebled under the antitrust laws.

GERS has filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

DISCUSSION

A. Standard of Review

In determining whether a complaint should be dismissed for failure to state a claim pursuant to Rule 12(b)(6), the Court must limit its consideration to the facts alleged in the complaint. Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir. 1978). Moreover, in its examination of the complaint, the Court is required to [*5] accept all of the allegations contained therein and all inferences arising therefrom as true. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). If plaintiff can prove any set of facts in support of his claim that would entitle him to relief, his complaint should not be dismissed. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); D.P. Enterprises v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984).

The Federal Rules of Civil Procedure only require that a claimant present a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8. As a general rule a complaint is sufficient if it enables

¹ Section 2 of the Clayton Act, better known as the Robinson-Patman Act states: "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 quantity, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . 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 . . ." 15 U.S.C. § 13(a).

² Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 2.

the defendant to file a responsive pleading. *Hickman v. Taylor*, 329 U.S. 495, 501, 91 L. Ed. 451, 67 S. Ct. 385 (1947). This rule is no different in antitrust cases. *Niagara of Buffalo Inc. v. Niagara Mfg. & Distrib. Corp.*, 262 F.2d 106 (2d Cir. 1958); *Nagler v. Admiral Corp.*, 248 F.2d 319, 322 (2d Cir. 1957) ("it is quite clear that the federal rules contain no special exceptions for antitrust cases"); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3 (9th Cir. 1963) ("we are of the opinion that there are no special rules of pleading in antitrust cases"). Thus, plaintiff's claims will be subject to the same liberal rules of pleading as in all other types of cases.

The Supreme Court has expressly stated that motions to dismiss under *Rule 12(b)(6)* should be granted "very sparingly" in antitrust cases. In *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746-47, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976), the Court held: In antitrust cases, where the 'proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." (citing, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)). Thus, plaintiff is not required to plead all of the facts in support of his antitrust claims, as much of this evidence will likely be unearthed during discovery.

This Court is bound by the rule that an antitrust claim should not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it [*7] to relief. *Conley*, 355 U.S. at 45-46.; *D.P. Enterprises*, 725 F.2d at 944. Conclusory allegations are sufficient if they provide an outline or notice of the antitrust violation charged. *Trans World Airlines Inc. v. Hughes*, 332 F.2d 602 (2d Cir. 1964), cert. dismissed, 380 U.S. 248 (1965) ("The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes."). Similarly, allegations of fact and conclusory statements of the pleader must be taken into account when deciding whether a claim for relief has been stated. As the Third Circuit held in *Knuth v. Erie-Crawford Dairy Cooperative Assn.*, 395 F.2d 420 (3d Cir. 1968):

Decisions of the United States Supreme Court indicate that we should be extremely liberal in construing antitrust complaints. See, *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656, 660, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961); *Radovich v. National Football League*, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957); and *United states v. Employing Plasterers Assn.*, 347 U.S. 186, 98 L. Ed. 618, [*8] 74 S. Ct. 452 (1954). Indeed, in the *Employing Plasterers*' case, the Supreme Court made it clear that, whether [the] charges be called "allegations of fact" or "mere conclusions of the pleader" they must be taken into account in deciding whether a claim for relief is stated.

The liberal approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all details and specific facts relied upon cannot properly be set forth as part of the pleadings.

Id. at 423.

With these legal principles in mind, the Court will examine each of GERS's claims to determine whether plaintiff has alleged a cause of action for violation of the antitrust laws or for tortious interference with contractual relationship or prospective business advantage or product disparagement.

B. Robinson-Patman Act

In order to establish liability for predatory pricing under the Robinson-Patman Act a plaintiff must show:

- (1) The seller is "engaged in commerce"; the price discrimination occurred "in the course of such commerce"; and at least one of the sales constituting the discrimination must itself be "in commerce";

- (2) The discrimination [*9] must involve "sale" transaction to at least two different purchasers;

- (3) The items involved must qualify as "commodities";

- (4) The commodities must be "of like grade and quality"

- (5) The seller's prices must be "discriminatory" as between the purchasers;
- (6) The discriminatory sale must occur reasonable contemporaneously in time;
- (7) The "effect" of such discrimination must be a reasonable possibility of (a) a substantial lessening of competition, or (b) injury, destruction or prevention of competition with the seller granting the discrimination, any person knowingly receiving the benefit of the discrimination, or customers of either the seller or such favored person;
- (8) If the action is one for damages, the plaintiff must prove actual injury to it such as lost sale or profits, proximately caused by the discriminatory price granted to the favored customer or customers.

[Brook Group Ltd. v. Brown & Williamson Tobacco Corp., U.S. , 113 S. Ct. 2578 \(1993\).](#)

In this case, GERS claims that Storis' complaint is insufficient because its fails to identify "specific buyers and particular contracts" and because its fails to "identify [*10] any sale across state lines." (GERS Br. at 11). GERS cites no case where the Court dismissed a claim for predatory pricing because the plaintiff failed to identify specific buyers and particular contracts. In this case, the complaint alleges that GERS committed price discrimination between Storis customers and all other customers, with the intent of injuring Storis. This is sufficient to state a claim for predatory pricing.

This case is factually distinguishable from *McPherson's Ltd. v. Never Dull Inc.*, 1990 WL 238812 (D.N.J. December 26, 1990). In *McPherson's* the plaintiff merely alleged price discrimination between unspecified buyers in New Jersey and elsewhere in the United States. 1990 WL 238812 at 4. The present complaint is far more specific than the complaint in *McPherson's*. Thus, taking the allegations in the complaint as true, Storis has stated a claim for predatory pricing in violation of the Robinson-Patman Act.

C. Sherman Act

Storis alleges that GERS is attempting to monopolize the relevant market of computer software in violation of § of the Sherman Act, [15 U.S.C. § 2](#). The elements of a monopolization claim in violation of [Section 2](#) of the Sherman [*11] Act include:

- (1) the possession of monopoly power in a relevant market.
- (2) willful acquisition or maintenance of that power in an exclusionary manner.

[U.S. v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#). In order to prove a claim of attempted monopolization claimant must merely allege that the defendant has a "dangerous probability" of achieving a monopoly in the relevant market. *Spectrum Sports, Inc.*, [U.S. , 113 S. Ct. 884 \(1993\)](#). A key element of this claim is that the defendant have sufficient market power to achieve a monopoly.

Market power is the power "to force a purchaser to do something that he would not do in a competitive market." [Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 14, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). "The existence of such power is ordinarily inferred from the seller's possession of the a predominant share of the market." [Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451, 112 S. Ct. 2072, 2081, 119 L. Ed. 2d 265 \(1992\)](#).

With regard to attempted monopolization, the federal courts have held that a "dangerous probability of success" can [*12] be satisfied by a showing of market share in excess of fifty percent (50%). [Barr Laboratories Inc. v. Abbott Laboratories, 978 F.2d 98, 112-115 \(3d Cir. 1992\)](#); [M&M Medical Supplies and Services Inc. v. Pleasant Valley Hospital Inc., 981 F.2d 160, 169-69 \(4th Cir. 1992\)](#) (en banc), cert. denied, 125 L. Ed. 2d 662, 113 S. Ct. 2962 (1993).

In this case, Storis alleges that GERS controls only 25% of the market. However, Storis alleges that if GERS was successful in driving Storis out of the market, GERS would capture Storis's 15% of the market and control 40% of the relevant market. Even assuming that GERS was successful in driving Storis out of business it is unlikely GERS, as one of several remaining competitors in the market, would garner all of Storis's customers. Therefore, even if GERS was successful in driving Storis out of business, it would have less than a 40% share of the market. GERS claims that less than a 40% market share is insufficient, as a matter law, to establish market power. (GERS Br. at 7). The Court agrees.

In *Fineman v. Armstrong World Industries Inc.*, 980 F.2d 171, 201-02 (3d Cir. 1992), cert. denied, *U.S.* , **[*13]** 113 S. Ct. 1285, 122 L. Ed. 2d 677 (1993) the Court held: "absent other relevant factors, a 55% market share will not prove the existence of monopoly power." And in *Barr*, the Court held that a 50% market share was insufficient to create "a dangerous probability" of monopolization. [978 F.2d at 115](#). This Court is bound by these precedents.

The Court notes that in [*Domed Stadium Hotel Inc. v. Holiday Inns Inc.*, 732 F.2d 480, 490 \(5th Cir. 1984\)](#) (footnotes and citations omitted), the Fifth Circuit held that market share of less than 50% can support a claim for attempted monopolization "if other factors such as concentration of market, high barriers to entry, consumer demand and strength of competition or consolidation trend in the market are present." Storis does not claim that any of the factors listed in *Domed Stadium* are present in this case. Rather, Storis merely states, without any citation to case law, that a 40% market share "is well over the threshold for an attempted monopolization claim." (Storis Br. at 6).

The Court disagrees. The Court is bound by *Barr*, which held that 50% market share is insufficient for attempted monopolization. Therefore, Storis's **[*14]** allegation that GERS will achieve less than 40% of the market is insufficient, as a matter of law, to state a claim for attempted monopolization. Storis's claim under the Sherman Act will be dismissed without prejudice pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

D. Tortious Interference With Prospective Economic Advantage

A claim for tortious interference with prospective economic advantage must allege:

- (1) a claimant's reasonable expectation of an economic benefit;
- (2) the defendant's knowledge of that expectancy;
- (3) the defendant's wrongful, intentional interference with that expectancy;
- (4) in the absence of interference, the reasonable probability that the claimant would have received the anticipated economic benefit; and
- (5) damages resulting from the defendant's interference.

Fineman, 980 F.2d 171, 186 (3d Cir. 1992) (citing, [*Printing Mart v. Sharp Electronics*, 116 N.J. 739, 751-52, 563 A.2d 31 \(1989\)](#)).

In *Fineman* the Third Circuit held that an element of this cause of action is "a sufficiently concrete prospective contractual relation." *Id.* at 195. In *Fineman*, the Court found that the plaintiff had failed **[*15]** to prove he would have gotten new customers in his consulting business. *Id.* The Court held the record was "devoid of any objective evidence that Fineman had any concrete plan for future consulting work." *Id.*

Storis need not prove at this stage of the litigation that it had sufficiently concrete prospective contracts with its customers. However, Storis must at least allege specific prospective contracts that were interfered with by GERS. Storis has failed to identify a single customer or a single contract that it was likely to consummate, but failed to consummate, due to the actions taken by GERS. As a result, Storis has failed to allege a claim for tortious interference with prospective economic advantage.

Therefore, Storis' claim for intentional interference with prospective economic advantage will be dismissed without prejudice pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

D. Tortious Interference With Contract

To state a claim for tortious interference with contract, Storis must allege: (1) the existence of a valid contract between Storis and a third party; (2) GERS' knowledge of the contract; (3) GERS intentional interference with that contract and (4) resulting [*16] actual damages. [Fleming v. United Parcel Service Inc., 255 N.J. Super. 108, 137, 604 A.2d 657 \(1992\)](#), aff'd, [273 N.J. Super. 526, 642 A.2d 1029 \(App. Div. 1994\)](#).

In the context of tortious interference with contract, plaintiff must allege the existence of a specific contract that was interfered with by defendant. In this case, Storis has failed to allege the existence of a specific contract that was interfered with by GERS. Therefore, Storis has failed to state a claim for intentional interference with contract. Storis's claim for intentional interference with contract will be dismissed without prejudice pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

E. Product Disparagement

To establish a claim for product disparagement the claim must prove (1) publication; (2) with malice (3) of false allegations concerning plaintiff's property or product (4) causing special damages. [System Operations Inc. v. Scientific Games Development Corp., 555 F.2d 1131, 1139041 \(3d Cir. 1977\)](#). In the present case, the GERS brochure is something that was mailed to Storis customers, therefore, there was publication. Storis claims that the GERS brochure contains numerous misrepresentations [*17] about the capabilities of Storis software. (Complaint P 13). This allegation is presumed to be true for the purposes of ruling on a motion pursuant to [Rule 12\(b\)\(6\)](#). However, Storis has not anywhere in its complaint alleged that the misrepresentations were made with "malice." In fact, the word "malice" does not appear in the complaint. Similarly, Storis has not alleged any facts suggesting that GERS acted with malice. Therefore, Storis has failed to state a claim for product disparagement. Storis's claim for product disparagement will be dismissed without prejudice pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

F. Storis Motion to Amend Complaint

Storis seeks to file an amended complaint pursuant to [Federal Rule of Civil Procedure 15](#). However, the amended complaint submitted by Storis does not cure any of the defects noted by the Court in this opinion. Therefore, the amended complaint is futile and will not be allowed.

CONCLUSION

For the reasons set forth above, the Court will deny defendant's motion to dismiss plaintiff's claim for predatory pricing pursuant to the Robinson-Patman Act. However, the Court will grant defendant's motion to dismiss and will dismiss without [*18] prejudice pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) plaintiff's claim for violation of [Section 2](#) of the Sherman Act; plaintiff's claim for tortious interference with prospective economic advantage; plaintiff's claim for tortious interference with contract and plaintiff's claim for product disparagement. The Court will deny plaintiff's motion to amend the complaint as futile.

An appropriate order is attached.

Dated: May 31, 1995

ALFRED M. WOLIN, U.S.D.J.

ORDER

In accordance with the Court's Opinion filed herewith,

It is on this 31st day of May, 1995,

ORDERED that defendant's motion to dismiss plaintiff's claim for predatory pricing pursuant to the Robinson-Patman Act is denied, in part; and it is further

ORDERED defendant's motion to dismiss is granted, in part; and it is further

ORDERED that plaintiff's claim for violation of [Section 2](#) of the Sherman Act is dismissed without prejudice; and it is further

ORDERED that plaintiff's claim for tortious interference with prospective economic advantage is dismissed without prejudice; and it is further

ORDERED that plaintiff's claim for tortious interference with contract is dismissed without prejudice; and [*19] it is further

ORDERED plaintiff's claim for product disparagement is dismissed without prejudice; and it is further

ORDERED that plaintiff's motion to amend its complaint is denied.

ALFRED M. WOLIN, U.S.D.J.

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G.K.A. Beverage Corp. v. Honickman

United States Court of Appeals for the Second Circuit

December 5, 1994, Argued ; June 1, 1995), Decided

Docket No. 94-7200

Reporter

55 F.3d 762 *; 1995 U.S. App. LEXIS 13556 **; 1995-1 Trade Cas. (CCH) P71,017

G.K.A. BEVERAGE CORP.; STATEN ISLAND BEVERAGE CORP.; CLOVER BEVERAGE DIST. CORP.; PRINCE BEVERAGE DIST. CORPORATION; GICCI BEVERAGE CORPORATION; V. IOCOLANO DISTRIBUTION CORPORATION; R-KET CORPORATION; P. LAUTAO CORPORATION; VIN-MARE DISTRIBUTION CORPORATION; MANUEL NIEVES LIMITED; VINCENT LAUTATO CORPORATION; ROCKVILLE DISTRIBUTION CORPORATION; LYNVEY BEVERAGE CORPORATION; PA DISTRIBUTION CORPORATION; STARLITE BEVERAGE CORPORATION; 396 6TH AVENUE SYSTEMS CORP.; RAPITZ BEVERAGE CORPORATION; RINDA BEVERAGE CORPORATION; R&E WOLDERICH CORPORATION; WINDY HILLS CORP.; VICTORIA HEIGHTS CORPORATION; DOMINO BEVERAGE CORPORATION; WESTERLEIGH BEVERAGE CORPORATION; QUINCO BEVERAGE CORPORATION; RODAN BEVERAGE CORPORATION; KARE-FRE BEVERAGE CORPORATION; BY SUM BEVERAGE CORPORATION; BREIT DISTRIBUTION CORPORATION; TITAN BEVERAGE CORPORATION; LUNDON BEVERAGE DISTRIBUTION CORPORATION; EL-LEN BEVERAGE CORPORATION; SCOGNAMIGLIO BEVERAGE CORPORATION; JOSEPH CAUCIELLA, INC.; BREITINGER DISTRIBUTION CORPORATION; FILMAR DISTRIBUTION LIMITED; J. MULVEY DISTRIBUTION CORPORATION; R.A.E. BEVERAGE CORPORATION; THREE GUYS DISTRIBUTION CORPORATION; KENNETH STEFFENS CORPORATION; JOHN BOEHLER CORPORATION; ROE BEVERAGE CORPORATION; DELTA SIGMA CORPORATION; MOE'S BEVERAGE CORPORATION; BARBARO 7UP DISTRIBUTION CORPORATION; GUMBY BEVERAGE CORPORATION; BIG DAN'S BEVERAGE CORPORATION; BALLATO BEVERAGE CORPORATION; JPM BEVERAGE CORPORATION; MILLER BEVERAGE CORPORATION; MATTY CASAMASSINA CORPORATION; DEL BEVERAGE CORPORATION; JERIJO CORPORATION; K&M BEVERAGE DISTRIBUTION CORPORATION; ACE METRO BEVERAGE CORPORATION; DAY LAYT DISTRIBUTION CORPORATION; FRANK MACCORONE CORPORATION; JENTINE BEVERAGE CORPORATION; F.C.L. BEVERAGE CORPORATION; TWIN EAST BEVERAGE CORPORATION; EUGENE & MICHAEL PARINE CORPORATION; ORLINO BEVERAGE CORPORATION; LAR-TIS LTD. CORP.; JAMES QUARTARARO CORPORATION; QUALITY BEVERAGE CORPORATION; M&A TISBO LIMITED; G&C FAVA CORPORATION; P.A.L. BEVERAGE CORPORATION; ALBANESE BEVERAGE CORPORATION; ROSARIO PANEBIANCO; FRANK SCARANO; JOE DECOSTANZO; FRANK GRASSO; JERRY BILOTTI; ROBERT RICH; RAYMOND LEVASSEUR; MIKE CHRISTINA; LINDA VITIELLO; LILLIAN BAGIELTO; ANTOINETTE M. GAMBINO; WILLIAM ROTTKAMP; RICHARD E. MISKOVSKY; NORMAN WALMSLEY; CONRAD PANZA; NICHOLAS J. FORTUNA; FREDERICK J. LUDWIG; MICHAEL HUBBARD; JACK QUARTARARO; MARY ELLEN TAFFO; and BART SIMONE, Plaintiffs-Appellants, v. HAROLD HONICKMAN; DR. PEPPER/SEVEN-UP COMPANIES, INC.; DR. PEPPER/SEVEN-UP CORPORATION; and LANCE T. FUNSTON, Defendants-Appellees.

Prior History: **[**1]** Appeal from dismissal of a complaint by the United States District Court for the Eastern District of New York (I. Leo Glasser, Judge) that alleged claims for violation of the antitrust laws and interference with contractual relations. We affirm the dismissal on the grounds that appellants lack antitrust standing and do not state a claim for interference with contractual relations.

Core Terms

distributors, antitrust, soft drink, bottling, acquisition, carbonated, contractual relationship, allegations, retail, anti trust law, monopolize, monopoly, antitrust claim, bankruptcy court, manufacturer, distribute, conspired, contracts, employees, brands

LexisNexis® Headnotes

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[Motions to Dismiss, Failure to State Claim

Where an appeal is from a [Fed. R. Civ. P. 12\(b\)\(6\)](#) dismissal for failure to state a claim upon which relief can be granted, a court assumes the allegations of the complaint to be true.

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

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

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

HN2[Private Actions, Standing

Antitrust injury is necessary, but not sufficient, for antitrust standing.

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

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

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

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

HN3[Private Actions, Standing

Merely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute "antitrust injury" sufficient to confer antitrust standing. It follows naturally that a party in a business relationship with an entity that failed as a result of an antitrust violation has not suffered the antitrust injury necessary for antitrust standing.

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

Contracts Law > Breach > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Interference With Business Relations

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

HN4 Distributorships & Franchises, Remedies

Under New York law, there are four elements to the tort of intentional interference with contractual relations: (i) Existence of a valid contract; (ii) defendant's knowledge of that contract; (iii) defendant's intentional procurement of the breach of that contract; and (iv) damages caused by the breach.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Interference With Business Relations

Torts > Business Torts > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN5 Causes of Action, Interference With Business Relations

To prevail on a claim for tortious interference with prospective business relations under New York law, plaintiff must demonstrate that defendant interfered with business relations existing between plaintiff and third party, either with the purpose of harming plaintiff or by means that are dishonest, unfair, or improper.

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PETER E. GREENE, New York, New York (Peter S. Julian, Skadden, Arps, Slate, Meagher & Flom, New York, New York, of counsel), for Defendant-Appellee Harold Honickman.

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DAVID A. ROBINSON, New York, New York, for Defendant-Appellee Lance T. Funston.

Judges: Before: KEARSE and WINTER, Circuit Judges, and CONNER, * District Judge.

*The Honorable William C. Conner, Judge, United States District Court for the Southern District of New York, sitting by designation.

Opinion by: WINTER

Opinion

[*764] WINTER, *Circuit Judge*:

Eighty-nine former distributors of Seven-Up soft drinks and other beverages (the "distributors") appeal from Judge Glasser's dismissal of their complaint alleging claims for violation of state and federal antitrust laws and interference with contractual relations. The distributors contend that the appellees, Dr. Pepper/Seven-Up Companies, Inc. and Dr. Pepper/Seven-Up Corporation (collectively "Dr. Pepper/Seven-Up"), Harold Honickman ("Honickman") and Lance T. Funston ("Funston") intentionally forced Seven-Up Brooklyn Bottling Company, Inc. ("Seven-Up Brooklyn") out of business in order to drive the distributors out of business and permit defendant Honickman to reacquire Seven-Up Brooklyn's assets free and [***3] clear of distribution agreements with the plaintiffs. This conduct, they argue, entitles them to relief under the antitrust laws. We affirm the district court's dismissal of the antitrust claims on the ground that the distributors lack antitrust standing. We also affirm the district court's dismissal on the merits of the state law claims for interference with contractual relations.

BACKGROUND

HN1 Because this appeal is from a *Fed. R. Civ. P. 12(b)(6)* dismissal for failure to state a claim upon which relief can be granted, we assume the allegations of the amended complaint to be true.

We begin with a brief description of the complaint's allegations concerning the structure of the soft drink industry and the role of the parties in that structure. Parent concentrate companies such as Dr. Pepper/Seven-Up sell syrup or concentrate to bottling companies, such as Seven-Up Brooklyn. The bottling companies obtain licenses to use that syrup or concentrate in bottling and distributing soft drinks in specified geographical areas. In the early 1990s, there were three bottlers in the New York City area: (i) the Coca-Cola Bottling Company of New York, which distributed Coca-Cola brands; (ii) Honickman, [***4] who sold the products of PepsiCo., Inc., and other brands such as Canada Dry; and (iii) Seven-Up Brooklyn and Seven-Up Bottling Company of New York. Seven-Up Brooklyn had contracts with independent truck drivers -- the plaintiff distributors -who paid Seven-Up Brooklyn for exclusive territorial rights to distribute its soft drinks to retail establishments.

Honickman entered the soft drink industry in 1977 and over time acquired numerous bottling companies. Without including the Seven-Up brands, which are the subject of this litigation, Honickman is alleged to control the sale to retailers of over half of the carbonated soft drinks in New York City. When the Seven-Up brands are included, Honickman is alleged to control 64 percent of that market. The combined market share of Honickman's companies and the one other large competitor in the bottling of carbonated soft drinks, Coca-Cola Bottling Company of New York, is alleged to constitute 95 percent of the carbonated soft drink market in New York City. Honickman does not presently use independent drivers to distribute its products but rather employs drivers directly.

We turn now to the events that gave rise to this litigation. In July [***5] 1987, Long Island Acquisition Company ("LIA"), a partnership in which Honickman and members of his family held a 52 percent share and Funston a [*765] 48 percent share, acquired all of Seven-Up Brooklyn's non-cola soft drink franchise rights, vehicles, vending machines, and related equipment. The complaint alleges that this transaction was facilitated by either a cash contribution or a loan guarantee from Canada Dry Bottling of New York, a Honickman-owned company. Seven-Up Brooklyn's plant in Melville, New York was acquired by Melville Business Partners L.P., a partnership of which the general and managing partner was Honickman and the six limited partners were his two children and four employees of Honickman-owned companies. Berriman Cozine Corporation, owned by Honickman's brother-in-law, purchased Seven-Up Brooklyn's facility in Brooklyn. According to the complaint, these acquisitions were financed largely by credit guarantees made by Honickman and Honickman-owned companies. Following the consummation of these transactions, LIA leased the Melville and Brooklyn facilities from their new owners.

Honickman's control of Seven-Up Brooklyn caused the Federal Trade Commission ("FTC") to investigate [**6] the anticompetitive effects of the acquisition. In late 1988, to avoid a legal dispute with the FTC, Honickman and his family sold their interest in LIA, which held the operating assets of Seven-Up Brooklyn, to Funston. However, the complaint alleges that Honickman remained secretly in control of Seven-Up Brooklyn and that the assets were transferred in such a way that Honickman could later reclaim them.

In November 1989, the FTC issued an administrative complaint challenging Honickman's acquisition of Seven-Up Brooklyn. Honickman subsequently entered into an agreement with the FTC providing that, for a period of ten years, Honickman would not acquire, directly or indirectly, any interest in any carbonated soft drink bottling operation in the New York metropolitan area without the prior approval of the FTC. Nevertheless, according to the complaint, Honickman and Funston secretly intended to cause Seven-Up Brooklyn to fail so that Honickman could reacquire it and counter any antitrust charges with the failing company defense. That defense permits an otherwise unlawful acquisition where the acquiree will go out of business if the acquisition is forbidden. See H.R. Rep. No. 1191, [**7] 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950); see also *International Shoe v. FTC*, 280 U.S. 291, 302-03, 74 L. Ed. 431, 50 S. Ct. 89 (1930); 4 Phillip Areeda & Donald F. Turner, *Antitrust Law*, §§ 924-931 (1978).

In October 1990, Seven-Up Brooklyn did in fact fail, filing a petition for Chapter 11 bankruptcy reorganization after a bank cancelled a line of credit. Thereafter, Seven-Up Brooklyn filed an application in the bankruptcy court for an order setting a hearing date to consider the sale of the company's assets. The application included a draft agreement pursuant to which Honickman would purchase Seven-Up Brooklyn's existing inventory, and a division of Dr. Pepper/Seven-Up would purchase Seven-Up Brooklyn's remaining franchise assets, which it in turn would sell to Honickman. At the bankruptcy court hearing, there were two bidders for the company's assets: Kenneth Kraus and the combination of Dr. Pepper/Seven-Up and Honickman.

The distributors favored the Kraus offer, which contemplated the continued operation of Seven-Up Brooklyn as a separate entity. At the hearing, the distributors alleged that Honickman, Funston, and Dr. Pepper/Seven-Up had conspired to rig [**8] the bidding in order to obtain market power in the carbonated soft drink market and had conducted a sham investigation to show falsely the lack of other qualified buyers. The bankruptcy court rejected both proposals and terminated Seven-Up Brooklyn's authority to use cash collateral. At a later hearing, according to the complaint, Dr. Pepper/Seven-Up represented to the bankruptcy court that Seven-Up Brooklyn was liable to it for more than a million dollars, and that any successor to Seven-Up Brooklyn would immediately be sued for this amount. According to the complaint, this discouraged the only other bidder from pursuing the acquisition of Seven-Up Brooklyn and allowed Honickman ultimately to make a successful bid. The bankruptcy court's order approving the acquisition of the assets of Seven-Up Brooklyn by Honickman was not appealed.

[*766] The FTC initially denied approval of the sale to Honickman on the ground that it failed to satisfy the failing company defense. Later, the FTC relented, permitting Honickman to acquire licenses from Dr. Pepper/Seven-Up and to distribute the soft drink brands formerly bottled by Seven-Up Brooklyn.

The distributors' complaint alleged that Honickman's [**9] efforts to acquire Seven-Up Brooklyn's non-cola bottling assets constituted monopolization of the carbonated soft drink market in New York City and intentional interference with present and prospective contractual relations.

The district court held that the claims were barred by the doctrine of res judicata, because the distributors' claims were "based essentially on the same factual issues that they raised before the bankruptcy court," but simply alleged new legal theories. As alternative grounds for the dismissal of the complaint, the district court held that: (i) the distributors failed to allege the type of antitrust injury necessary to confer standing to maintain a suit under the antitrust laws; (ii) the distributors' claim for tortious interference with present contractual relations failed because the distributors did not allege that Honickman's conduct proximately caused Seven-Up Brooklyn to breach its contract with the distributors; and (iii) the distributors' claim for tortious interference with prospective contractual relations failed because the distributors had not alleged that Honickman had taken any action with respect to the third parties with whom the distributors [**10] claimed to have had prospective relationships.

This appeal followed.

DISCUSSION

The distributors' complaint alleged three distinct claims for violation of state and federal antitrust laws: (i) that appellees conspired to eliminate both the distributors and Seven-Up Brooklyn as competitors, in order to monopolize the carbonated soft drink market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; (ii) that appellees conspired to restrain trade in order to monopolize the carbonated soft drink market at the bottler and distribution level, in violation of the Donnelly Act, N.Y. Gen. Bus. Law § 340; and (iii) that appellees attempted to monopolize the New York carbonated soft drink market, also in violation of Section 2 of the Sherman Act. We conclude that all three antitrust claims are barred because the distributors lack antitrust standing.

HN2[¹] Antitrust injury is necessary, but not sufficient, for antitrust standing. Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). Although antitrust standing analysis often includes additional factors, *id. at 111 n.6*; see also Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 66 [*11] (2d Cir. 1988) (setting forth factors comprising antitrust standing analysis), the issue of antitrust injury is dispositive in the instant case.

We believe that the distributors do not have standing to bring an antitrust claim against defendants because the distributors have not alleged an antitrust injury. Their antitrust claims essentially boil down to the contention that Honickman, Funston, and Dr. Pepper/Seven-Up conspired to destroy Seven-Up Brooklyn through predatory practices and, in doing so, eliminated the distributors' contractual rights with Seven-Up Brooklyn to market soft drinks at the retail level. For this elimination of contractual rights to be antitrust injury, it must constitute the kind of injury that the antitrust laws were directed at. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). However, **HN3**[¹] "merely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing." Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1378 (7th Cir. 1987). It follows naturally that a party in a business [*12] relationship with an entity that failed as a result of an antitrust violation has not suffered the antitrust injury necessary for antitrust standing. See, e.g., Lovett v. General Motors Corp., 975 F.2d 518, 521 (8th Cir. 1992) (denying [*767] antitrust standing to sole shareholder where only alleged injury stemmed from failure of corporation), *cert. denied*, 127 L. Ed. 2d 378, 114 S. Ct. 1058 (1994); Sharp v. United Airlines, Inc., 967 F.2d 404, 407-08 (10th Cir.) (denying antitrust standing to employees where only alleged injury stemmed from failure of corporation), *cert. denied*, 121 L. Ed. 2d 372, 113 S. Ct. 464 (1992).

If Seven-Up Brooklyn, before its bankruptcy, had cancelled its distribution agreements and hired delivery drivers as employees, the distributors would not have been able to assert an antitrust violation. Lacking such a claim against Seven-Up Brooklyn, the distributors also lack a claim against Honickman, Funston, and Dr. Pepper/Seven-Up, who, having taken over Seven-Up Brooklyn's business, have not hired the plaintiffs as distributors.

Although the distributors undoubtedly suffered injury as a result of the alleged antitrust violation, the injury suffered by the distributors is derivative [*13] of the injury suffered by Seven-Up Brooklyn. Thus, accepting the antitrust allegations as true, it was not the distributors that suffered direct antitrust injury, but Seven-Up Brooklyn. Therefore, the proper party to bring the antitrust action on these facts was Seven-Up Brooklyn, or, after its bankruptcy, the estate's trustee.

In A.G.S. Electronics, Ltd. v. B.S.R. (U.S.A.), Ltd., 460 F. Supp. 707 (S.D.N.Y.), *aff'd*, 591 F.2d 1329 (2d Cir. 1978), a manufacturer of record players acquired another manufacturer, thereby allegedly monopolizing the market. The acquiring manufacturer then terminated an exclusive distributorship contract which the acquired manufacturer had with the plaintiff. The court held that the terminated distributor lacked standing to assert an antitrust claim because the injuries "all flow from the termination of its distributorship rather than any anticompetitive effects of the defendants' acquisition of [the second manufacturer]." *Id. at 710*. We believe that the same result is mandated in the instant case.

The distributors attempt to recharacterize their antitrust claims by arguing that they suffered antitrust injury in the elimination of competition [**14] in retail distribution between themselves and Honickman. However, the so-called "distribution monopoly" is derived entirely from Honickman's share of the bottling market. Honickman's "distribution monopoly" thus involves only his product. Moreover, a vertically structured monopoly can take only one monopoly profit. See *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 318 (D.C. Cir. 1983); see also Robert H. Bork, *The Antitrust Paradox* 229 (2d ed. 1993); 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* § 725b (1978). If, as alleged, appellees successfully conspired to monopolize soft drink bottling in the New York area, they could reap no additional gain from monopolizing the retail distribution of soft drinks. If a monopolist at the distribution level were to restrict output to maximize profit, the restriction would deprive the monopolist at the bottling level of its maximizing output and price. Once having achieved the alleged bottling monopoly, therefore, appellees' sole incentive is to select the cheapest method of distribution. See *Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979). The distributors are thus free to offer their services to appellees, [**15] who have no incentive to reject the offer if it is more economical than use of their employees, and consumers of soft drinks will benefit from this competition.

The distributors' claim for tortious interference with contractual relations was also properly dismissed by the district court. The distributors allege that appellees intentionally interfered with Seven-Up Brooklyn's performance of the distribution contracts. **HN4** Under New York law, there are four elements to the tort of intentional interference with contractual relations: (i) existence of a valid contract; (ii) defendant's knowledge of that contract; (iii) defendant's intentional procurement of the breach of that contract; and (iv) damages caused by the breach. See *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 612 N.E.2d 289, 292, 595 N.Y.S.2d 931 (N.Y. 1993).

We believe that appellants' allegations fail to show that appellees had the requisite intent with regard to procuring the breach of Seven-Up Brooklyn's contracts [*768] with appellants. Nothing in the allegations may reasonably be read to suggest that the target of appellees' conduct was Seven-Up Brooklyn's contractual arrangements with appellants, any more than the target was Seven-Up Brooklyn's contracts [**16] with phone or electric companies. As alleged, Honickman's sole interest was to achieve the soft-drink bottling monopoly, and the distribution system utilized by the target of his allegedly predatory behavior was irrelevant to that goal.

The distributors' claim for tortious interference with prospective business relations was also properly dismissed by the district court for failure to state a claim. **HN5** To prevail on this claim, under New York law, "a plaintiff must demonstrate that the defendant interfered with business relations existing between a plaintiff and a third party, either with the purpose of harming the plaintiff or by means that are dishonest, unfair, or improper." *Volvo N. Am. Corp., 857 F.2d at 74*. The distributors contend that appellees interfered with their relationships with retailers and other final purchasers of soft drinks. As noted, however, appellees' alleged goal was to obtain a monopoly in bottling, and the distributors' relationship with their retail customers is irrelevant to that goal. The distributors thus make no allegations that appellees had any contact with the distributors' customers or that appellees tried to convince the customers to make contracts [**17] with them rather than the distributors. It is axiomatic that, in order to prevail on this claim, the distributors would have to show that the appellees intentionally caused the retailers not to enter into a contractual relation with them. See *Marilyn Miglin, Inc. v. Gottex Indus.*, 790 F. Supp. 1245, 1254 (S.D.N.Y. 1992); see also *Volvo N. Am. Corp., 857 F.2d at 74*. The distributors cannot allege such intentional interference, and their claim therefore fails.

CONCLUSION

For the foregoing reasons, we affirm the dismissal of the complaint.



Manufacturers Life Ins. Co. v. Superior Court

Supreme Court of California

June 1, 1995, Decided

No. S031022.

Reporter

10 Cal. 4th 257 *; 895 P.2d 56 **; 41 Cal. Rptr. 2d 220 ***; 1995 Cal. LEXIS 3138 ****; 95 Daily Journal DAR 7060; 95 Cal. Daily Op. Service 4114; 1998-1 Trade Cas. (CCH) P72,195

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.

Prior History: [****1] Superior Court of the City and County of San Francisco, No. 920327, Alex J. Saldamando and Ira A. Brown, Jr., Judges.

Disposition: The judgment of the Court of Appeal is affirmed.

Core Terms

Cartwright Act, Practices, Unfair, exemption, cause of action, insurance industry, antitrust, counts, remedies, dictum, insurance business, regulation, superseded, insurers, insurance commissioner, insurance company, trade practice, defendants', displace, unfair competition, civil liability, provisions, demurrsers, brokers, unfair business practice, absolve, relieve, unfair trade practice, specific provision, title company

LexisNexis® Headnotes

Civil Procedure > Appeals > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

HN1 Civil Procedure, Appeals

For purposes of appellate review, the court assumes that all well-pleaded material allegations of the complaint are true.

Insurance Law > Industry Practices > General Overview

HN2 Insurance Law, Industry Practices

See [Cal. Ins. Code § 790.](#)

Insurance Law > Industry Practices > General Overview

HN3 Insurance Law, Industry Practices

The California Insurance Commissioner has no power to initiate a criminal proceeding against, or an action to impose civil liability on, a person who engages in unfair trade practices. The authority of the commissioner is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate.

Governments > Legislation > Interpretation

HN4 Legislation, Interpretation

Well-established canons of statutory construction preclude a construction that renders a part of a statute meaningless or inoperative. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. [Cal. Civ. Proc. Code, § 1858](#). Pursuant to this mandate a court must give significance to every part of a statute to achieve the legislative purpose.

Evidence > Judicial Notice > General Overview

HN5 Evidence, Judicial Notice

Pursuant to [Cal. Evid. Code § 459](#), a reviewing court must take judicial notice of any matter that was properly noticed by the trial court or of which the trial court was required to take notice under [Cal. Evid. Code § 451](#). The reviewing court may also take judicial notice of matters specified in [Cal. Evid. Code § 452](#).

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

HN6 Legislation, Interpretation

The presumption against finding a pro tanto repeal of a statute in the enactment of subsequent legislation on the subject is so strong that the court will do so only if the later statute revises the earlier in a manner that necessarily implies legislative intent to substitute the new statute for the older.

Insurance Law > Industry Practices > General Overview

HN7 Insurance Law, Industry Practices

The Unfair Insurance Practices Act (UIPA), [Cal. Ins. Code § 790 et seq.](#), does not create an exemption from remedies for unlawful conduct in the insurance industry under the Cartwright Act, [Cal. Bus. & Prof. Code § 16720-16770](#), or the Unfair Competition Act, [Cal. Bus. & Prof. Code § 17200 et seq.](#) Because the state scheme of regulation of the insurance industry is not wholly inconsistent with their application, no exemption may be implied.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

HN8 Exemptions & Immunities, McCarran-Ferguson Act Exemption

See [Cal. Ins. Code § 1861.03\(a\)](#).

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

HN9 Regulated Practices, Trade Practices & Unfair Competition

See [Cal. Bus. & Prof. Code § 17205](#).

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

An insurance agency brought statutory causes of action against various insurance companies for violation of the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16721.5](#)), the Unfair Competition Act (UCA) ([Bus. & Prof. Code, § 17200](#)), and the Unfair Insurance Practices Act (UIPA) ([Ins. Code, § 790.03](#)), alleging that the insurance companies had engaged in an unlawful boycott against it. The trial court sustained, with leave to amend, defendants' demurrers to the Cartwright Act causes of action, but overruled the demurrers with respect to the UCA and UIPA claims. Defendants sought a writ of mandate directing the trial court to sustain the demurrers to those counts. Pending the determination of that matter, plaintiff filed an amended complaint in which it again attempted to state the Cartwright Act claims. The trial court again sustained demurrers, and plaintiff petitioned for a writ of mandate to compel the trial court to overrule the demurrers. (Superior Court of the City and County of San Francisco, No. 920327, Alex Saldamando and Ira A. Brown, Jr., Judges.) The Court of Appeal, First Dist., Div. Two, Nos. A052795 and A055038, issued a writ of mandate directing the trial court to set aside its first order insofar as it overruled defendants' demurrers to the cause of action under the UIPA, and to sustain those demurrers without leave to amend. The court also issued a writ of mandate directing the trial court to set aside its second order insofar as it sustained defendants' demurrers to the causes of action under the Cartwright Act, and to overrule the demurrers to those causes of action.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that neither the language of the UIPA nor its history suggests that the Legislature intended by its enactment to abolish the Cartwright Act and UCA remedies for conduct which the UIPA also proscribes. [Ins. Code, § 790.09](#) (civil and criminal liability is unaffected by cease-and-desist order under UIPA), cannot be construed so as to conclude that, in adopting the UIPA, the Legislature intended that only the Insurance Commissioner be authorized to remedy unlawful conduct by insurance companies. The court also held that a prior opinion of the Supreme Court did not hold that the UIPA exempted the insurance industry from application of the Cartwright Act and other antitrust-related remedies, and that it was not required by principles of stare decisis to construe the UIPA as creating a wholesale exemption from remedies under the Cartwright Act and the UCA for the insurance industry. Moreover, the enactment of [Ins. Code, § 1861.03, subd. \(a\)](#) (insurance business is subject to laws of state applicable to any other business), as part of Prop. 103 did not imply that prior to the adoption of that proposition, the insurance industry was exempt from antitrust regulation other than that of the Insurance Code. Finally, the court held that the Court of Appeal did not "seriously compromise" the

Supreme Court's holding that there may be no private UIPA cause of action under [Ins. Code, § 790.03](#), when it held that, although plaintiff could not plead around the limitation in [Ins. Code, § 790.03](#), against a private civil cause of action under the UIPA by relying on conduct which violated only the UIPA as the basis for a cause of action under the UCA, the conduct on which plaintiff predicated that cause of action also violated the Cartwright Act and thus could form the basis for a cause of action under the UCA. (Opinion by Baxter, J., with Lucas, C. J., Kennard, Arabian, George and Werdegar, JJ., concurring. Separate concurring opinion by Mosk, J.)

Headnotes

[CA\(1a\)](#) [down] (1a) [CA\(1b\)](#) [down] (1b) [CA\(1c\)](#) [down] (1c)

Monopolies and Restraints of Trade § 6—Cartwright Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act: Unfair Competition § 3—Unfair Competition Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act: Insurance Companies § 2—Regulation.

--Neither the language of the Unfair Insurance Practices Act (UIPA) ([Ins. Code, § 790 et seq.](#)) nor its history suggests that the Legislature intended by its enactment to abolish the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) and Unfair Competition Act (UCA) ([Bus. & Prof. Code, § 17200 et seq.](#)) remedies for conduct which the UIPA also proscribes. [Ins. Code, § 790.09](#) (civil and criminal liability is unaffected by cease-and-desist order under UIPA), cannot be construed so as to conclude that, in adopting the UIPA, the Legislature intended that only the Insurance Commissioner be authorized to remedy unlawful conduct by insurance companies. Since the Insurance Commissioner has no power to initiate a criminal proceeding against, or an action to impose civil liability on, a person who engages in unfair trade practices, such a construction would render that part of [Ins. Code, § 790.09](#), which preserves civil and criminal liability meaningless. Further, a conclusion that the Legislature intended by [Ins. Code, § 790.09](#), to displace Cartwright Act, Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)), and UCA remedies would be contrary to consistent administrative construction of the act and construction by courts in other states which have adopted the same or substantially similar statutes.

[See 1 **Witkin**, Summary of Cal. Law (9th ed. 1987) Contracts, § 575 et seq.; 6 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 1159 et seq.; 11 **Witkin**, Summary of Cal. Law (9th ed. 1990) Equity, §§ 93, 94.]

[CA\(2\)](#) [down] (2)

Words, Phrases, and Maxims § 7—Absolve.

--"Absolve" means to set free from an obligation or the consequences of guilt.

[CA\(3\)](#) [down] (3)

Words, Phrases, and Maxims § 7—Obstruct.

--"Obstruct" means to block or close up by an obstacle.

[CA\(4\)](#) [down] (4)

Words, Phrases, and Maxims § 7—Impede.

--"Impede" means to interfere with or slow the progress of.

CA(5)[] (5)**Statutes § 16—Repeal—By Implication—Presumption Against.**

--The presumption against finding a pro tanto repeal of a statute in the enactment of subsequent legislation on the subject is so strong that the court will indulge in such a presumption only if the later statute revises the earlier statute in a manner that necessarily implies a legislative intent to substitute the new statute for the older one.

CA(6a)[] (6a) CA(6b)[] (6b)**Monopolies and Restraints of Trade § 6—Cartwright Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act—Effect of State Decisis: Unfair Competition § 3—Unfair Competition Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act: Insurance Companies § 2—Regulation.**

--In an action by an insurance agency, alleging that defendant insurance companies had engaged in an unlawful boycott against it, the Supreme Court was not required by principles of stare decisis to construe the Unfair Insurance Practices Act (UIPA) ([Ins. Code, § 790 et seq.](#)) as creating a wholesale exemption from remedies under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) and the Unfair Competition Act (UCA) ([Bus. & Prof. Code, § 17200 et seq.](#)) for the insurance industry. A prior opinion by the Supreme Court, in which it was stated that certain statutory and common law protections against combinations in restraint of the insurance trade were superseded by specific provisions of the Insurance Code, did not hold that the UIPA supersedes and displaces the Cartwright Act and the UCA prohibitions on anticompetitive activities and unfair business practices by insurers. Also, the Supreme Court has never held that the insurance industry is exempt from antitrust and unfair competition laws or that it enjoys immunity from civil liability for such conduct. Finally, even if the court accepted the argument that the UIPA and [Ins. Code, § 790.03](#) (prohibited unfair or deceptive acts or practices), supplant the Cartwright Act and UCA, and assuming the prior opinion could be read as holding that [Ins. Code, § 790.09](#) (civil and criminal liability is unaffected by cease and desist order under UIPA), permits only administrative sanctions for anticompetitive activities and unfair business practices proscribed by the UIPA, principles of stare decisis would not have precluded reconsideration of that conclusion.

CA(7)[] (7)**Monopolies and Restraints of Trade § 6—Cartwright Act—Exemption for Insurance Industry from Remedies Under Act: Unfair Competition § 3—Unfair Competition Act—Exemption for Insurance Industry from Remedies Under Act: Insurance Companies § 2—Regulation.**

--Neither the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) nor the Unfair Competition Act ([Bus. & Prof. Code, § 17200 et seq.](#)) creates a wholesale exemption from remedies thereunder for the insurance industry, and, since the state scheme of regulation of the insurance industry is not wholly inconsistent with their application, no exemption may be implied.

CA(8)[] (8)**Monopolies and Restraints of Trade § 6—Cartwright Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act—Effect of Proposition 103: Unfair Competition § 3—Unfair Competition Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act: Insurance Companies § 2—Regulation.**

--The enactment of [Ins. Code, § 1861.03, subd. \(a\)](#) (insurance business is subject to laws of state applicable to any other business), as part of Prop. 103 did not imply that prior to the adoption of that proposition, the insurance industry was exempt from antitrust regulation other than that of the Insurance Code. Although Prop. 103 was

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intended to terminate an insurance industry antitrust exemption, as manifested in [Ins. Code, § 1861.03, subd. \(a\)](#), and in the ballot materials provided to the voters, it also repealed Ins. Code, former §§ 1853, [1853.6](#), and 1853.7. Those sections were part of the McBride-Grunsky Act, which was enacted after the Supreme Court held that the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) applied to the insurance industry; they created a partial antitrust exemption applicable only to certain property and casualty lines of insurance. Therefore, the declaration of purpose in [Ins. Code, § 1861.03, subd. \(a\)](#), and the ballot pamphlet statements may have reflected nothing more than an intent to terminate the partial antitrust exemption granted to those lines of property and casualty insurance. Moreover, even assuming that [Ins. Code, § 1861.03](#), did reflect a belief by the drafters of Prop. 103 and the electorate that the Cartwright Act and the Unfair Competition Act ([Bus. & Prof. Code, § 17200 et seq.](#)) were not applicable to the insurance industry, that belief would have been irrelevant. The addition of Ins. Code, § 1861.3, subd. (a), could not have ratified or supplied what was not present in the prior law.

CA(9) [] (9)

Unfair Competition § 3—Unfair Competition Act—Cause of Action as Predicated on Violations of Cartwright Act—As Compromising Rule of no Private Cause of Action Under Unfair Insurance Practices Act.

--In an action by an insurance agency, alleging that defendant insurance companies had engaged in an unlawful boycott against it, the Court of Appeal did not "seriously compromise" the Supreme Court's holding that there may be no private Unfair Insurance Practices Act (UIPA) ([Ins. Code, § 790 et seq.](#)) cause of action under [Ins. Code, § 790.03](#), when it held that, although plaintiff could not plead around the limitation, in [Ins. Code, § 790.03](#), against a private civil cause of action by relying on conduct which violated only the UIPA as the basis for a cause of action under the Unfair Competition Act (UCA) ([Bus. & Prof. Code, § 17200 et seq.](#)), the conduct on which plaintiff predicated that cause of action also violated the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) and thus could form the basis for a cause of action under the UCA. A cause of action for unfair competition based on conduct made unlawful by the Cartwright Act is not an "implied" cause of action which the Supreme Court held could not be found in the UIPA. There is no attempt to use the UCA to confer private standing to enforce a provision of the UIPA. Nor is the cause of action based on conduct that is absolutely privileged or immunized by another statute. In holding that the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in [Ins. Code, § 790.03](#), the Supreme Court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices.

[See 6 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 1172A.]

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No appearance for Respondent.

Judges: Opinion by Baxter, J., with Lucas, C. J., Kennard, Arabian, George, and Werdegar, JJ., concurring. Separate concurring opinion by Mosk.

Opinion by: BAXTER, J.

Opinion

[*263] [**58] [***222] BAXTER, J.

We granted review in this matter to consider the holding of the Court of Appeal [****3] that the Unfair Insurance Practices Act ([Ins. Code, § 790 et seq.](#)) does not supersede or displace insurance-industry-related claims under the Cartwright Act ([Bus. & Prof. Code, § 16720- 16770](#)) and/or the Unfair Competition Act ([Bus. & Prof. Code, § 17200 et seq.](#)) Simply stated, the issue is whether life insurance, which was not affected by Proposition 103, the 1988 initiative measure which expressly declares that other lines of insurance are subject to antitrust and unfair business practice laws ([Ins. Code, § 1861.03, subd. \(a\)](#)), is exempt from such laws.

We conclude that the decision of the Court of Appeal should be affirmed. Contrary to dictum in three decisions subsequent to [Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal. 2d 305 \[70 Cal. Rptr. 849, 444 P.2d 481\]](#) ([Greenberg v. Equitable Life Assur. Society \(1973\) 34 Cal. App. 3d 994, 999, fn. 2 \[110 Cal. Rptr. 470\]](#)); [Liberty Transport, Inc. v. Harry W. Gorst Co. \(1991\) 229 Cal. App. 3d 417 \[280 Cal. Rptr. 159\]](#); [Karlin v. Zalta \(1984\) 154 Cal. App. 3d 953 \[201 Cal. Rptr. 379\]](#)), this court did not hold there that the Legislature had granted the insurance industry a general exemption [****4] from state antitrust and unfair business practices statutes. Rather, the Legislature intended that rights and remedies available under those statutes were to be cumulative to the powers the Legislature granted to the Insurance Commissioner to enjoin future unlawful acts and impose sanctions in the form of license and certificate suspension or revocation when a member of the industry violates any applicable statute, rule, or regulation. (See, e.g., [Ins. Code, § 704, 704.5, 790.05, 790.07, 10433, 10435, 10450.6, 12900 et seq.](#))

[***223] I. BACKGROUND

These related petitions for writ of mandate are directed to several counts in the underlying superior court action by plaintiff Weil Insurance Agency, Inc. (Weil). The defendants are Manufacturers Life Insurance Company, [*264] other insurers, competing insurance brokers, trade associations, and an officer of one group of competing brokers (defendants). In the counts at issue here, Weil's complaint asserted statutory causes of action for violation of [Business and Professions Code sections 16720, 16721.5, and 17200](#), and [Insurance Code section 790.03](#).¹ [Business and Professions Code sections 16720 and 16721.5](#) are provisions of [****5] the Cartwright Act. [Business and Professions Code section 17200](#) is part of the Unfair Competition Act (UCA). [Section 790.03](#) is part of the Unfair Insurance Practices Act (UIPA).

¹ Unless otherwise indicated, all statutory references are to the Insurance Code.

The complaint alleged ² that Weil operated a successful insurance brokerage and consulting [**59] business in which it advised attorneys regarding settlement annuities. After Weil disclosed to those clients the actual costs of such annuities, the defendant insurance companies boycotted plaintiff's brokerage and conspired to prevent claimants from obtaining the information Weil provided. Allegedly they did so because the information plaintiff provided to attorneys and injury victims had an adverse impact on the ability of liability insurance carriers to settle personal injury claims below their cash settlement value. The complaint alleged that pursuant to the conspiracy, defendants denied injury victims and their attorneys critical information [****6] regarding annuities used to fund settlement of their claims; boycotted any broker, agent or consultant who provided information and/or consulting services to injury victims and their attorneys; refused to appoint brokers and consultants who did provide the information and/or services; prohibited their brokers, agents and consultants from providing the information and services; falsely disparaged brokers who did provide the information; gave bogus reasons for not dealing with brokers who offered consulting services to injury victims and their attorneys; threatened and intimidated brokers to coerce compliance with their scheme; and caused the trade association (defendant National Structured Settlements Trade Association) to adopt and enforce rules, guidelines and policies in furtherance of their scheme.

The [***7] purpose of these actions was to depress the cost of personal injury settlements below their cash value. The complaint alleged that, in furtherance of the conspiracy, and in retaliation for plaintiff's interference with it through its consulting and brokerage practices and efforts to educate the bar and insurance industry through articles authored by one of plaintiff's senior executives, defendants boycotted Weil and used coercion, intimidation, threats, and false disparagement of Weil to cause structured settlement [*265] annuity brokers and agents with whom Weil did business to discontinue that relationship, and to cause other annuity brokers to refuse all business dealings with Weil. Plaintiff's settlement annuity business was destroyed as a result of defendants' conduct.

The complaint asserted that the conduct also harmed the public in that it constituted price fixing, concerted output restriction, and a boycott, all of which were claimed to be per se violations of the Cartwright Act; its requirement that brokers refrain from dealing with Weil was a per se violation of the Cartwright Act; it constituted an unreasonable restraint intended to monopolize the business of insurance [***8] in violation of the UIPA; and it therefore involved unlawful, unfair or fraudulent business practices which violated the UCA.

The trial court sustained defendants' demurrers to Weil's first amended complaint with leave to amend as to the Cartwright Act causes of action, but overruled the demurrers with respect to the UCA and UIPA claims. Defendants then petitioned for a writ of mandate to compel the trial court to sustain the demurrers to those counts and the Court of Appeal issued an order directing the real party in interest to show cause why the peremptory writ should not issue as prayed.

[***224] Weil then filed an amended complaint in which it again attempted to state the Cartwright Act claims. The life insurance defendants demurred to the second amended complaint on the ground that the complaint failed to state a cause of action as to those counts. They argued in support of the demurrers that the Cartwright Act had been superseded in the business of insurance by [Insurance Code section 790.03](#), a provision of the UIPA. It relied for that claim on [Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal. 2d 305, 322](#) (hereafter *Chicago Title*), and [***9] [Greenberg v. Equitable Life Assur. Society, supra, 34 Cal. App. 3d 994](#). The trial court sustained those demurrers, and Weil petitioned for writ of mandate to compel the court to overrule the demurrers.

After the Court of Appeal summarily denied Weil's petition, this court granted review and transferred the matter back to the Court of Appeal with directions to issue an alternative writ. Although the two petitions [**60] had not previously been formally consolidated, the Court of Appeal joined them for purposes of argument and opinion. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 539, pp. 528-529; cf. [Pacific Legal Foundation v. California Coastal Com. \(1982\) 33 Cal. 3d 158, 165, fn. 3 \[188 Cal. Rptr. 104, 655 P.2d 306\].](#)) [*266]

II. THE COURT OF APPEAL OPINION

²  For purposes of this review, we assume that all well-pleaded material allegations of the complaint are true. ([Hendy v. Losse \(1991\) 54 Cal. 3d 723, 727, fn. 2 \[1 Cal. Rptr. 2d 543, 819 P.2d 1\].](#))

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In a thorough and thoughtful review of both the statutory language of the UIPA and its history, and the terms of the UCA, the Court of Appeal held that the UIPA does not supersede or displace actions under the Cartwright Act, and that a private cause of action may be stated under the UCA for violations of the Cartwright Act, but not for violations of the UIPA. We summarize the court's reasoning [****10] below.

A. Cartwright Act.

The Court of Appeal reasoned that the UIPA was enacted pursuant to the authority of the McCarran-Ferguson Act, [15 United States Code sections 1011-1015](#), in order to displace federal law which might otherwise have governed insurance trade practices, displacing the law of any state which did not generally proscribe the same industry conduct.³ In so doing the Legislature did not intend to shield the industry from otherwise applicable state law. The intent to preserve existing rights and remedies for unlawful business practices in the insurance industry was clear, as the Legislature had expressly provided in the UIPA, in [section 790.09](#), that "[n]o order to cease and desist under [the UIPA] directed to any person or subsequent administrative or judicial proceedings 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." The original UIPA bill did not contain this stipulation, and instead preserved only preexisting powers [****11] of the commissioner to enforce penalties, fines or forfeitures (Assem. Bill No. 1530 (1959 Reg. Sess.) § 1; see now § 790.08),⁴ but from the first amended version of the bill until its passage, the section preserving existing remedies had been included. (Assem. Amend. to Assem. Bill No. 1530 (1959 Reg. Sess.) Apr. 8, 1959; Assem. Amend. to Assem. Bill No. 1530 (1959 Reg. Sess.) May 6, 1959; [*267] Sen. Amend. to Assem. Bill No. 1530 (1959 Reg. Sess.) June 11, 1959; Stats. 1959, ch. 1737, § 1, p. 4191.)

[****12] It is probable that the inclusion of [section 790.09](#) reflected the understanding of the Legislature that adoption of the UIPA would make no change in existing law. The Legislative Analyst stated in an analysis of the UIPA bill that it "makes no substantive change in existing law." (Ops. Legis. Analyst, Analysis of Assem. Bill No. 1530 (May 20, 1959) p. 1.)

[***225] Moreover, the Court of Appeal observed, the Legislature had included specific provisions exempting specified classes of insurance from other laws. (E.g., § 795.7 [senior citizens health insurance], 1860.1 [casualty insurance rates], 11758 [workers' compensation], 12414.26 [title insurance].) Had the UIPA created a general exemption of insurance from the Cartwright Act and other laws, none of these provisions would have been necessary. Since the Legislature thereby demonstrated that it was aware of the need to create an exemption, and did not do so for other classes of insurance, the UIPA did not displace existing rights and remedies for unlawful business practices in [**61] the insurance industry, among them the Cartwright Act. Finding such displacement would necessarily be to find a pro tanto repeal of [****13] the Cartwright Act notwithstanding the rule that such repeals are disfavored and will be recognized only when the circumstances reflect a clear legislative intent to do so. (See [Roberts v. City of Palmdale \(1993\) 5 Cal. 4th 363, 379 \[20 Cal. Rptr. 2d 330, 853 P.2d 496\]](#); [Kennedy Wholesale, Inc. v. State Bd. of Equalization \(1991\) 53 Cal. 3d 245, 249 \[279 Cal. Rptr. 325, 806 P.2d 1360\]](#); [Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. \(1989\) 49 Cal. 3d 408, 419-420 \[261 Cal. Rptr. 384, 777 P.2d 157\]](#); [Hays v. Wood \(1979\) 25 Cal. 3d 772, 784 \[160 Cal. Rptr. 102, 603 P.2d 19\]](#); [Fuentes v. Workers' Comp. Appeals Bd. \(1976\) 16 Cal. 3d 1, 7 \[128 Cal. Rptr. 673, 547 P.2d 449\]](#).)

B. UCA.

³ [HN2](#)  [Section 790](#) expresses that intent: "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 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."

⁴ Section 790.08: "The powers vested in the commissioner in this article shall be additional to any other powers to enforce any penalties, fines or forfeitures, denials, suspensions or revocations of licenses or certificates authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive."

The Court of Appeal recognized that the UIPA does not create a private right of action for violations of its provisions ([*Moradi-Shalal v. Fireman's Fund Ins. Companies \(1988\) 46 Cal. 3d 287 \[250 Cal. Rptr. 116, 758 P.2d 58\]*](#) (*Moradi-Shalal*)), and that a plaintiff may not "plead around" that limitation by casting a cause of action based on a violation of the UIPA as one brought under the UCA. The Court of Appeal upheld the overruling [****14] of defendants' demurrers to the UCA cause of action, however, reasoning that a UCA cause of action may be predicated on a violation of the Cartwright Act. That followed because the UCA defines "unfair competition" as any "unlawful, [*268] unfair or fraudulent business act or practice" ([*Bus. & Prof. Code, § 17200*](#)), and permits any person to sue for injunctive and restitutionary relief for such conduct on behalf of the general public. ([*Bus. & Prof. Code, § 17204, 17203.*](#)) A violation of the Cartwright Act is such a practice. ([*People v. National Association of Realtors \(1981\) 120 Cal. App. 3d 459, 473-475 \[174 Cal. Rptr. 728\], later app. \(1984\) 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 \[235 Cal. Rptr. 228\].*](#))

III. DISCUSSION

Defendants contend that the Court of Appeal erred. Simply stated, their position is that, except to the extent that Proposition 103 applies, the insurance industry is exempt from any antitrust and unfair business practices legislation other than the UIPA. Therefore, insurers are subject only to the regulatory authority of the Insurance Commissioner and there [****15] is no private right of action to redress injuries brought about by combinations in restraint of trade and other unfair business practices in the insurance industry. They argue that in *Chicago Title* and all subsequent cases the courts have consistently held that the Cartwright Act does not apply to insurance industry practices, that stare decisis counsels adherence to those decisions, and that the *Chicago Title* decision and its progeny have been ratified by subsequent legislation, including Proposition 103. They also argue that the Court of Appeal has misconstrued [*section 790.09*](#), the UIPA provision which the court held preserves existing rights and remedies. That section, they argue, establishes only that administrative cease-and-desist orders do not preclude other administrative action related to the same conduct. Finally, they claim that permitting a UCA action for an unfair insurance practice that is prohibited by the UIPA would "seriously compromise" this court's holding in [*Moradi-Shalal, supra, 46 Cal. 3d 287*](#), that there is no private cause of action for violations of [*section 790.03*](#) even if the conduct also constitutes a violation of the Cartwright Act.

[***226] [****16] A. *Chicago Title*.

In reaching its conclusion that, in [*section 790.09*](#), the UIPA expressly preserved remedies for unlawful conduct in the insurance industry which existed at the time the UIPA was adopted, the Court of Appeal rejected defendants' argument that this court in fact held in *Chicago Title* that the UIPA exempted insurance from the Cartwright Act and other antitrust related remedies, a proposition which [*Greenberg v. Equitable Life Assur. \[**269\] Society, supra, 34 Cal. App. 3d 994 \[**62\]*](#) (*Greenberg*) states was the holding of *Chicago Title*. The Court of Appeal expressed the view that the statement in *Chicago Title* on which defendants relied was dictum, and found it to be neither compelling nor persuasive authority.

The language in *Chicago Title* to which defendants and the Court of Appeal refer appears, italicized, in this passage: "The Cartwright Act, as previously mentioned, is similar in spirit and substance to the federal legislation encompassed by the Sherman (15 U.S.C.A. § 1-7) and Clayton Acts (15 U.S.C.A. § 12-27). Private individuals, businesses, or corporations have, in the absence of express statutory authority, no [****17] standing to enforce such regulatory statutes. (Cf. [*Show Management v. Hearst Publishing Co., 196 Cal. App. 2d 606, 612-616 \[16 Cal. Rptr. 731\]*](#); [*West Coast Poultry Co. v. Glasner, 231 Cal. App. 2d 747 \[42 Cal. Rptr. 297\]; Hudson v. Craft, 33 Cal. 2d 654 \[204 P.2d 1, 7 A.L.R.2d 696\].*](#)) The Cartwright Act however follows federal policy which expressly contemplates private civil litigation based upon statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices. ([*Bus. & Prof. Code, § 17040- 17051.*](#))

*"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. Counts three (secret rebate), four (discriminatory pricing) and seven (unlawful rebate) clearly concern the regulation of rates charged by title insurers and title companies, and rate regulation has traditionally commanded administrative expertise applied*

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to controlled industries. ([Ins. Code § 12404- 12412](#); [****18] [County of Placer v. Aetna Cas. etc. Co., 50 Cal. 2d 182 \[323 P.2d 753\]](#); [Division of Labor Law Enforcement v. Moroney, 28 Cal. 2d 344 \[170 P.2d 31\]](#))" (*Chicago Title, supra, 69 Cal. 2d 305, 322-323*, italics added.)

Defendants argue that the italicized statement is not dictum and that, properly understood, *Chicago Title* held that Cartwright Act remedies for boycotts and other unlawful practices in the insurance industry had been superseded by the UIPA in [section 790.03, subdivision \(c\)](#). We need not decide here whether the passage to which the Court of Appeal referred was dictum or a holding of the court, however, as the passage did not refer to the UIPA. The Insurance Code provisions which *Chicago Title* cited are not part of the UIPA and are not in issue here.

Even assuming arguendo that the reference in *Chicago Title* to the superseding impact of Insurance Code provisions was not dictum, the holding was far narrower than defendants suggest.

[*270] Consideration of the nature of the action in *Chicago Title* is crucial to understanding that case. It arose on demurrers to the various causes of action stated by the plaintiffs. They sought injunctive [****19] relief and damages for unfair trade practices and combinations in restraint of trade, including a boycott of the plaintiffs' business. Plaintiffs were "underwritten title companies" that did title searches and examinations and prepared certificates or abstracts of title for title insurers, and delivered the title insurance policies issued by the insurers. (See § 12402.) In the counts at issue in the decision, plaintiffs alleged that the defendants⁵ violated antitrust [***227] laws, and engaged in price discrimination and unfair trade practices. They accused the defendants of conspiring to provide rebates in order to induce customers to transfer business to defendants.

[****20] [**63] After explaining that the counts directed to insurance rates could not state a cause of action because specific provisions of the Insurance Code (which are not part of the UIPA) gave the Insurance Commissioner authority over rates, the court went on to say that several other counts did not state a cause of action and that the factual allegations failed to support the charge. The Court of Appeal concluded for that reason that *Chicago Title* held only that the allegations of the complaint were insufficient, and that we had not held that the UIPA superseded the Cartwright Act insofar as insurance industry practices are concerned.

This court adopted, with modifications, the decision of the Court of Appeal in *Chicago Title*. Defendants argue that the court necessarily had the UIPA in mind when it stated that the Cartwright Act had been superseded by the specific provisions of the Insurance Code and that the statement referred to all of the counts of the complaint that were directed to insurance company defendants. They base their argument on a passage in the Court of Appeal opinion which, they assert, addressed the jurisdiction of the Insurance Commissioner. This court [****21] deleted that passage when it adopted the opinion of the Court of Appeal in *Chicago Title*, however.

Apart from the impropriety of citing and relying on a vacated Court of Appeal opinion, this argument necessarily lacks merit. The opinion of this [*271] court in *Chicago Title* is the sole source of decision and the reasoning underlying the decision. Moreover, deletion of a passage from a Court of Appeal opinion that is adopted by this court may reflect this court's unwillingness to adopt the view of the Court of Appeal on the deleted matter.

Defendants also argue that this court's analysis of the adequacy of the allegations of the *Chicago Title* complaint to state Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)) violations in counts unrelated to ratemaking addressed only claims made against defendants who were not insurance companies. Therefore, that discussion does not imply that in other circumstances a cause of action for conduct made unlawful by statutes other than the

⁵ The named defendants were: Lehman Brothers, an investment firm; Great Western Financial and Financial Corporation of America, financial holding companies owned by Lehman Brothers; Great Western Savings and Loan Association; Security Title Insurance Company; American Title Company; Summit Title Company; and Sherwood Escrow Company. Many of these defendants were not engaged in the insurance industry and thus did not hold certificates and/or licenses which the commissioner could revoke. The commissioner does have the power to seek an injunction against anyone who is violating or about to violate any provisions of the Insurance Code or regulations issued thereunder. (§ 12928.6.)

Plaintiffs competed directly with Summit Title Company and American Title Company for the business of title insurance companies.

UIPA could be stated against an insurer subject to that act. The discussion in point involved two counts alleging a boycott: "Appellants contend in counts six and eight that the conduct [****22] of the Sherwood and Great Western groups, respectively, infringes [Business and Professions Code section 17046](#) [part of the Unfair Practices Act]. The attempted application of this section to the facts evidences appellants' misinterpretation of the nature of a boycott. The allegation of boycott cannot be supported in this instance because everyone has the unrestricted right to select customers and sources of supply. ([Bus. & Prof. Code, § 17042](#); [A.B.C. Distributing Co. v. Distillers Distributing Corp., 154 Cal. App. 2d 175, 189 \[316 P.2d 71\]](#)) There is not, and could not be an allegation that it is unreasonable for Sherwood to buy through Summit, or for Great Western Financial to require its subsidiaries in the saving and loan or escrow business to engage the services of the title company in which it likewise has an interest. Not only are vertical distribution agreements in this instance contemplated by the Insurance Code, but 'it seems clear to us that vertical integration, as such without more, cannot be held violative of the Sherman Act.' [Citation.] Neither do exclusive dealing arrangements constitute boycotts" ([Chicago Title, supra, 69 Cal. 2d 305, 323-324](#))

[****23] This passage contemplates the possibility of a Cartwright Act or Unfair Practices Act claim, and rejects the claim stated by plaintiffs only because the facts alleged did not constitute a violation of either act.

Defendants' argument that these counts were not directed against insurance companies and that the discussion anticipates Cartwright Act or Unfair Practices Act claims only against persons or entities that are not engaged in the business of insurance is not supported by the opinion. The "Sherwood group" to which the court referred included [****228] both Summit Title Company and Sherwood Escrow Company. ([Chicago Title, supra, 69 Cal. 2d 305, 318](#)) Summit, an underwritten title company (§ 12340.5 [former § 12402]) was [*272] subject to licensing and regulation under provisions of the Insurance Code. (§ 12389.2 [former **64] § 12396, added by Stats. 1965, ch. 361, § 2, p. 1467.).

Therefore, if the *Chicago Title* statement the Court of Appeal here deemed dictum was instead a holding of this court, the holding was much narrower than defendants' claim. The court said only that sections of the Insurance Code that are not part of the UIPA superseded [****24] other antitrust and unfair competition laws *insofar as they might apply to conduct related to rates and ratemaking* which are governed by specific provisions of the Insurance Code that authorize some practices and as to others gave the Insurance Commissioner authority to determine the propriety of the conduct. None of the Insurance Code provisions cited by the court in *Chicago Title* is part of the UIPA and this court did not mention the UIPA in the *Chicago Title* opinion. Nor did the court say that in [section 790.09](#) the UIPA reflects legislative intent to displace remedies created by the Cartwright Act or other statutes directed to unfair trade practices.

Had the court concluded in *Chicago Title* that the UIPA displaced preexisting legislation in the field and that the insurance industry was thereby exempted from antitrust and other unfair business practices remedies applicable to other industries, there would have been no need to explain in detail, as the court did ([Chicago Title, supra, 69 Cal. 2d at pp. 324-325](#)), why the allegations supporting the remaining counts of the complaint were insufficient for other reasons to state causes of action under [****25] the Cartwright Act or the Unfair Practices Act.⁶

[****26] B. *Legislative history and administrative construction of the UIPA.*

⁶ Possibly the most telling rebuttal to defendants' claim that *Chicago Title* held that antitrust and unfair competition statutes other than the UIPA did not apply to the insurance industry is found by negative implication in the dissent of Justice Mosk. ([Chicago Title, supra, 69 Cal. 2d 305, 328](#) (dis. opn. of Mosk, J.)) In that dissent, Justice Mosk disagreed with the court's conclusion that the complaint did not state a cause of action under the Cartwright Act. The reasoning is directed exclusively to the allegations necessary to plead such a cause of action. Had the court held that the Cartwright Act was superseded by the UIPA, as defendants argue, the absence from the dissent of any reference to or acknowledgment of that holding would be quite remarkable.

Moreover, had the majority held that the UIPA precluded any Cartwright Act claim, the opinion would certainly have responded to the dissent by observing that in light of the holding on the effect of the UIPA, the adequacy of the allegations pleading those causes of action was irrelevant.

CA(1a) [↑] (1a) Defendants offer a construction of [section 790.09](#) which, they argue, demonstrates that in adopting the UIPA, the Legislature intended that only the Insurance Commissioner be authorized to remedy unlawful conduct [*273] by insurance companies. They argue that in providing that a cease-and-desist order does not relieve a person of civil or criminal liability, [section 790.09](#) simply gives nonpreclusive effect to administrative cease and desist orders that are followed by further action by the Insurance Commissioner, and the section has no relevance to the issues in this case. In their view [section 790.09](#) means only that the issuance of a cease and desist order by the Insurance Commissioner does not preclude other action by the commissioner directed to the same impermissible trade practice. Defendants argue that the Court of Appeal erred in its construction of [section 790.09](#) when that court concluded that the section stated that the commissioner's issuance of a cease and desist order shall not "obstruct or impede" the imposition of civil liability or criminal penalties. They perceive a crucial difference in [****27] the actual language of the statute which provides that such orders do not "relieve or absolve" a person from imposition of civil liability or criminal penalties. That distinction, defendants claim, precludes viewing [section 790.09](#) as a "savings clause" and demonstrates that its purpose is merely to provide that cease and desist orders do not have a preclusive effect.

We agree that the definitions of the words used in the two phrases differ. **CA(2)** [↑] (2) "Absolve" is defined as "to set free from an obligation or the consequences of guilt." (Webster's New Collegiate Dict. (1981) p. 969.) **CA(3)** [↑] (3) "Obstruct" [**229] means "to block or close up by an obstacle," **CA(4)** [↑] (4) while "impede" means "to interfere with or slow the progress of." (*Id. at p. 570.*) **CA(1b)** [↑] (1b) We fail to find in those distinctions the crucial [*65] difference noted by defendants and do not agree with defendants that "relieve or absolve" is beyond question language of res judicata and claim preclusion. Defendants cite no statute or case using those terms in reference to res judicata and claim preclusion and we are aware of none. The definition of "relieve and absolve" offered by defendants leads us to the same conclusion reached by the Court of [****28] Appeal. The issuance of a cease-and-desist order enjoining future unlawful conduct does not free the offender from the civil obligation or criminal guilt incurred as a result of the unlawful conduct he has engaged in prior to issuance of the order.

Defendants offer no satisfactory answer to the observation of the Court of Appeal that as defendants construe [section 790.09](#), its reference to civil and criminal liability becomes meaningless. The section provides that a ceaseand-desist order to a person does not "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." (Italics added.) **HN3** [↑] The Insurance Commissioner has no power to initiate a criminal proceeding [*274] against, or an action to impose civil liability on, a person who engages in unfair trade practices. The authority of the commissioner is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate. ([Sherhoff v. Superior Court \(1975\) 44 Cal. App. 3d 406, 409 \[118 Cal. Rptr. 680\].](#))

[****29] That part of [section 790.09](#) which preserves civil and criminal liability would be meaningless if defendants' proposed construction of the section were accepted. **HN4** [↑] Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. ([Code Civ. Proc., § 1858.](#)) Pursuant to this mandate we must give significance to every part of a statute to achieve the legislative purpose. ([Schwab v. Rondel Homes, Inc. \(1991\) 53 Cal. 3d 428, 435 \[280 Cal. Rptr. 83, 808 P.2d 226\]; J. R. Norton Co. v. Agricultural Labor Relations Bd. \(1979\) 26 Cal. 3d 1, 36-37 \[160 Cal. Rptr. 710, 603 P.2d 1306\].](#))

Not only is the construction defendants suggest inconsistent with the language of [section 790.09](#), but a conclusion that the Legislature intended by [section 790.09](#) to displace [****30] Cartwright Act, Unfair Practices Act, and UCA remedies would be contrary to consistent administrative construction of the act and available legislative history. It would also be contrary to the conclusion of courts of other states which have adopted the same or similar legislation in order to take advantage of the McCarran-Ferguson Act exemption from application of the federal law that existing rights and remedies are preserved by this provision.

The Cartwright Act (Stats. 1941, ch. 526, § 1, p. 1834) and the Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#), also added by Stats. 1941, ch. 526, § 1, p. 1834) predate the UIPA (Stats. 1959, ch. 1737, § 1, p. 4191). The Legislature was aware that almost all of the practices which the UIPA prohibits in [section 790.03](#) and defines as "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance" were already proscribed under those acts.⁷ When the UIPA was introduced as Assembly Bill No. 1530 in 1958, its acknowledged purpose was to preclude [\[*275\]](#) federal jurisdiction over the business of insurance. [Section 790](#) states that purpose: "The purpose of this article is to regulate trade [\[****31\]](#) practices in the [\[**66\] \[***230\]](#) 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." Lower courts have repeatedly recognized that the purpose of the UIPA is to displace federal law, not existing state law in the field of antitrust and unfair competition. (See, e.g., [Karlin v. Zalta, supra, 154 Cal. App. 3d 953, 966](#); [American Internat. Group, Inc. v. Superior Court \(1991\) 234 Cal. App. 3d 749, 756-758 \[285 Cal. Rptr. 765\]](#).)

[\[****32\]](#) Moreover, as the Court of Appeal recognized, nothing in the history of the UIPA reflects legislative intent to bring about a pro tanto repeal of the Cartwright Act or the UCA.

At the time the bill was passed the Legislative Analyst expressed the view that adoption of the UIPA made no change in existing law, stating: "The bill makes no substantive change in existing law as the insurance commissioner has in the past regulated such matters under his general powers." (Ops. Legis. Analyst, Analysis of Assem. Bill No. 1530 (May 20, 1959) p. 1.) That this understanding of the UIPA was shared by the Legislature is confirmed by that body's enactment of the specific exemptions from antitrust legislation noted above, exemptions that would have been unnecessary had the UIPA effected a blanket exemption of the insurance industry from the rights and remedies available under the Cartwright Act, UCA and other legislation.⁸

[\[****33\] \[*276\]](#) As the Court of Appeal noted, [section 790.09](#) was patterned after a draft of the Model Unfair Insurance Practices Act proposed by the National Association of Insurance Commissioners (NAIC) (exhibit B to Rep. of Joint Com. on Federal Legislation, etc. (Jan. 24, 1947) § 8(d); Proceedings, 78th Ann. Sess., NAIC (1947)) p. 398),⁹ and has been construed in other states which have adopted the same or substantially similar statute as

⁷ Records of the Insurance Commissioner of which the Court of Appeal took judicial notice reflect that in a memorandum to the Insurance Commissioner at the time Assembly Bill No. 1530 was introduced, his chief assistant advised that the acts proscribed by the bill were covered by other statutes, and in particular the acts of boycott, threat, or intimidation were proscribed by the Cartwright Act. The chief assistant expressed concern that notwithstanding other sections of the UIPA, it could be construed to preclude use of the sanctions available under existing law. That concern led to the inclusion of [section 790.09](#) in the proposed legislation.

⁸ The Insurance Commissioner, whose office proposed inclusion of [section 790.09](#) in the UIPA to ensure that existing remedies would be preserved, continues to take the position that the Legislature did not intend, by adoption of the UIPA, to supersede the Cartwright Act or any other state laws. Appearing as amicus curiae in support of plaintiff, the commissioner expresses his belief that regulatory enforcement by his office is complementary to the Cartwright Act and the UCA. Both the commissioner and the California District Attorneys Association, which also appears as amicus curiae, express the belief that the public interest is served by vigorous enforcement of all three statutes. The California District Attorneys Association asserts that actions under the UCA have become the principal law enforcement instrument of prosecutors in the areas of consumer protection and unfair competition, with more than 200 such actions being prosecuted annually. The UCA is also the basis for prosecutions brought to supplement provisions of the Health and Safety Code and the Labor Code to remedy public health and sanitation and public safety violations, and its use to supplement other provisions of law has been upheld repeatedly. (See, e.g., [People v. McKale \(1979\) 25 Cal. 3d 626, 632 \[159 Cal. Rptr. 811, 602 P.2d 731\]](#); [People v. Los Angeles Palm, Inc. \(1981\) 121 Cal. App. 3d 25, 33 \[175 Cal. Rptr. 257\]](#); [People v. Casa Blanca Convalescent Homes, Inc. \(1984\) 159 Cal. App. 3d 509 \[206 Cal. Rptr. 164, 53 A.L.R.4th 661\]](#).)

⁹ The request of plaintiff that this court take judicial notice of this and other materials related to the adoption of the UIPA, much of which was considered by the Court of Appeal, is granted. [HN5](#) Pursuant to [Evidence Code section 459](#), a reviewing court

preserving remedies already available at the time the UIPA was adopted in those states. (See *Attorney General of Tex. v. Allstate Ins. Co. (Tex.App. 1985) 687 S.W.2d 803, 805; Application of Kusher (1981) 108 Misc. 2d 329 [437 N.Y.S.2d 889, 890-891]; Fischer, etc. v. Forrest T. Jones & Co. (Mo. 1979) 586 S.W.2d 310, 313, 315; Dodd v. Commercial Union Ins. Co. (1977) 373 Mass. 72 [365 N.E.2d 802, 805]; Correa v. Pennsylvania Mfrs. Ass'n. Ins. Co. (D.Del. 1985) 618 F. Supp. 915, 926; Grand Ventures, Inc. v. Whaley (Del.Super.Ct. 1992) 622 A.2d 655, 664; Mead v. Burns (1986) 199 Conn. 651 [509 A.2d 11, 18]; Skinner v. Steele (Tenn.App. 1987) 730 S.W.2d 335, 337-338; Hardy v. Pennock Ins. Agency, Inc [****34] . (1987) [***231] 365 Pa. Super. 206 [**67] [529 A.2d 471, 479]; St. ex rel . Stratton v. Gurley Motor Co. (1987) 105 N.M. 803 [737 P.2d 1180, 1183]; Phillips v. Integon Corp. (1984) 70 N.C.App. 440 [319 S.E.2d 673, 675]; Grams v. Boss (1980) 97 Wis.2d 332 [294 N.W.2d 473, 480].) ¹⁰ By contrast, no court has construed a version of [section 790.09](#) in the manner suggested by defendants as intended only to avoid a possible res judicata effect of "merger" of other administrative remedies into an action leading to a cease-and-desist order.*

[****35] [CA\(5\)](#)[↑] (5) The presumption against finding a pro tanto repeal of a statute in the enactment of subsequent legislation on the subject is so strong that the court will do so only if the later statute revises the earlier in a manner that [*277] necessarily implies legislative intent to substitute the new statute for the older. (*Roberts v. City of Palmdale, supra, 5 Cal. 4th 363, 379.*) [CA\(1c\)](#)[↑] (1c) Neither the language of the UIPA nor its history suggests that the Legislature intended by its enactment to abolish the Cartwright Act and UCA remedies for conduct which the UIPA also proscribes.

C. *Stare decisis.*

[CA\(6a\)](#)[↑] (6a) [CA\(7\)](#)[↑] (7) Invoking the principles of stare decisis, defendants next argue that the court should not depart from the construction of the UIPA that courts have followed since this court's decision in *Chicago Title*. As we have explained above, however, the court did not construe the UIPA or [section 790.09](#) of that act in *Chicago Title*, and has never held that the UIPA created a wholesale exemption from the Cartwright Act and UCA remedies for the insurance industry. [HN7](#)[↑] Those acts do not create such an exemption, and, since the state scheme of regulation of the insurance industry is not wholly [****36] inconsistent with their application, no exemption may be implied. (*Cianci v. Superior Court (1985) 40 Cal. 3d 903, 922 [221 Cal. Rptr. 575, 710 P.2d 375].*)

[CA\(6b\)](#)[↑] (6b) Defendants also rely on the Court of Appeal interpretation of *Chicago Title* in *Greenberg, supra, 34 Cal. App. 3d 994, 999*, footnote 2, which, they assert, was accepted by this court in *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880 [153 Cal. Rptr. 842, 592 P.2d 329]* (*Royal Globe*). Defendants recognize that *Royal Globe* was overruled in *Moradi-Shalal*, but argue that *Moradi-Shalal* did not address the claimed insurance industry exemption from antitrust and unfair competition laws, an exemption which, they assert, other courts have continued to recognize since *Moradi-Shalal* was decided.

In *Greenberg, supra, 34 Cal. App. 3d 994*, the plaintiff sought to state a cause of action under section 770 ¹¹ on behalf of himself and a similarly situated class. The complaint alleged that the defendant insurance company, as

must take judicial notice of any matter that was properly noticed by the trial court or of which the trial court was required to take notice under [Evidence Code section 451](#). The reviewing court may also take judicial notice of matters specified in [Evidence Code section 452](#).

¹⁰ Illinois, New Jersey, and Washington have enacted express exemptions from state [antitrust law](#) for those activities of insurers which are regulated by their insurance commissioners and/or authorized by statute. (Ill. Rev. Stat. ch. 38, par. 60-5 (1969); *N.J. Stat. Ann. § 56:9-5, subd. (b)(4); Wash. Rev. Code § 19.86.170*; see *B & L Pharmacy, Inc. v. Metropolitan Life Ins. Co. (1970) 46 Ill.2d 1 [262 N.E.2d 462]; Washington Osteo. Med. Ass'n v. King Co. Med. S. Corp. (1970) 78 Wn.2d 577 [478 P.2d 228].*)

[HN6](#)[↑] -

¹¹ Section 770: "No person engaged in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property and no trustee, director, officer, agent or other employee, or affiliate of, any such person shall require, as a condition precedent to financing the purchase of such property or to loaning money upon the security thereof, or as a condition prerequisite for the renewal or extension of any such loan or for the performance of any other act in

security for the balance on home loans it made, required the borrower to [*278] obtain from the company a policy of whole life insurance equal to the [****37] loan balance. It was alleged that comparable insurance was available from other insurance companies at a lower premium and that the "tie-in sale" violated section 770. On plaintiff's appeal after the trial court had sustained a demurrer without leave to amend, the Court of Appeal held that while no cause of action had been stated under that section, leave to amend should [**68] [***232] have been granted as it appeared that plaintiff could state a UIPA cause of action under [subdivision \(c\) of section 790.03](#) for an unfair business practice as that subdivision should be construed in light of similar statutes prohibiting activities in restraint of trade. In an accompanying footnote the *Greenberg* court stated: "In *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305 [70 Cal. Rptr. 849, 444 P.2d 481], our Supreme Court, in dealing with a demurrer to a complaint alleging restraint of trade by an insurance company, stated that the Cartwright Act which encompasses the general antitrust law of California is 'expressly superseded and contravened by the specific provisions of the Insurance Code.' (69 Cal. 2d at p. 322.)" (*Greenberg, supra*, 34 Cal. [I****381 App. 3d 994, 999, fn. 2.](#))

Contrary to defendants' characterization of our discussion of *Greenberg* in *Royal Globe*, *supra*, 23 Cal. 3d 880, we did not state there that the *Greenberg* [****39] court had correctly interpreted *Chicago Title* as precluding application of the Cartwright Act to all forms of anticompetitive conduct by insurers. Our opinion said only that the *Greenberg* court had "determined that the general antitrust prohibitions of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) were inapplicable to insurance companies and that only [section 790.03](#) prohibits insurers from engaging in anticompetitive activity." (*Royal Globe*, *supra*, 23 Cal. 3d 880, 886-887.) That statement was made in response to an argument that [section 790.09](#) did not provide affirmative authority for filing a civil action for violation of the UIPA. We said that this argument was contrary to the *Greenberg* holding that [section 790.03](#) did afford the basis for a civil suit. We did not hold, as defendants claim, that the *Greenberg* interpretation of *Chicago Title* was correct. That question was not before us in *Royal Globe*.

Defendants' claim that the *Greenberg* interpretation of *Chicago Title* has been "affirmed by all subsequent case authorities" does not withstand examination. Other than [Moradi-Shalal, supra, 46 Cal. 3d 287](#), which, as we have explained, [****40] does not approve the *Greenberg* interpretation, defendants cite only three cases in support of that proposition. None does so. The court quoted the *Greenberg* statement in [Karlin v. Zalta, supra, 154 Cal. App. 3d 953](#), but in *Karlin* the court concluded that plaintiffs' claims were not governed by the Insurance Code and, as defendants concede, the plaintiffs [*279] did not state a Cartwright Act claim. Thus, the court had no occasion to apply the *Greenberg* formulation of *Chicago Title*. In *Liberty Transport, Inc. v. Harry W. Gorst Co., supra, 229 Cal. App. 3d 417*, disapproved on other grounds in [Adams v. Murakami \(1991\) 54 Cal. 3d 105, 116 \[284 Cal. Rptr. 318, 813 P.2d 1348\]](#), the court stated in dictum that only the UIPA prohibits anticompetitive behavior by an insurer, citing *Greenberg*. ([229 Cal. App. 3d at p. 432](#).) There, however, the court acknowledged that because *Moradi-Shalal* had only limited retroactivity, the case was governed by *Royal Globe*. ([229 Cal. App. 3d at p. 426, fn. 1](#).) The actual holding was that the statute of limitations did not bar the [section 790.03](#) cause of action stated by the plaintiff.

[Maler v. Superior Court \(1990\) 220 Cal. App. 3d 1592 \[270 Cal. Rptr. 222\]](#) affords no more support to defendants. The opinion does not mention either *Chicago Title* or *Greenberg*, holding only that the adoption of [sections 1861.03](#) and [1861.10](#) as part of Proposition 103 at the November 8, 1988, election did not restore or create private causes of action under [section 790.03](#).¹²

connection therewith, that the person from whom such purchase is to be financed or to whom the money is to be loaned or for whom such extension, renewal or other act is to be granted or performed negotiate any insurance or renewal thereof covering such property through a particular insurance agent or broker."

¹² Contrary to defendants' assertion, [Maler v. Superior Court, supra, 220 Cal. App. 3d 1592](#), did not uphold the sustaining of a demurrer to a UCA cause of action. The trial court had overruled that demurrer (*id. at p. 1596*) and the only issue before the *Maler* court was whether the court erred in sustaining a demurrer to a cause of action for violation of [section 1861.03](#), the section added by Proposition 103 which states that the insurance industry is subject to antitrust and unfair business practices laws. ([220 Cal. App. 3d at p. 1595](#).)

Nor has this court, or any other, accepted defendants' argument that the UIPA [****42] [**69] [***233] exempts insurance companies from other state antitrust laws or from civil liability for anticompetitive conduct.¹³ The act itself contains no such exemption and, in the only case in which this court has considered that question, we held that the insurance industry is not exempt from Cartwright Act claims. (*Speegle v. Board of Fire Underwriters (1946) 29 Cal. 2d 34, 45-46 [172 P.2d 867]*.) As the Court of Appeal recognized, *Royal Globe* and *Greenberg* recognized such liability, holding only that the statutory authority for a civil action was found in the UIPA, not the Cartwright Act. We have since held in *Moradi-Shalal, supra, 46 Cal. 3d 287, 304-305*, that neither section 790.03 nor section 790.09 creates the basis for a private cause of action, but that insurance companies do have civil liability for such conduct. The Court of Appeal below correctly understood that "*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[] [who, in his [*280] [***43] dissent,] 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 . . .)." This court did not, as defendants argue, hold in *Moradi-Shalal* that insurers are subject to common law, but not statutory, civil liability for anticompetitive activities and unfair business practices. We said, with respect to third parties and insured who had no cause of action under section 790.03 for bad faith refusal to settle: "[C]ourts 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." (*Moradi-Shalal, supra, 46 Cal. 3d 287, 304-305*.) Bad faith refusal to settle is not conduct encompassed by the Cartwright Act. Whether statutory causes of action under the Cartwright Act and the UCA may be stated against an insurance company was not an issue in *Moradi-Shalal* which, in the context [***44] of bad faith refusal to settle claims, overruled *Royal Globe Ins. Co., supra*, 23 Cal. 3d 880, and confirmed that section 790.03, subdivision (h), was not the source of a private right of action against an insurer for that conduct.

Addressed in this context, defendants' argument that stare decisis principles mandate adherence to *Chicago Title* must fail. First and foremost, *Chicago Title* did not hold that the UIPA supersedes and displaces the Cartwright Act and UCA prohibitions on anticompetitive activities and unfair business practices by insurers. Second, we have never held that the insurance industry is exempt from antitrust and unfair competition laws or that it enjoys immunity from civil liability for such conduct. Finally, even were we to accept defendants' argument that the UIPA and section 790.03 supplant the Cartwright [***45] Act and UCA, and assuming *Chicago Title* could be read as holding that section 790.09 permits only administrative sanctions for anticompetitive activities and unfair business practices proscribed by the UIPA, principles of stare decisis would not preclude reconsideration of that conclusion.

Subdivision (c) of section 790.03 includes among the unfair methods of competition and unfair and deceptive acts or practices in the business of insurance it describes: "Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance." This broad prohibition of anticompetitive activities and unfair business conduct alone demonstrates that defendants may not claim justifiable reliance on a right to engage in such unlawful conduct. A [*281] belief that only administrative sanctions are available to deter or punish such conduct is not equivalent to a justifiable belief that the conduct is permissible. Thus, defendants have no basis [**70] [***234] for arguing that under their interpretation of *Chicago Title*, they were [***46] free to engage in concerted action that tended to result in an unreasonable restraint of trade.

"[T]he doctrine of stare decisis 'is based on the assumption that certainty, predictability and stability in the law are major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.' (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 758, p. 726, and see cases cited.)" (*Moradi-Shalal, supra, 46 Cal. 3d 287, 296*.) Even if defendants believed the Cartwright Act and UCA did not apply to an insurer, however, they would be bound to conform their conduct to the UIPA. That law mirrors the Cartwright Act's prohibition of boycotts and other forms of unfair and

¹³ Defendants appear to argue both that the insurance industry is exempt from antitrust regulation generally and that no private civil remedy for such conduct exists.

anticompetitive conduct. Therefore, defendants will not be heard to complain that they should not suffer civil liability because they lacked "reasonable assurance of the governing rules of law." In essence, their claim is that they believed they could violate the law and be subject only to sanctions imposed by the Insurance Commissioner. Principles of stare decisis do not protect a person from the consequences [****47] of actions based on such a belief.

D. Proposition 103.

CA(8)[⁸] (8) Defendants argue that legislation subsequent to *Chicago Title* has "ratified" the rule that the UIPA supplants the Cartwright Act. They reason that the addition of section [HN8\[⁸\]](#) 1861.03, subdivision (a), to the Insurance Code implies that prior to the adoption of Proposition 103 the insurance industry was exempt from antitrust regulation other than that of the Insurance Code. That subdivision provides: "The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Sections 51 to 53, inclusive, of the Civil Code), and the antitrust and unfair business practices laws (Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code)."

Clearly, Proposition 103 was intended to terminate an insurance industry antitrust exemption. That intent is manifest in [section 1861.03, subdivision \(a\)](#), and in the ballot materials provided to the voters. The Legislative Analyst stated in his analysis that "[t]he measure makes insurance companies subject to the state's antitrust [****48] laws." In the ballot pamphlet argument in favor of Proposition 103 and in rebuttal to the counterargument, proponents [*282] of Proposition 103 stated that the measure "will also end the insurers' exemption from the antimonopoly laws, . . ." and that it "eliminates the insurance industry's unfair exemption from the antitrust laws." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters Gen. Elect. (Nov. 8, 1988) argument in favor of Prop. 103, pp. 100-101, 140.)

However, Proposition 103 also repealed former sections 1853, [1853.6](#), and 1853.7 of the Insurance Code. Those sections were part of the McBride-Grunsky Act, which was enacted after this court held in [Speegle v. Board of Fire Underwriters, supra, 29 Cal. 2d 34](#), that the Cartwright Act applied to the insurance industry; they created a partial antitrust exemption applicable only to certain property and casualty lines of insurance.¹⁴ The McBride-Grunsky Act permitted casualty insurers to engage in rate-setting practices that, but for statutory authorization, would have violated [antitrust law](#). Therefore, the declaration of purpose in [section 1861.03, subdivision \(a\)](#), and the ballot pamphlet statements [****49] may reflect nothing more than an intent to terminate the partial antitrust exemption granted to those lines of property and casualty insurance. They do not necessarily reflect a belief that other lines of insurance enjoyed a similar exemption, or that the McBride-Grunsky Act had exempted even property and casualty lines from all aspects of antitrust and unfair competition laws.

[**71] [***235] Moreover, even assuming that [section 1861.03](#) did reflect a belief on the part of the drafters of Proposition 103 and the electorate that the Cartwright Act and UCA were not applicable to the insurance industry, that belief would be irrelevant. The addition of [section 1861.03, subdivision \(a\)](#), to the Insurance Code cannot [****50] ratify or supply what is not present in the prior law.

Proposition 103 does not apply to several lines of insurance, among which is life insurance. (§ 1861.13.)¹⁵ We need not decide if the drafters intended [subdivision \(a\) of section 1861.03](#) to apply to all aspects of the insurance

¹⁴ Section 1851 excludes eight categories of insurance from the partial antitrust exemption conferred by the McBride-Grunsky Act. Life insurance is among the excluded lines. The others are: reinsurance, marine, title, disability, workers' compensation, mortgage, and county mutual fire insurance.

¹⁵ Section 1861.13: "This article shall apply to all insurance on risks or on operations in this state, except those listed in Section 1851."

Section 1851, like section 1861.13, is part of chapter 9 of division 1 of the Insurance Code, a chapter directed to rates and rating.

industry, however, as there is no way that Proposition 103 can be construed as creating an exemption from antitrust laws for those lines of insurance to which its other provisions do not apply.

[*283] IV. UNFAIR COMPETITION ACT

Relying on this court's decision in [*Rubin v. Green \(1993\) 4 Cal. 4th 1187, 1201-1202 \[17 Cal. Rptr. 2d 828, 847 P.2d 1044\]*](#), the Court of Appeal held that, because [section 790.03](#) does not create a private civil cause [****51] of action, plaintiff could not plead around that limitation by relying on conduct which violates only the UIPA as the basis for a UCA cause of action. It held, however, that the trial court had properly overruled defendants' demurrers to the UCA cause of action because the conduct on which plaintiff predicated that cause of action also violated the Cartwright Act. Therefore, the conduct could form the basis for a cause of action under the UCA.

[CA\(9\)](#) [↑] (9) Defendant contends that this holding will "seriously compromise" our holding in *Moradi-Shalal* that there may be no private UIPA cause of action under [section 790.03](#).

The question the court addressed in [*Rubin v. Green, supra, 4 Cal. 4th 1187*](#), was whether allegedly improper solicitation by an attorney, which could not form the basis of a tort action because the conduct fell within the litigation privilege of *Civil Code section 47, subdivision (b)*, could be the basis of an action for injunctive relief under the UCA. Plaintiff's theory was that the conduct could do so as it was prohibited by [Business and Professions Code sections 6152](#) and [6153](#). Therefore, it was a species of "unfair competition" as to which, under [Business and Professions \[****52\] Code section 17204](#), plaintiff, acting in the interests of the general public, had standing to seek an injunction.¹⁶

The court held that the plaintiff could not plead around the absolute bar to relief created by the litigation privilege by recasting the cause of action as one for unfair competition. It analogized such pleading to the attempts to avoid the bar to "implied" private causes of action under [section 790.03](#), which several Courts of Appeal had held could not be avoided by characterizing the claim as one under the UCA. (See [*Safeco Ins. Co. v. Superior Court \(1990\) 216 Cal. App. 3d 1491 \[265 Cal. Rptr. 585\]; Maier v. Superior Court, supra, 220 Cal. App. 3d 1592; Industrial Indemnity Co. v. Superior Court \[*284\] \(1989\) \[****53\] 209 Cal. App. 3d 1093 \[257 Cal. Rptr. 655\]; Lee v. Travelers Companies \(1988\) 205 Cal. App. 3d 691, 694-695 \[252 Cal. Rptr. 468\]; Doctors' Co. Ins. Services v. Superior Court \(1990\) 225 Cal. App. 3d 1284, 1289 \[275 Cal. Rptr. 674\]; American Internat. Group, Inc. v. Superior Court \(1991\) 234 Cal. App. 3d 749, 768 \[285 Cal. Rptr. 765\].*](#))

As the Court of Appeal here recognized, however, a cause of action for unfair competition based on conduct made unlawful by the Cartwright Act is not an "implied" cause of action which *Moradi-Shalal* held could not be found in the UIPA. There is no attempt to use the UCA to confer private standing to enforce a provision of the UIPA. Nor is the cause of action based on conduct which is absolutely privileged or immunized by another [**72] [***236] statute, such as the litigation privilege of *Civil Code section 47, subdivision (b)*.

This conclusion does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in [section 790.03](#), and therefore that section did not create a [****54] private cause of action under the UIPA. The court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices. Nothing in the UIPA would support such a conclusion. The UIPA nowhere reflects legislative intent to repeal the Cartwright Act

¹⁶ [Business and Professions Code section 17204](#), a part of the UCA, provides that an action for an injunction against unfair competition may be prosecuted by, among others, "any person acting for the interests of itself, its members or the general public."

insofar as it applies to the insurance industry, and the Legislature has clearly stated its intent that the remedies and penalties under the UCA are cumulative to other remedies and penalties.¹⁷

V. DISPOSITION

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Kennard, J., Arabian, J., George, J., and Werdegar, J., concurred.

Concur by: MOSK, J.

Concur

[****55] [*285] MOSK, J.

I concur in the judgment.

I also generally concur in the majority opinion prepared by Justice Baxter. Its reasoning is substantially sound. Its result is unquestionably correct. On two points, however, I would take a different approach.

I

First, unlike the majority, I would declare that the statement in *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal. 2d 305, 322-323 [70 Cal. Rptr. 849, 444 P.2d 481]* (hereafter sometimes *Chicago Title*), is dictum, not holding, and unsound dictum at that. As the majority themselves clearly show, this language has caused mischief in the past. It should not be allowed to retain any vitality for the future.

"The Cartwright Act," stated the *Chicago Title* court, "is similar in spirit and substance to that federal legislation encompassed by the Sherman (15 U.S.C.A. § 1-7) and Clayton Acts (15 U.S.C.A. § 12-27). Private individuals, businesses or corporations have, in the absence of express statutory authority, no standing to enforce such regulatory statutes. (Cf. *Show Management v. Hearst Publishing Co., 196 Cal. App. 2d 606, 612-616 [16 Cal. Rptr. 731]*; *West Coast Poultry* [****56] *Co. v. Glasner, 231 Cal. App. 2d 747 [42 Cal. Rptr. 297]*; *Hudson v. Craft, 33 Cal. 2d 654 [204 P.2d 1, 7 A.L.R. 696]*.) The Cartwright Act however follows federal policy which expressly contemplates private civil litigation based upon statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices. (*Bus. & Prof. Code, § 17040- 17051* [sic: these provisions belong to the Unfair Practices Act, *not* the Cartwright Act].)

"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. Counts three (secret rebate), four (discriminatory pricing) and seven (unlawful rebate) clearly concern the regulation of rates charged by title insurers and title companies, and rate regulation has traditionally commanded administrative expertise applied to controlled industries. (*Ins. Code, § 12404- 12412*; *County of Placer v. Aetna Cas. etc. Co., 50 Cal. 2d 182 [323 P.2d 753]*; Division [****57] of *Labor Law Enforcement v. Moroney, 28 Cal. 2d 344 [170 P.2d 3]*.) Count three, for instance, is based upon a statute [*286] (*Bus. & Prof. Code, § 17045*) aimed at preventing a distributor from discriminating between customers, but fails to allege facts from which a court might properly infer that [**73] [***237] the prices charged by Security [a title insurer defendant] or Summit [a title company defendant] differ from customer to customer, and is thus defective. (*Federal Automotive Services v. Lane Buick Co., 204 Cal. App. 2d 689 [22 Cal. Rptr. 603]*.) Count four, presumably based on the same facts, charges that the discount constitutes a

¹⁷  *Business and Professions Code section 17205*: "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state."

sale of title insurance below cost which is an infraction only if done 'for the purpose of injuring competitors' ([Bus. & Prof. Code, § 17043, 17049](#)), but a court is not the appropriate initial arbiter of factors involved in insurance costs. Count seven implies that Sherwood (an escrow company [defendant]) acts as 'agent' for real property owners with whom title insurers and title companies are prohibited from splitting fees and that because Summit is controlled by identical interests, the receipt of a title policy from [****58] Security at a discount constitutes an illegal rebate ([Ins. Code, § 12404](#)) to Sherwood. The statutory framework, however, specifically contemplates a division of fees between title insurers and title companies which shall be proper unless the method used constitutes such fee divisions 'illegal.' ([Ins. Code, § 12412, 12404.5, 12405.7](#).) It is not clear from the facts alleged that the discount rendered would or should be considered illegal by the insurance commissioner, or that the practice of extending secret rebates or engaging in unreasonably low or discriminatory pricing policy is followed by the defendants, or any of them.

"[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." ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal. 2d at pp. 322-323](#), italics added and brackets without enclosed material deleted.)

In my view, *Chicago Title*'s statement is dictum, indeed [****59] unsound dictum. On this point, I adopt the analysis that Justice Benson set out in his opinion for the Court of Appeal below, which I quote in full.

"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 [*287] 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 [Unfair Insurance Practices Act or] UIPA.

"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 [****60] 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, identifying numerous factual and legal deficiencies. ¹ [****61] 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. [**74] [****238] But the court explicitly identified factual insufficiency as the 'determinative' issue. ²

¹ "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.[2]d at p. 324.)"

² " '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.)"

10 Cal. 4th 257, *287 895 P.2d 56, **74 41 Cal. Rptr. 2d 220, ***238 1995 Cal. LEXIS 3138, ****61

"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 [****62] Code 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 \[*288\] 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 [Unfair Practices Act]. 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 [Unfair Practices Act] 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 \[\(1946\) 29 Cal. 2d \[34.\] 42 \[172 P.2d 867\]](#) [same]; cf. [Bus. & Prof. Code, § 17000](#) [defining 'Unfair Practices Act'].) 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 [****63] 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 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 \[****64\] , 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* [(1984)] 154 Cal. App. 3d [953,] 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 \[*289\] Financial Corp., supra, 69 Cal. 2d at p. 323](#).) The court only then turned to claims [**75] [**239] 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 [****65] 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 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." (Fn. omitted.)

II

Second, I consider somewhat differently from the majority the question whether the Unfair Insurance Practices Act, codified as article 6.5, commencing with [section 790](#), of chapter 1 of part 2 of division 1 of the Insurance Code, supersedes other law, statutory and decisional, that may be applicable to trade practices in the business of insurance.

The source of the Unfair Insurance Practices Act is, obviously, the Model Unfair Trade Practices Act drafted by the National Association of Insurance Commissioners. The source of the Model Unfair Trade Practices Act is the Federal Trade Commission Act, codified at [section 41 et seq. of title 15 of the United States Code](#). Indeed, the model act "is patterned very closely after" the federal act "and much of the language was lifted bodily" therefrom. [****66] (2 Proceedings of the National Association of Insurance Commissioners (1971) p. 345.)

Let us return to the Unfair Insurance Practices Act itself. [Insurance Code section 790](#) declares that "[t]he purpose of" the act "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." The congressional act referred to is popularly known as the McCarran-Ferguson Act, codified at [section 1011 et seq. of title 15 of the United States Code](#), which in its section 2(b), [section 1012\(b\) of title 15 of the United States Code](#), makes "the Sherman Act, . . . [*290] the Clayton Act, and . . . the Federal Trade Commission Act . . . [in]applicable to the business of insurance to the extent that such business is . . . regulated by State law."

It seems clear that the Unfair Insurance Practices Act was not *intended* to supersede [****67] other law, statutory and decisional, that might be applicable to trade practices in the business of insurance. The majority are right to impliedly approve the reasoning of Justice Benson in his opinion for the Court of Appeal below: The Unfair Insurance Practices Act "was enacted pursuant to the authority of the McCarran-Ferguson Act . . . in order to displace federal law which might otherwise have governed insurance trade practices, displacing the law of any state which did not generally proscribe the same industry conduct. In so doing the Legislature did not intend to shield the industry from otherwise applicable state law." (Maj. opn., *ante*, at p. 266, fn. omitted.)

Less clear, however, is whether the Unfair Insurance Practices Act *has the effect* of superseding other law, statutory and decisional, that may be applicable to trade practices in the business of insurance. Evidently, to use the language of [Insurance Code section 790](#), the act "defin[es], or provid[es] for the determination of, all . . . [trade practices in the business of insurance] in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and . . . prohibit[s] [****68] the trade practices so defined or determined." (Italics added.) In so doing, it constitutes a comprehensive statutory scheme governing trade practices in the business of insurance. ([American Intern. Group, Inc. v. Superior Court \(1991\) 234 Cal. App. 3d 749, 764 \[285 Cal. Rptr. 765\]](#).) Such a scheme may supersede the otherwise applicable common law. (E.g., [I.E. Associates v. Safeco Title Ins. Co. \(1985\) 39 Cal. 3d 281, 285 \[***240\] \[**76\] \[216 Cal. Rptr. 438, 702 P.2d 596\]](#).) It may supersede the otherwise applicable statutory law as well.

Weighing all in the balance, however, I believe that the Unfair Insurance Practices Act does *not* have the effect of superseding other law, statutory and decisional, that may be applicable to trade practices in the business of insurance. A supersessive effect should be found if and only if the act may be considered a substitute for such other law. (See [Penziner v. West American Finance Co. \(1937\) 10 Cal. 2d 160, 176 \[74 P.2d 252\]](#).) The condition is not satisfied. The act sets up a regime of direct regulation by public actors through administrative proceedings of various sorts. By contrast, the otherwise applicable law allows [****69] "indirect regulation" by both private and public actors through both civil and criminal actions. There is no basis to conclude that the former is a substitute for the latter.

[*291] In view of the foregoing, I find it unnecessary to rely on [Insurance Code section 790.09](#). Because I find it unnecessary, I would not do so.

Unlike the majority, I cannot discern in [Insurance Code section 790.09](#) what they have impliedly discovered, namely, an "*intent* to preserve existing rights and remedies for unlawful business practices in the insurance industry." (Maj. opn., *ante*, at p. 266, italics added.) The provision declares: "No order to cease and desist issued under" the Unfair Insurance Practices Act "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." The provision merely imposes a bar against defensive collateral estoppel--stating only that an administrative cease-and-desist [****70] order issued against a person on a finding that he has engaged in unfair or deceptive conduct does not "relieve or absolve" him from any administrative action, civil liability, or criminal penalty arising out of the conduct in question. The proximate source of Insurance Code section 790.09 is section 8(d) of the Model Unfair Trade Practices Act: "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." (Italics added.) The ultimate source of Insurance Code section 790.09 is section 5 of the Federal Trade Commission Act, section 45(e) of title 15 of the United States Code: "No order of the Commission or judgment of court to enforce the same shall in anywise *relieve or absolve* any person, partnership, or corporation from any liability under the Antitrust Acts." (Italics added.) That provision, in fact, merely imposes a bar against defensive collateral estoppel. (See, e.g., State of N.C. v. Chas. Pfizer & Co., Inc. (4th Cir. 1976) 537 F.2d 67, 74; United States v. Chas. Pfizer & Co. (S.D.N.Y. 1962) 205 F. Supp. 94, [***71] 96-97.)

I hasten to add that, although I cannot discern in Insurance Code section 790.09 an "intent to preserve existing rights and remedies for unlawful business practices in the insurance industry" (maj. opn., *ante*, at p. 266, italics added), I nevertheless find therein an *assumption* that such "existing rights and remedies" are indeed "preserved." The provision imposes a bar against defensive collateral estoppel that is broad, extending beyond administrative proceedings to civil and criminal actions. Administrative proceedings belong to the regime of direct regulation set up by the Unfair Insurance Practices Act. Civil and criminal actions, in contrast, belong to the regime of "indirect regulation" allowed under otherwise applicable law. The provision [*292] recognizes the survival of those actions. It thereby presupposes the perduration of that law.

III

With all that said, I concur in the judgment, and also generally concur in the majority opinion.

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Wallace v. Bank of Bartlett

United States Court of Appeals for the Sixth Circuit

May 1, 1995, Argued ; June 2, 1995, Decided ; June 2, 1995, Filed

No. 94-5499

Reporter

55 F.3d 1166 *; 1995 U.S. App. LEXIS 13501 **; 1995 FED App. 0165P (6th Cir.) ***; 1995-1 Trade Cas. (CCH) P71,016

APRIL WALLACE and VICKIE GWIN, et al. Plaintiffs-Appellants, v. BANK OF BARTLETT, BOATMEN'S BANK OF TENNESSEE, FIRST AMERICAN NATIONAL BANK, FIRST TENNESSEE BANK, N.A., LEADER FEDERAL BANK FOR SAVINGS, NATIONAL BANK OF COMMERCE, NATIONSBANK, TRI-STATE BANK OF MEMPHIS and UNION PLANTERS NATIONAL BANK, Defendants-Appellees.

Subsequent History: [\[**1\]](#) As Corrected June 6, 1995.

Rehearing and Rehearing En Banc Denied July 7, 1995, Reported at: [1995 U.S. App. LEXIS 19704](#).

Prior History: ON APPEAL from the United States District Court for the Western District of Tennessee. District No. 92-02431. Julia S. Gibbons, District Judge.

Disposition: AFFIRMED

Core Terms

Banks, prices, conspiracy, customers, charges, checks, costs, summary judgment, antitrust, collusion, conspired

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**](#) [down arrow] **Standards of Review, De Novo Review**

The court reviews a district court's grant of summary judgment de novo, viewing all facts and inferences drawn therefrom in the light most favorable to the nonmoving party.

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

55 F.3d 1166, *1166 1995 U.S. App. LEXIS 13501, **1 1995 FED App. 0165P (6th Cir.), ***Cir.)

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

HN2[**Entitlement as Matter of Law, Appropriateness**

Fed. R. Civ. P. 56(c) mandates the entry of summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate if plaintiffs failed to make a showing sufficient to establish any element essential to their claims and on which they bear the burden of proof.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Summary judgment may be granted even in a complex antitrust case because antitrust law limits the range of permissible inferences from ambiguous evidence in a [15 U.S.C.S. § 1](#) case.

Antitrust & Trade Law > Sherman Act > General Overview

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

Evidence > Inferences & Presumptions > Inferences

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

HN4[**Antitrust & Trade Law, Sherman Act**

The court has established a two-part inquiry for evaluating a summary judgment motion in an antitrust conspiracy case: (1) Is the plaintiff's evidence of conspiracy ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests. The court holds that a plaintiff cannot demonstrate a conspiracy if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action.

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

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

Evidence > Types of Evidence > Circumstantial Evidence

HN5 Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

It is not necessary for an antitrust plaintiff to introduce any direct evidence of a conspiracy. Rather, a conspiracy can be inferred from business behavior which evidences a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6 Sherman Act, Claims

Parallel pricing, without more, does not itself establish a violation of [15 U.S.C.S. § 1](#), the Sherman Act. Courts require additional evidence which they have described as "plus factors." Examples of these "plus factors" include actions contrary to a defendant's economic self-interest, product uniformity, exchange of price information and opportunity to meet, and a common motive to conspire or a large number of communications.

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

HN7 Regulated Practices, Price Fixing & Restraints of Trade

The exchange of price information among competitors is not a per se violation of the antitrust laws.

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN8 Regulated Practices, Market Definition

An economist's expert testimony which is based on insufficient facts cannot be relied on to support a jury verdict. The court states that expert testimony is useful as a guide to interpreting market facts, but is not a substitute for them.

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Richard Buchignani, BRIEFED, Robert L. Crawford, McDonnell Boyd, Memphis, TN. Thomas J. Walsh, Jr., Wolff Ardis, Memphis, TN. For BOATMEN'S BANK OF TENNESSEE, Defendant - Appellee: C. Lee Cagle, David Wade, ARGUED, BRIEFED, Martin, Tate, Morrow & Marston, Memphis, TN.

Judges: Before: KENNEDY and SUHRHEINRICH, Circuit Judges; HILLMAN, District Judge. *

Opinion by: KENNEDY

Opinion

[**2] [*1167] KENNEDY, Circuit Judge. Plaintiffs brought this action against nine banks doing business in Tennessee (the "Banks"),¹ [**2] alleging that the Banks conspired, in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), to fix the amount of certain fees charged to bank customers. The fees at issue are the fees the Banks charge customers for writing checks upon accounts with insufficient funds ("NSF") and for depositing checks which are returned uncollected ("DIR").² Plaintiffs are individuals who allegedly paid NSF fees at each of the respective defendant banks.

Plaintiffs admit that they do not have any direct evidence of any agreement or conspiracy among the Banks to set prices but contend that the uniformity of these fees shows there is tacit collusion. The District Court granted summary judgment in favor of defendants. Plaintiffs appeal, arguing that the District Court erred in determining that they failed to present sufficient evidence to exclude the possibility that the Banks were pursuing legitimate independent business interests. For the following reasons, we affirm.

[**3] I.

[HN1](#) We review a district court's grant of summary judgment de novo, [Hanover Ins. Co. v. American Eng'g Co., 33 F.3d 727, 730 \(6th Cir. 1994\)](#), "viewing all facts and inferences drawn therefrom in the light most favorable to the nonmoving party." [Boyd v. Ford Motor Co., 948 F.2d 283, 285 \(6th Cir. 1991\), cert. denied, 503 U.S. 939 \(1992\)](#). [Rule 56\(c\) of the Federal Rules of Civil Procedure](#) [HN2](#) mandates the entry of summary judgment where there is "no genuine issue [**3] as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Summary judgment is appropriate if plaintiffs failed to make a showing sufficient to establish any element essential to their claims and on which they bear the burden of proof. [Barnhart v. Pickrel, Schaeffer & Ebeling Co., 12 F.3d 1382, 1388-89 \(6th Cir. 1993\)](#).

[HN3](#) Summary judgment may be granted even in a complex antitrust case because "[antitrust law](#)" limits the range of permissible inferences from ambiguous evidence in a [§ 1](#) case. [Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). In [Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474 \(6th Cir.\), cert. denied, 498 U.S. 855 \(1990\)](#), [HN4](#) we established a two-part inquiry for evaluating a summary judgment motion in an antitrust conspiracy case:

- (1) Is the plaintiff's evidence of conspiracy ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; [*1168] and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.

* The Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan, sitting by designation.

¹ The Banks are Bank of Bartlett, Boatmen's Bank of Tennessee, First American National Bank, First Tennessee Bank, N.A., Leader Federal Bank for Savings, National Bank of Commerce, NationsBank, Tri-State Bank of Memphis and Union Planters National Bank.

² For purposes of brevity, we will refer to both of these types of fees as "NSF" throughout the opinion.

Id. [I**4\]](#) at 483 (citation omitted). We held that a plaintiff cannot demonstrate a conspiracy "if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action." *Id.*

[***4] II.

[HN5](#) It is not necessary for an antitrust plaintiff to introduce any direct evidence of a conspiracy. Rather, a conspiracy can be inferred from business behavior which evidences "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." [Nurse Midwifery Ass'n. v. Hibbett, 918 F.2d 605, 616 \(6th Cir. 1990\)](#) (citation omitted), cert. denied, 502 U.S. 952 (1991).

However, [HN6](#) parallel pricing, without more, does not itself establish a violation of the Sherman Act. [Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 98 L. Ed. 273, 74 S. Ct. 257 \(1954\)](#); [General Business Sys. v. North Am. Philips Corp., 699 F.2d 965, 976 \(9th Cir. 1983\)](#). Courts require additional evidence which they have described as "plus factors." Examples of these "plus factors" include actions contrary to a defendant's economic self-interest, [Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 \(11th Cir. 1991\)](#), product uniformity, exchange [**5](#) of price information and opportunity to meet, [Wilcox v. First Interstate Bank, N.A., 815 F.2d 522, 525-26 \(9th Cir. 1987\)](#), and a common motive to conspire or a large number of communications, [Apex Oil Co. v. Di Mauro, 822 F.2d 246, 253-54 \(2d Cir.\), cert. denied, 484 U.S. 977 \(1987\)](#).

Plaintiffs first contend that because the Banks all charge essentially the same fee for NSF checks, they have conspired to fix the level of fees. In addition, plaintiffs argue that the public disclosure of the fees and the alleged failure of the Banks to set NSF fees relative to cost are the plus factors which, in addition to the alleged parallel pricing, show a violation of [section 1](#). Plaintiffs also rely on the affidavits of two experts stating that defendants would not be able to charge high NSF fees without collusion.

The Banks assert that the prices are not sufficiently similar to constitute parallel pricing. The District Court examined the record, however, and concluded that, when the inferences from the evidence were construed in favor [***5](#) of plaintiffs, "the variances between the fees are not as drastic as the Banks contend."³ The Banks do not raise this issue of the similarity of [**6](#) the prices on appeal. Rather, they argue that even assuming their prices are similar, plaintiffs have failed to present other evidence sufficient to support an inference of a conspiracy.

Plaintiffs mainly rely on the fact that the Banks do not set NSF fees relative to the cost of processing NSF checks as evidence of a conspiracy beyond parallel pricing. In support of their argument, plaintiffs cite 12 C.F.R. § 7.8000 (1995) which provides that:

- (a) All charges to customers should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding or discussion with other banks or their officers.
- (b) Establishment of deposit account service charges, and the amounts [**7](#) thereof, is a business decision to be made by each bank according to sound banking judgment and federal standards of safety and soundness. In establishing deposit account service charges, the bank may consider, but is not limited to considering:
 - (1) Costs incurred by the bank, plus a profit margin, in providing the service;
 - (2) The deterrence of misuse by customers of banking services;
 - (3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy;

[\[*1169\]](#) (4) Maintenance of the safety and soundness of the institution. . . .

[***6](#) Plaintiffs contend that under this regulation, the Banks must take into account the costs of processing NSF and DIR checks and that their failure to do so is evidence of a conspiracy.

³ The Banks argued to the District Court that on a statewide level, NSF fees varied by as much as 44%, varied by as much as 26.67% on a citywide level, and varied within individual banks' branches by as much as 90%. The NSF fees varied from \$ 10.00 to \$ 20.00 per transaction.

Defendants concede that they do not price NSF charges in relation to cost. They note that although section 7.8000 states that the Banks *may* consider costs, it does not require costs to be taken into account. We agree with the District Court that "the failure of the banks to consider one factor does not require the conclusion that the banks conspired to set the level of NSF fees."

It is clear from the [**8] affidavits submitted by the Banks that they do in fact take many legitimate factors into account besides costs. Several of the Banks submitted affidavits stating that they established high prices for NSF checks because they did not want to attract customers who write these checks and wanted to deter customers from this behavior.⁴ One bank stated that it set NSF fees based on "what the market is charging, government regulations, and business judgment." Another bank considers profitability, handling and processing costs, competitive position, and the maintenance of safety and soundness.

[**9] [***7] Plaintiffs also argue that the manner in which NSF fees are publicized allows the banks to collude in setting prices. However, the Banks' publication of prices is as least as consistent with their independent interests as it is with collusion.

First, the Banks certainly have a legitimate interest in providing customers relevant information regarding the fees associated with their checking accounts. The Banks also have an interest in publishing prices to attract or deter consumers from opening accounts. "Permitting an inference of conspiracy [based on the dissemination or advertising of retail prices] would make it more difficult for retail consumers to get the information they need to make efficient market decisions." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 448 n.14 (9th Cir. 1990), cert. denied, 500 U.S. 959 (1991).

Most of the Banks admit they evaluate the fees charged by other banks when they set fees. "[HN7](#)"⁵ The exchange of price information among competitors is not a per se violation of the antitrust laws." *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1505 (11th Cir. 1985), cert. denied, 475 U.S. 1107 [**10] (1986); *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978). The Banks naturally are interested in surveying the market to determine what other banks are charging in order to make strategic competitive decisions. All of the affidavits submitted by the Banks contained statements to the effect that there was no agreement or collusion between them, tacit or otherwise. Although publication and evaluation of [***8] prices can serve as a means to violate [section 1](#),⁵ plaintiffs have produced no evidence that this is occurring.

[*1170] Plaintiffs offer two affidavits [**11] in support of their allegations that the Banks have tacitly conspired to fix prices. First, they have submitted the affidavit of Allen Buckalew, an economist with a Master of Science degree. Buckalew reviewed the Banks' depositions, 12 C.F.R. 7.8000, the Banks' pricing history and a presumed cost per NSF check of \$.15 to \$ 1.50 and stated that:

Assuming all of the above, and further assuming that defendants have historically totally failed to openly compete in the market for customers on the basis of more attractive NSF charges, I can testify that based on

⁴ For instance, one bank's affidavit stated that "when NSF, DRI and other overdrafts are honored, unsecured and often unsound extensions of credit result which may go uncollected. In addition, check kiting and other fraudulent schemes that result in losses to banking institutions can arise out of presentation of overdraft items. Setting NSF charges at their current levels . . . is designed to discourage this undesirable conduct." Another affidavit stated that "excessive overdrafts are detrimental to the banking system because at some level they will cause a loss of confidence in checks as a medium of payment First American does not want customers who continually bounce checks. First American's procedures require that the account of a customer who bounces an excessive amount of checks in a twelve month period be closed." Another bank's affidavit contained the statement "to contend that [NSF charges are] an area of business that is encouraged by NationsBank is pure folly. The ideal customer is one who keeps large balances in the account, makes deposits, writes few checks and is never overdrawn."

⁵ For instance, public dissemination of prices can violate the Sherman Act where the publication serves little purpose other than facilitating collusion, *Petroleum Products*, 906 F.2d at 448, or where prices are published in advance by a price leader to communicate its intention and to gauge reactions of competitors. *Id. at 446*. The fees are published here together with other charges to advise customers of the charges they must pay.

well-accepted economic theories dealing with supply and demand in our American economy, defendants have been able to maintain these artificially excessive NSF/DIR charges by means of a tacit agreement not to compete on such charges and to set the prices at the inflated amounts which they presently are.

The Banks contend that this affidavit fails to raise a genuine issue of material fact because the expert offers no additional facts or evidence and relies on conclusory allegations.

Buckalew's affidavit is not sufficient to defeat the Banks' motion for summary judgment. In *Brooke Group Ltd. v. Brown & Williamson* [**12] *Tobacco Corp.*, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993), the Supreme Court held that HN8[[↑]] an economist's expert testimony which was based on insufficient facts could not [***9] be relied on to support a jury verdict. *Id.* at 2598. The Court stated that "expert testimony is useful as a guide to interpreting market facts, but is not a substitute for them." *Id.* Buckalew's conclusions are based on nothing more than facts which, as we have already stated, are equally consistent with independent actions by the Banks. For instance, the Banks readily admit that they have "totally failed to openly compete" because they do not want to attract customers who write checks with insufficient funds to cover them.

Plaintiffs submitted another affidavit from Antonio L. Zate, a certified public accountant with a masters degree in economics who has worked as a bank examiner for the Federal Reserve Bank.⁶ According to Zate, the banking industry's income derived from interest has been declining since the early 1980s while income derived from "non-interest income sources" such as NSF fees has been increasing. It is Zate's "educated and professionally-gained opinion" that the "enormous profit" from NSF fees would not have [**13] been possible without collusion between banks. Zate's opinion, however, does not exclude the possibility that the Banks wanted to keep these fees high to discourage NSF check-writing or that, by increasing NSF fees to compensate for lost interest revenue, the Banks were maintaining the safety and soundness of the institution as permitted by 12 C.F.R. 7.8000. Plaintiffs' expert evidence is equally consistent with independent action as it is with conspiracy.

Finally, plaintiffs assert that they have not been able to produce evidence to respond [**14] to defendants' summary judgment motion because defendants denied them access to [***10] any discovery. However, at a status conference held on February 2, 1994, plaintiff's counsel agreed with the court that "there [was] a consensus that the summary judgment motion can be resolved, and [it was] not dependent on [plaintiffs] obtaining anything else." Furthermore, the information plaintiffs sought apparently had to do with the actual costs to the Banks of processing NSF checks, and defendants stated that they were not challenging plaintiffs' assumptions concerning costs for the purposes of the summary judgment motion. Thus, the District Court properly granted summary judgment in favor of defendants.

III.

For the foregoing reasons, we AFFIRM the District Court's grant of summary judgment.

End of Document

⁶The Banks argue that the District Court should not have considered Zate's affidavit. They contend that the affidavit was submitted after the discovery deadline established by the District Court's scheduling order and that plaintiffs stated that no experts had been retained in their responses to expert interrogatories. The District Court found it unnecessary to reach these issues in light of its order granting summary judgment. Likewise, we need not address these arguments.

Coors Brewing Co. v. Miller Brewing Co.

United States District Court for the District of Colorado

June 5, 1995, Decided ; June 6, 1995, FILED

Civil Action No. 94-K-728

Reporter

889 F. Supp. 1394 *; 1995 U.S. Dist. LEXIS 8342 **

COORS BREWING COMPANY, a Colorado corporation, Plaintiff, v. MILLER BREWING COMPANY, a Wisconsin corporation; MOLSON BREWERIES, an Ontario partnership; THE MOLSON COMPANIES LIMITED, a Canadian corporation; MOLSON BREWERIES OF CANADA LIMITED, a Canadian corporation; and MOLSON BREWERIES U.S.A., INC., a Delaware corporation, Defendants.

Subsequent History: [**1] As Corrected June 7, 1995.

Core Terms

antitrust, Alliance, Brewing, allegations, license agreement, anti trust law, commerce, damages, beer, anticompetitive, defendants', motion to dismiss, domestic, markets, entity, export, anticompetitive conduct, arbitration, competitor, contends, import, lack of personal jurisdiction, subject matter jurisdiction, personal jurisdiction, antitrust action, Clayton Act, acquisition, predatory

LexisNexis® Headnotes

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

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

HN1[] International Aspects, Foreign Trade Antitrust Improvements Act

See the Foreign Trade Antitrust Improvement Act of 1982, [15 U.S.C.S. § 6a](#).

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

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

889 F. Supp. 1394, *1394 1995 U.S. Dist. LEXIS 8342, **1

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

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN2 [Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The Foreign Trade Antitrust Improvement Act, [15 U.S.C.S. § 6a](#), has been interpreted to mean that with the exception of claims brought by domestic importers, the Sherman Act will not apply to conduct affecting foreign markets, consumers, or producers unless there is also a direct, substantial, and reasonably foreseeable effect on the domestic market or on opportunities to export from the United States.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN3 [International Aspects, Foreign Trade Antitrust Improvements Act

Anticompetitive conduct confined to exports with no significant domestic spillover would fall outside the United States' antitrust jurisdiction by virtue of the Foreign Trade Antitrust Improvement Act, [15 U.S.C.S. § 6a](#), as would anticompetitive conduct that did not significantly affect imports into the United States.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN4 [Clayton Act, Claims

Standing is an essential element in any private antitrust action under § 4 or [§ 16](#) of the Clayton Act, [15 U.S.C.S. §§ 16](#) and [26](#). The following factors are to be considered in evaluating standing: the causal connection between the antitrust violation and the plaintiff's injury, the defendant's intent, the nature of the plaintiff's injury, the directness or the indirectness of the connection between the plaintiff's injury and the unlawful market restraint, the speculativeness of the plaintiff's damages, and the risk of duplicative recoveries or the danger of complex apportionment of damages.

Antitrust & Trade Law > Clayton Act > Claims

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

[**HN5**](#) Clayton Act, Claims

The "nature of the plaintiff's injury" factor implements the requirement that only antitrust injuries are redressable under § 4 of the Clayton Act, [15 U.S.C.S. § 16](#). Standing does not exist absent antitrust injury.

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

[**HN6**](#) Private Actions, Remedies

"Antitrust injury" is defined as injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. This definition reflects a fundamental principal in **antitrust law** that an injury, even if causally related to an antitrust violation, will not qualify as an "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under scrutiny. The point is to prevent an award of damages for losses stemming from continued or increased competition rather than diminished competition -- a result that otherwise would be "inimical" to the antitrust laws.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Evidence > Burdens of Proof > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

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

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

Mergers & Acquisitions Law > General Overview

[**HN7**](#) Complaints, Requirements for Complaint

Where the challenged conduct is a merger or acquisition, the plaintiff is required to prove injury flowing from the anticompetitive or predatory nature of the merger or the post-merger entity.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN8[] Clayton Act, Claims

Complex antitrust litigation is subject to no greater pleading requirements than the Rules of Civil Procedure provide for ordinary litigation.

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Judges: JOHN L. KANE, JR., U.S. SENIOR DISTRICT COURT JUDGE

Opinion by: JOHN L. KANE, JR.

Opinion

[*1395] MEMORANDUM OPINION AND ORDER

KANE, J.

Defendant Miller and Molson brewing companies, together with certain related importing and distribution entities, move to dismiss brewing rival Coors' antitrust claims against them for lack of subject matter jurisdiction, lack of standing and failure to state a claim upon which relief can be granted. The three Molson defendants that are Canadian entities also dispute this court's *in personam* jurisdiction **[**2]** over them and move to dismiss Coors' complaint on that independent ground as well. For the reasons set forth below, I deny both motions.

I. Background

Coors Brewing Company ("Coors") filed this action against Miller Brewing Company ("Miller Brewing"), Molson Breweries of Canada Limited ("Old Molson"), Molson Breweries,¹ and certain Miller-Molson affiliated importing and distribution entities,² alleging the "North American Strategic Brewing Alliance" (the "Alliance") announced by Miller Brewing, Molson Limited and Foster's on January 14, 1993 violates the Clayton and Sherman antitrust acts. Pursuant to the Alliance, Miller Brewing bought Molson USA, acquiring a 20 % equity interest in Molson Breweries and representation on its board of directors. Miller Brewing also obtained an exclusive license over the Molson's and Foster's beer brands in the United States.

¹ Molson Breweries is a partnership owned by The Molson Companies Limited ("Molson Limited") (40 %), Foster's Brewing Group ("Foster's") (40 %) and Miller (20 %). Old Molson is a wholly owned subsidiary of Molson Breweries.

² Molson Limited and Miller-owned Molson Breweries, U.S.A., Inc. ("Molson USA") are the other party defendants in this action. Miller Brewing of Canada, Limited ("Miller Canada") was dismissed from this action by stipulation of the parties. For ease of reference, "Miller" will be used to refer collectively to defendants Miller Brewing and Molson USA and "Molson" will be used to refer collectively to defendants Molson Limited, Old Molson and Molson Breweries.

[**3] [*1396] At the time the Alliance was announced and since 1985, Coors and Old Molson were parties to a licensing agreement ("Licensing Agreement") whereby Old Molson obtained the right to market, distribute, and sell all Coors brands of beer in Canada. Pursuant to the Licensing Agreement, Coors claims it provides Old Molson with its proprietary formula and brewers yeast, competitive strength studies, positioning strategies, advertising proposals, and other confidential marketing studies and business information. The Licensing Agreement contains a 10-year notice of termination clause.

Because Old Molson is wholly owned by the entity in which Miller Brewing, through the Alliance, acquired a 20% interest and board membership, Coors contends Miller Brewing now has access to Coors' "vital North American proprietary and strategic information" and the power to restrain Coors as an independent competitive force in the United States and North American markets. Compl., PP 38-41. Coors contends its presence in this market is necessary to prevent Miller and Anheuser-Busch from having a duopoly in the United States, where they already control two-thirds of the market.³ Coors seeks dissolution of the [*4] Licensing Agreement or relief from the 10-year notice of termination clause; a permanent injunction prohibiting Miller Brewing and Molson USA from having any interest in or participating on the board of Molson Breweries or an order requiring Miller to dispose of its interest in Molson Breweries so long as Old Molson is Coors' exclusive licensee in Canada; a permanent injunction prohibiting Molson and its present and former employees from disclosing any Coors marketing or strategic information to Miller;⁴ and treble damages.

[**5] Coors contends not only that the Molson-Miller Alliance violates United States antitrust laws, but also that Molson's participation in the Alliance breaches the Coors-Molson Licensing Agreement. Thus, at the same time it initiated this antitrust litigation, Coors also initiated arbitration proceedings against Old Molson in Canada under the Licensing Agreement. Asserting Coors brought the antitrust action merely to circumvent its duty to arbitrate under the Agreement, the Molson defendants moved for a stay pending resolution of the arbitration proceedings in Canada. Molson argued arbitration would settle the factual disputes upon which Coors' antitrust claims were based. Chief Judge Richard P. Matsch, to whom this case originally was assigned,⁵ denied the motion for stay and Molson appealed.

In a published opinion issued March 30, 1995, the Tenth Circuit [*6] affirmed in part and reversed in part the order denying Molson's motion for stay. *Coors v. Molson et al.*, 51 F.3d 1511, 1995 WL 139321 (10th Cir. March 30, 1995). The panel affirmed Judge Matsch's order refusing to stay the action against Miller. Slip op. at 17. With respect to the action against Molson, the panel agreed Coors' allegations regarding market concentration and the Alliance as a restraint of trade were unrelated to the Licensing Agreement and thus not subject to a stay, and preliminarily agreed Coors' allegations regarding the anticompetitive effects of Miller's control over Molson were unrelated to the Agreement and also not subject to a stay.⁶ The panel disagreed, however, that allegations regarding Molson's use or misuse of confidential Coors' product and marketing [*1397] information were unrelated to the Licensing Agreement, and reversed Judge Matsch's order as it applied to them. *Id.* at 15.

³ Coors further alleges Miller has an incentive to restrain Coors unlawfully and to leverage its access to Coors' proprietary and strategic information because Coors' growth represents a "threat" to Miller, particularly in the important "light" beer market that accounts for 40 % of Miller's volume and in which Coors has obtained a 21.5 % share.

⁴ As an example, Coors alleges Jefferson J. Carefoote, a former old Molson employee with "intimate knowledge" of Coors' competitive strength and strategies, is now a Vice President of Miller Brewing's wholly owned subsidiary Molson USA.

⁵ Upon determination that a workload imbalance was affecting the parties adversely, Chief Judge Matsch reassigned this case to me on February 23, 1995.

⁶ See slip op. at 4, 15-16. The Tenth circuit invited this court to reconsider the latter conclusion once the parties have had an opportunity to conduct discovery and refine their theories. *Id.* at 16.

[**7] Thus, with the exception of the dispute between Coors and Molson over Molson's access to and use of Coors' confidential information, this antitrust action will proceed, in theory at least,⁷ unimpeded by the Canadian arbitration. See generally *Block 175 Corp. v. Fairmont Hotel Management. Co.*, 648 F. Supp. 450, 453-54 (D. Colo. 1986) (refusing to delay discovery pending arbitration).

II. Merits

Coors claims the acquisition by Miller Brewing of an equity interest in the entity owning and controlling Old Molson will have an anticompetitive effect on the United States [**8] beer market in violation of § 7 of the Clayton Act, 15 U.S.C. § 18. (Compl., PP 46-48.) Coors claims the Miller-Molson Alliance, as well as the Coors-Old Molson Licensing Agreement now that Miller Brewing is a partner in the Alliance, are combinations or conspiracies in restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. (Id., PP 49-53.) Coors seeks both injunctive relief and treble damages.⁸

A. Subject Matter Jurisdiction

Defendants assert Coors' complaint should be dismissed for lack of subject matter jurisdiction under the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"), arguing Coors' claims lack the requisite [**9] "direct, substantial, and reasonably foreseeable" relationship to United States, as opposed to Canadian, commerce. Coors contends the FTAIA is inapplicable because Coors' claims do not relate exclusively to foreign commerce, but arise from domestic conduct affecting domestic trade or commerce.

The FTAIA amends the Sherman Act to provide:

§ 6a. HN1[↑] Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations; or
 (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7, other than this section.

If section 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then [these Acts] shall apply to such conduct only for injury to export business in the United States.

[**10] 15 U.S.C. § 6a (1995 Pock Pt.).⁹

⁷ To the extent Coors relies on Molson's access to its confidential and proprietary market information in its control claim against Miller, the practical effect of the Tenth Circuit's ruling is less clear. It is difficult to determine at this stage of the proceedings how a stay of Coors' dispute with Molson over Molson's access to confidential information will affect Coors' ability to conduct discovery on its control claim against Miller.

⁸ Section 4 of the Clayton Act permits the recovery of damages by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1988). Section 16 entitles "any person . . . threatened [with] loss or damage by a violation of the antitrust laws" to obtain an injunction. Id. § 26.

⁹ A brief history leading up to the enactment of § 6a is in order. Since the early cases involving concerted activities by shipping companies engaged in the transport of passengers and cargo to and from the United States, it has been clear that an activity partly within and partly outside the United States falls within the coverage of the United States antitrust laws. See, e.g. Thomsen v. Cayser, 243 U.S. 66, 88, 61 L. Ed. 597, 37 S. Ct. 353 (1917). Activity outside the United States, however, has long been subject to the United States' antitrust jurisdiction only if it has an anticompetitive effect inside the United States. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) ("Alcoa"). Before enactment of § 6a in 1982, the "effects test" articulated by Judge Learned Hand in Alcoa had been subject to different applications in the various circuits, becoming an "effects only"

[**11] Although cases applying [HN2](#)[↑] the FTAIA are few, its "inelegant" language has been interpreted [*1398] to mean that with the exception of claims brought by domestic importers, the Sherman Act will not apply to conduct affecting foreign markets, consumers or producers unless there is also a direct, substantial, and reasonably foreseeable effect on the domestic market (subsection (1)(A)) or on opportunities to export from the United States ((1)(B)). P. Areeda & H. Hovenkamp, *Antitrust Law* P 236'a at pp. 306-07 (1993 Supp.); see [McGlinch v. Shell Chemical Co., 845 F.2d 802, 813 \(9th Cir. 1988\)](#) (allegations of a refusal to deal in foreign markets injuring only foreign customers and plaintiff insufficient to confer antitrust jurisdiction under FTAIA); [The Importers, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 498-99 \(M.D.N.C. 1987\)](#) (French garment distributor had no cause of action under federal antitrust laws absent evidence of injury within the United States); [Liamuiga Tours v. Travel Impressions Ltd., 617 F. Supp. 920, 922-23 \(E.D.N.Y. 1985\)](#) (court lacked jurisdictional nexus under the FTAIA where restraint of trade and conspiracy claims involved exclusively lost business [**12] and anticompetitive effects in St. Kitts). Thus, [HN3](#)[↑] anticompetitive conduct confined to exports with no significant domestic spillover would fall outside the United States' antitrust jurisdiction by virtue of the FTAIA, as would anticompetitive conduct that did not significantly affect imports into the United States. Areeda & Hovenkamp, P 236'a at pp. 306-07 (1993 Supp.); see Murphy, *supra* n.8, at 786-91.

Given the integrated nature of the North American beer market and the fact the principal parties are American companies competing in that market, it seems a fine distinction indeed to assert defendants' alleged conduct impacts Canadian -- but not American -- markets, producers or consumers. I need not address this issue, however, because I find Coors' allegations, taken as true, establish that defendants' conduct satisfies both subsections (1)(A) and (B) of the FTAIA because it has a direct, substantial, and reasonably foreseeable effect not only on Coors' export trade with Canada, but also, albeit less directly, on the United States beer market and the consumers in that market.

According to Coors, the Miller-Molson Alliance subjects Coors to the Catch-22 of having either to share [**13] confidential information with rival Miller Brewing or to unwind its Canadian brewing and distribution relationship with Molson. Coors asserts it has already been forced to make decisions and to alter its business strategies as a result. Coors also alleges the Alliance threatens its status as principal competitor to Miller and Anheuser-Busch in the United States beer market which, given the concentration in that market, weakens domestic competition and promotes a Miller/Anheuser-Busch duopoly. Defendants' effort to circumscribe Coors' allegations to anticompetitive effects in Canada alone ignores both Coors' allegations regarding its export activities as well as the blurred line between the domestic and foreign effects of conduct in the North American beer market. I am unpersuaded and decline to dismiss this action for lack of subject matter jurisdiction.¹⁰

[**14] B. Personal Jurisdiction

Canadian defendants Molson Breweries, Molson Limited and Old Molson assert Coors has failed to make *prima facie* showings of personal jurisdiction over them to withstand a motion to dismiss. Each contends it lacks sufficient contacts with Colorado to confer either general or specific personal [*1399] jurisdiction on this court. (Defs.' Mot. Dismiss for Lack of Personal Jurisdiction at 2-3.) Coors demurs, arguing that in suits brought under the Clayton Act,

test, a "direct or substantial effects" test, a "direct and substantial effects" test, and a "some effects, regardless of whether they are intended or substantial," test. See Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvement Act and the Restatement of Foreign Relations Law (Revised)*, [54 U. Cin. L. Rev. 779, 806 \(1986\)](#) (footnotes and citations omitted). [Section 6a](#) was Congress' attempt to temper what many perceived to be the over-application of United States antitrust laws to extraterritorial commercial conduct under the more expansive of these tests. See *id.* at 779, 782-84 (citations to legislative history omitted).

¹⁰ I note here the guidance provided by the American Law Institute's comprehensive restatement of United States antitrust jurisdiction law set forth in the *Restatement (Third) of Foreign Relations Law* § 415 (1987). While the Restatement's "reasonableness" approach focuses on balancing United States and foreign interests, it synthesizes and reviews both the legislative and judicial efforts in the United States to control the extraterritorial application of federal antitrust laws and should prove helpful in future efforts to apply the FTAIA. See generally Reporters' Notes, [§ 415](#) pp. 288-94.

the relevant forum with which these defendants must have minimum contacts is the United States, not Colorado. (Coors' Opp. to Mot. Dismiss for Lack of Personal Jurisdiction at 7-8.) Coors contends the Molson defendants have extensive contacts with the United States by virtue of their beer sales in this country, achieved through their alliance with Miller, and their contractual relationships with Coors and others. Moreover, Coors argues, the Molson defendants have "purposely availed" themselves of this court's jurisdiction by causing antitrust injury in this forum. Id. at 12.

I reject out of hand the Molson defendants' contention that the exercise of personal jurisdiction over them in this case would **[**15]** be "unfair," "inappropriate" and a violation of due process. (Defs.' Mot. Dismiss for Lack of Personal Jurisdiction at 2-3.) In these days of NAFTA ¹¹ **[**16]** and a deemphasis in particular on the border between Canada and the United States, the assertion that these Canadian companies, whose products can be found on the shelves of virtually every convenience store and supermarket in Colorado and whose extensive business relationships with Miller and Coors form the basis of this litigation, lack sufficient minimum contacts with the forum to avoid "offending traditional notions of fair play and substantial justice" if they are required to defend Coors' claims here, ¹² rings hollow. At a minimum, Coors has established a *prima facie* showing of personal jurisdiction over each of the Molson defendants sufficient to warrant further inquiry. ¹³ Accordingly, the Motion to Dismiss for Lack of Personal Jurisdiction filed by Molson Breweries, Molson Limited and Old Molson is denied.

[17] C. Antitrust Injury -- Standing**

Having determined I have jurisdiction over the parties and their claims, I turn next to defendants' assertion that Coors lacks standing to obtain either injunctive relief or treble damages under the Clayton Act because it has alleged no cognizable antitrust injury. Defendants rely on [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#) and its progeny to argue the circumstances under which one competitor will have standing to maintain an antitrust action against another are "very limited" and do not exist in this case. (Miller Defs.' Mot. Dismiss at 9-10.) Where the challenged conduct is a merger or acquisition, defendants argue a mandatory element of standing is proof that the post-merger firm is likely to engage in predatory pricing. (Mot. Dismiss at 10, Reply Supp. Mot. Dismiss at 4-5.) Coors disagrees predatory pricing is the only cause of actionable antitrust injury between competitors, and maintains **[*1400]** its allegations are sufficient to establish both antitrust injury and standing to sue. (Coors Mem. Opp. Miller Mot. Dismiss at 18-20.)

HN4 Standing is an essential element in any private antitrust **[**18]** action under § 4 or [§ 16](#) of the Clayton Act. [Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 960-61 \(10th Cir.\), cert. denied, 113 S. Ct. 464](#)

¹¹ The North American Free Trade Agreement (NAFTA) was signed into law by President Clinton on December 27, 1993. Its purpose was to expand trade and the economic relationships between Canada, Mexico and the U.S. by reducing barriers and liberalizing restraints on investment and services.

¹² See [International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 \(1945\)](#).

¹³ I reject the Molson defendants' argument in their Reply that Coors has confessed the motion to dismiss by failing to refute the affidavit testimony attached to Molson's opening brief with affidavits of its own as hypertechnical. Affidavits prepared in support of Coors' Motion for Preliminary Injunction -- part of the record in this case -- contain statements by Peter Coors and Mark Stankovic recounting at least one visit to Colorado by Bruce Pope, the President and CEO of Molson Breweries (a partnership owned in part by Molson Limited), to inform Coors of Molson's decision to enter into the Alliance, see Coors Affid. at P 8; and documenting the free flow of information and communications between Old Molson and Coors in Colorado, see Stankovic Affid. at P 6. I also note an on-line review of pending cases in which the Canadian Molson defendants are parties revealed at least one case in which Molson Breweries (ergo, Molson Limited) and Old Molson have submitted to the jurisdiction of a federal court. See [Labatt v. Molson Breweries, et al., 1995 U.S. Dist. LEXIS 699](#), No. 93-75004 (E.D. Mich. 1993) (while defendants deny minimum contacts with the forum, they do not challenge venue there). In at least two other cases, the submission by these defendants to the courts' jurisdiction is unclear. See [Pearl Brewing Co. v. Miller Brewing Co., et al., 1993 U.S. Dist. LEXIS 16841](#), No. SA-93-CA-205 (W.D. Tex. 1993) (opinion dismissing action for lack of standing published at 1993 WL 424236); [Labatt v. Molson Breweries, et al., 56 F.3d 13](#), Nos. 93-CV-75004, 94-CV-71540 (S.D.N.Y.) (discovery ongoing).

(1990) (applying *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 110, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)). See *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 652 n.14 (10th Cir. 1992); *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 406 (10th Cir.), cert. denied, 113 S. Ct. 464, 121 L. Ed. 2d 372 (1992); *Anesthesia Advantage, Inc. v. Metz Group*, 759 F. Supp. 638 (D. Colo. 1991). The following factors are to be considered in evaluating standing:

the causal connection between the antitrust violation and the plaintiff's injury; the defendant's intent; the nature of the plaintiff's injury; the directness or the indirectness of the connection between the plaintiff's injury and the unlawful market restraint; the speculativeness of the plaintiff's damages; and the risk of duplicative recoveries or . . . the danger of complex apportionment of damages.

Reazin, 899 F.2d at 962, [\[**19\] n.15](#) (citing *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 544, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)). See generally Page, *The Scope of Liability for Antitrust Violations*, [37 Stan. L. Rev. 1445, 1483-85 \(1985\)](#); Areeda & Turner, *Antitrust Law*, P 334.1 (Supp. 1989).

HN5 The "nature of the plaintiff's injury" factor implements the requirement that only antitrust injuries are redressable under § 4 of the Clayton Act. *Reazin*, 899 F.2d at 962, [n.15](#). Because standing does not exist absent antitrust injury, I review the sufficiency of Coors' Complaint on this threshold issue first.

1. Antitrust Injury

HN6 "Antitrust injury" is defined, somewhat circuitously, as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Cargill*, 479 U.S. at 109 (quoting *Brunswick*, 429 U.S. at 489). This definition reflects a fundamental principal in *antitrust law* that an injury, even if causally related to an antitrust violation, will not qualify as an "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under [\[**20\]](#) scrutiny. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990) (applying *Cargill*). The point is to prevent an award of damages for losses stemming from continued or increased competition rather than diminished competition -- a result that otherwise would be "inimical" to the antitrust laws. *Cargill*, 479 U.S. at 109-110 (quoting *Brunswick* at 488).

HN7 Where the challenged conduct is a merger or acquisition, this standard requires plaintiff to prove injury flowing from the anticompetitive or predatory nature of the merger or the postmerger entity. *Brunswick*, 429 U.S. at 488-89.¹⁴ [\[**21\]](#) The question, then, is whether Coors has alleged antitrust injury with sufficient specificity to meet the requirements of notice pleading.¹⁵

[\[**22\]](#) [\[*1401\]](#) Defendants contend predation is a necessary element of antitrust injury in antitrust actions between competitors and argue the post-acquisition Miller-Molson combination lacks the dominant market share

¹⁴ This does not mean, necessarily, that plaintiff must prove the merger actually drove it from the market before it can recover under § 4 of the Clayton Act. *Brunswick*, 429 U.S. at 489 n.14. The short-term effect of some types of anticompetitive behavior, e.g., below-cost pricing, may be to stimulate price competition. *Id.* What plaintiff must show is an injury that reflects the anticompetitive effect either of the antitrust violation or of anticompetitive acts made possible by the violation. *Id.* at 489.

¹⁵ While *Cargill* requires antitrust plaintiffs to plead standing and antitrust injury as necessary elements of claims for damages under the Clayton Act, it does not heighten the notice standard for pleading those elements. The rule in this circuit has been that **HN8** complex antitrust litigation is subject to no greater pleading requirements than the Rules of Civil Procedure provide for ordinary litigation. See, e.g., *Perington*, 631 F.2d 1369, 1372-73 (amended complaint charging conspiracy to violate antitrust laws sufficient to give fair notice of basis of claim); *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957); c.f. *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1387-88 (10th Cir. 1980) (blanket statement that twenty-eight defendants conspired to fix prices on drug sales to thirteen plaintiffs provided inadequate notice for responsive pleading). *Cargill* does not, in my opinion, alter this general rule. See generally Wright, C. *Law of Federal Courts*, § 68 at 475-76 (5th ed. 1994) (efforts by some district courts to apply strict rules as to the contents of antitrust complaints generally resulted only in a waste of time and longer pleadings, with no corresponding gain).

necessary to engage in predatory conduct. Coors' "injury," they argue, would be the result not of anticompetitive conduct or anticompetitive acts made possible by such conduct, but of "tough" competition. (Miller Mem. Supp. Mot. Dismiss at 3.) Defendants contend that under these circumstances, Coors is asking this court to protect a competitor, not competition, which is the "inimical" result against which the Supreme Court has cautioned. *Id.* To support their conclusion, defendants cite a case in which an earlier antitrust challenge to the Miller-Molson USA transaction was rejected on the same grounds. See *Pearl Brewing Co. v. Miller Brewing Co., 1993 U.S. Dist. LEXIS 16841*, 1993-2 Trade Cases P 70,370, 1993 WL 424236, *2-3 (W.D. Tex. 1993) (adopting magistrate judge's Recommendation), aff'd 52 F.3d 1066 (5th Cir. Aprl 6, 1995) (TABLE, No. 94-50509).

In Pearl, the United States District Court for the Western District of Texas rejected two brewers' efforts to enjoin the Miller-Molson **[**23]** USA acquisition on grounds the plaintiff-competitors had failed to establish antitrust injury. The court found the post-acquisition Miller-Molson combination would have an insufficient share of the defined relevant market (approximately 23%) to engage in predatory conduct, and agreed with Miller's experts that the acquisition would result in increased, rather than decreased, competition. *Id.* at *3. Because the conduct at issue was "not activity forbidden by the antitrust laws," it could not give rise to an "antitrust injury" no matter how damaging it was to plaintiffs' business. *Id.* at *4 (quoting *Cargill, 479 U.S. at 116*).

Coors disputes Pearl applies in this case because the Alliance, viewed in light of the Coors-Molson Licensing Agreement, is anticompetitive on its face. Coors maintains the post-acquisition Miller-Molson combination by definition restrains Coors' competitive behavior, "automatically" lessening competition in the North American beer market. (Coors Mem. Opp. Miller Mot. Dismiss at 20.) According to Coors, Pearl is distinguishable because the antitrust challenge was brought by brewing companies that, unlike Coors, had no contractual relationship **[**24]** with the entity their competitor was acquiring. (Mem. Opp. Miller Mot. Dismiss at 29 n.17.) It is this contractual relationship, Coors argues, that Miller is leveraging in this case to restrain trade, and which transforms Miller's "tough competition" into anticompetitive conduct causing antitrust injury to Coors. *Id.*¹⁶

[25]** The parties' logomachy reduces to opposite views on an ultimate issue in this case, *viz*, whether the post-acquisition Miller-Molson Alliance has injured Coors in a way the antitrust laws were designed to prevent. Coors' Complaint must stand or fall on the question of whether it has asserted factual allegations that, if proved, tend to establish an injury that flows from a threatened or actual restraint on competition. See, e.g., [*1402] *Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1372-73 (10th Cir. 1979)*.

While Coors' theory in this regard is less than clear, I find Coors has pleaded sufficient factual allegations to survive the present motion to dismiss. The Tenth Circuit's opinion on Molson's interlocutory appeal of Judge Matsch's denial of Molson's motion for stay, supports this conclusion.¹⁷ At this stage of the proceedings, Coors' ability to

¹⁶ Without relying on this document in ruling on the present motion to dismiss, I note Coors has come forward with an expert affidavit to support its contentions regarding the anticompetitive effects of the Alliance. In this affidavit, submitted as part of Coors' pending motion for preliminary injunction, Dr. Douglas Greer explains the nature of the United States and North American beer markets, and the parties' relevant status in those markets both generally as well as in the "premium" and "light" market segments. According to Dr. Greer, the Miller-Molson combination, considered in light of both Coors' status as "the main competitor" to Miller and Anheuser-Busch in these markets and the broad discretionary power over Coors' brands granted Molson under the Coors-Molson Licensing Agreement, "may substantially lessen competition" in the U.S. market generally and in the "premium" and "light" beer market segments in particular. See Affid. of Professor Douglas F. Greer, Ph.D. in Supp. Pl.'s Mot. Preliminary Inj., p. 3-5 (emphasis original).

¹⁷ Acknowledging the murky nature of Coors's theory regarding the anticompetitive effect of Miller's alleged ability, through the Alliance, to control Coors, the Tenth Circuit in dicta nevertheless stated Coors had "presented a sufficient factual outline to suggest it might develop a theory" of antitrust injury, and stated Coors was "therefore entitled to conduct discovery and refine its theories." *Coors v. Molson et al., 889 F. Supp. 1394*, No. 94-1217, slip op. at 16 (inviting Molson, however, to challenge the legal sufficiency of Coors' claims "at a later point in this litigation"). As I indicated *supra*, at n.7, Coors' ability to prove Miller has sufficient control over Coors to restrain competition in the U.S. and North American beer markets is confounded somewhat by the Tenth Circuit's imposition of a stay of Coors' claims against Molson to the extent those claims relate to the Coors-Molson Licensing Agreement upon which that control is premised.

marshall the necessary facts to support its theory of antitrust injury has not been tested and dismissal is inappropriate. If Coors is unable during discovery to marshall those facts, defendants no doubt will renew their challenge to the sufficiency of Coors' claims and the issue will be revisited on a [**26] motion for summary judgment.

2. Standing to Claim Damages

Even [**27] if Coors is found to have adequately alleged antitrust injury, Miller and Molson argue Coors lacks standing to pursue a claim for treble damages because the injury Coors alleges is based on "sheer speculation" as to harm Coors "might hypothetically" suffer in the future. (Defs.' Mem. Supp. Mot. Dismiss at 14.) This argument is not without merit. As I review the record, I find few allegations that the Alliance has resulted in *actual* harm to Coors. The gist of Coors' Clayton Act claim for damages is that the Alliance's effect "may be substantially to lessen competition in the United States [and North American] beer market[s]." Compl., P 47.

Again, however, I am reluctant to dismiss Coors' claim without first giving it an opportunity to develop and refine its theory of antitrust injury. In its Complaint, Coors alleges the Alliance threatens to preclude it from implementing unified competitive strategies in the North American market except at the mercy of Miller and Molson, and alleges this threat has had a "current tangible impact" on its operations. (Coors' Mem. Opp. Mot. Dismiss at 18.) Coors asserts it has been forced to make choices, investments and plans it would not otherwise [**28] have made in order to protect itself from the threat it perceives is presented by the Alliance.¹⁸ See [id. at 27-31](#); Coors' Compl., PP 7-10, 40, 44, 45, 48, 53. These assertions, if true, create an inference that Coors has suffered actual harm from the allegedly anticompetitive conduct of Miller and Molson.

I also find Coors has satisfied the other factors to be considered in an evaluation of antitrust standing. Coors has alleged a causal connection between its injuries and the defendants' allegedly anticompetitive conduct, and has alleged facts from which anticompetitive intent can be inferred. See n.3, *supra*. Given the unique [**29] factual underpinnings of Coors' claims and the limited number of parties involved, there appears to be little risk of duplicative recoveries or the need for complex damages apportionment as would militate against conferring standing in this case. Under these circumstances, I find Coors has satisfied the requirements articulated in *Cargill* and deny defendants' motion to dismiss for lack of standing.

D. Sufficiency of Coors' Claims Under Rule 12(b)(6)

Finally, defendants assert Coors' Complaint should be dismissed for failure to state a claim upon which relief can be granted. As grounds, defendants argue Coors has [*1403] alleged injury only to itself, and not to competition as is a prerequisite to any action under the antitrust laws. Because antitrust standing cannot be established without antitrust injury, [Sharp v. United Airlines, 967 F.2d at 406](#), my finding that Coors's Complaint cannot, at this stage of the proceedings, be dismissed for lack of standing necessarily disposes of defendants' arguments. Again, if Coors is unable during discovery to marshall facts to support its theory of antitrust injury, defendants will be free to renew their challenge. No further comment on [**30] the question of antitrust injury is required.

III. Conclusion

For the foregoing reasons, the motion to dismiss for lack of subject matter jurisdiction, lack of standing and failure to state a claim upon which relief can be granted, in which all defendants join, is DENIED, and the motion to dismiss for lack of personal jurisdiction, in which the Canadian Molson defendants join, is also DENIED.

Dated this 5th day of June, 1995, at Denver, Colorado.

JOHN L. KANE, JR.

U.S. SENIOR DISTRICT COURT JUDGE

¹⁸ For example, Coors asserts the Miller-Molson Alliance has already affected competition in the U.S. market by preventing Coors from pursuing an intention of using Molson to brew Coors beer in Canada for import into certain areas of the U.S. where it would be cost-effective to do so, e.g., northern New England. Mem. Opp. Mot. Dismiss at 27 (citing Greer Affid., P 34).

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Pacific Gas & Electric Co. v. County of Stanislaus

Court of Appeal of California, Fifth Appellate District

June 8, 1995, Decided ; June 8, 1995

No. F021776.

Reporter

48 Cal. App. 4th 1393 *; 41 Cal. Rptr. 2d 602 **; 1995 Cal. App. LEXIS 539 ***; 95 Cal. Daily Op. Service 4443; 1996-1 Trade Cas. (CCH) P71,433

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff and Appellant, v. COUNTY OF STANISLAUS et al., Defendants and Respondents.

Notice: NOT CITABLE - SUPERSEDED BY GRANT OF REVIEW

Subsequent History: [***1] Review Granted September 28, 1995 (S047749), Reported at: [1995 Cal. LEXIS 5962.](#)

[Reprinted without change to permit tracking pending disposition on review by the Supreme Court (See Preface to Cumulative Subsequent History Table. Previous cites [35 Cal. App. 4th 908](#) and [39 Cal. App. 4th 1778](#) and [44 Cal. App. 4th 490.](#))]

Prior History: Superior Court of Stanislaus County, No. 303786, John G. Whiteside, Judge.

Disposition: The judgment is affirmed. Costs on appeal are awarded to respondents.

Core Terms

attorney general, district attorney, class action, political subdivision, public agency, government entity, public official, Cartwright Act, prosecute, subdivision, antitrust, civil action, initiate, resides, antitrust action, legislative history, entities, local government, damages, class representative, criminal proceeding, cause of action, first sentence, violations, legislative intent, name of the people, bring an action, natural person, confirm, effects

LexisNexis® Headnotes

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

HN1[] Legislation, Interpretation

In determining legislative intent, the court shall look first to the words of the statute themselves. When the language is clear and unambiguous, there is no need for construction. When the language is susceptible of more than one reasonable interpretation, however, the court shall look to a variety of extrinsic aids, including the ostensible objects

to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN2 [down arrow] **Public Enforcement, State Civil Actions**

The existence of a private cause of action for damages does not inherently include the right to prosecute that cause of action in a class action lawsuit. [Fed. R. Civ. P. 23](#) and [Cal. Civ. Proc. Code § 382](#) are the basis for the right to bring a class action. However, problems that might make a class action inappropriate in a particular case do not undermine the individual cause of action of the governmental entity provided by the Cartwright Act, [Cal. Bus. & Prof. Code § 16750](#); those problems are to be addressed as provided by the body of class action law.

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

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN3 [down arrow] **Class Actions, Certification of Classes**

The plain language of the Cartwright Act, [Cal. Bus. & Prof. Code § 16750\(a\),\(b\)](#), permits counties and other governmental entities with the capacity to sue to bring and prosecute Cartwright Act actions on an equal footing with any other person. This includes the option to proceed on a class action basis when the trial court certifies that such basis is appropriate in the particular lawsuit. Neither [§ 16750\(c\)](#) nor [§ 16750\(g\)](#), individually or read together, limits the prosecution of the [§ 16750\(a\)](#) cause of action. They simply provide a further mechanism by which anticompetitive activity may be attacked.

Counsel: Nossaman, Guthner, Knox & Elliott, William T. Bagley, Douglas J. Maloney, Alan D. Miller, J. Michael Reidenbach, Joshua Bar-Lev, McKenna & Cuneo, Howard V. Golub, and Brunn & Flynn for Plaintiff and Appellant.

Michael H. Krausnick, County Counsel, and Andrew N. Eshoo, Deputy County Counsel, for Defendants and Respondents.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Thomas Greene, Assistant Attorney General, Richard N. Light and Sanford N. Gruskin, Deputy Attorneys General, as Amici Curiae, upon the request of the Court of Appeal.

Judges: Opinion by Vartabedian, J., with Ardaiz, P. J., and Thaxter, [\[**2\]](#) J., concurring.

Opinion by: VARTABEDIAN, J.

Opinion

[*1396] [\[**603\]](#) VARTABEDIAN, J.

Appellant Pacific Gas and Electric Company is defendant in an antitrust class action pending in federal court. Respondent County of Stanislaus (the county) is a named plaintiff in that class action. The present case involves appellant's attempt pursuant to [Code of Civil Procedure section 526a](#) to prohibit respondents from expending any funds to prosecute the federal court action. The trial court sustained respondents' demurrer to appellant's complaint without leave to amend. We affirm.

FACTS AND PROCEDURAL HISTORY

On December 3, 1993, the county and a residential customer of appellant filed a class action complaint in the United States District Court, Eastern District of California. The complaint alleged violations of various federal statutes ¹ [***3] and the California Cartwright and Unfair Practices Acts. ² The complaint challenges the mechanism by which appellant contracts for the purchase of Canadian natural gas.

In response, appellant filed its state court complaint for injunctive and declaratory relief on February 9, 1994. That complaint, filed pursuant to [Code of Civil Procedure \[**6041 section 526a\]](#), ³ [***4] named as defendants the county, its board of supervisors, and each county supervisor individually (collectively, respondents). The complaint alleges that [Business and Professions Code section 16750](#) ⁴ only permits the county to sue concerning acts which occurred or have their effects primarily within the county. The complaint further alleges the county usurped the sovereignty of the class-member counties by prosecuting an action on their behalf. Respondents demurred to the complaint.

The trial court heard the demurrer on March 24, 1994. By written order filed May 3, 1994, the court sustained the demurrer without leave to amend. [*1397] Judgment was entered on May 11, 1994. Appellant filed its notice of appeal on June 9, 1994.

DISCUSSION

Appellant contends that [section 16750](#), in net effect, permits the county to file a multi-county class action antitrust suit only if the county is represented by the Attorney General. Respondents contend [section 16750](#) does not limit a county's right to proceed with a class action through counsel of its own choosing. ⁵

[***5] We will begin by setting out the historical development of [section 16750](#) and related sections; we will then discuss the meaning of [section 16750](#). We will conclude that respondents' interpretation of [section 16750](#) is correct: there is no requirement that the county's class action be prosecuted by the Attorney General.

¹ The complaint alleges violations of the Sherman Act ([15 U.S.C. § 1 et seq.](#)), the Wilson Tariff Act ([15 U.S.C. § 8 et seq.](#)), and the Clayton Act ([15 U.S.C. § 12 et seq.](#)).

² The Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) is the California counterpart of federal antitrust laws. The Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)) prohibits "unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." ([Bus. & Prof. Code, § 17001](#).)

³ [Code of Civil Procedure section 526a](#) provides, in relevant part: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein."

⁴ All further statutory references are to the Business and Professions Code except when otherwise indicated.

⁵ Due to the nature of the issue presented, the court invited the Attorney General to appear in this appeal as amicus curiae. He accepted the invitation and filed a letter brief on April 11, 1995. That brief states that "although the matter is not free from doubt, the Attorney General has exclusive authority to bring statewide class actions for treble damages under state and federal antitrust laws on behalf of political subdivisions and other public agencies of the state." We address specific arguments in the amicus brief at various points below.

A. THE STATUTORY BACKGROUND.

The Cartwright Act was enacted in 1907. (Stats. 1907, ch. 530, p. 984.) The initial statutory authority for a civil damages action was enacted in 1941. (Stats. 1941, ch. 526, § 1, p. 1834.) The current statutory authorization for treble damages was enacted in 1959. (Stats. 1959, ch. 2078, § 1, p. 4811.) As amended in that year, section 16750 provided, in relevant part: "Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys' fee together with the costs [***6] of the suit...."

In 1961, the foregoing section was renumbered as subdivision (a) and subdivisions (b) and (c) were added to section 16750, as follows (Stats. 1961, ch. 1023, § 1, p. 2705):

"(b) The state and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section.

[*1398] "(c) The Attorney General may bring an action on behalf of the state or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of federal law, provided that the Attorney General shall notify in writing any political subdivision or public agency of his intention to bring any such action on its behalf, [**605] and at any time within 30 days thereafter, such political subdivision or public agency may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the Attorney General to bring the intended action...."

In addition to the codified sections of chapter 1023, Statutes of 1961, section 2 of the statute provided: "Subdivision (b) is added to this section section 16750 for the purpose of clarification [***7] only and is not to be construed or interpreted as an indication that the State or any of its political subdivisions or public agencies is not a person within the meaning of Section 16750 as originally enacted in Chapter 530 of the Statutes of 1907 and as subsequently amended. The Legislature hereby further declares that at the time of the original enactment of Section 16750, and at all times since, it intended that the State, its political subdivisions and public agencies be included within the meaning of the word 'person.' "

Also in 1961, the Legislature repealed and replaced section 16754. (Stats. 1961, ch. 757, § 1, p. 2013.) That section previously authorized the Attorney General and the district attorney to initiate forfeiture actions for violations of the Cartwright Act. (Stats. 1941, ch. 526, § 1, p. 1834.) The 1961 revision provided: "The Attorney General, or the district attorney of any county, on the order of the Attorney General, shall initiate civil actions or criminal proceedings for violation of this chapter. Civil actions and criminal proceedings for violation of this chapter initiated by the Attorney General or on his order may be brought in the superior court [***8] in and for any county where the offense or any part thereof is committed or where any of the offenders reside or where any corporate defendant does business."

From 1961 until 1977, there were amendments to section 16750, but the above quoted subdivisions were essentially unchanged. One 1972 amendment bears mention, however. Chapter 1140, section 1, Statutes of 1972, added subdivision (d) to section 16750, as follows: "(d) In any antitrust action brought on behalf of the state in which the Attorney General is the class representative of political subdivisions, public agencies, or citizens of the state who have been affected by the matters set forth in the complaint, the state shall retain for deposit in the Attorney General antitrust account within the General Fund, the proceeds, if any, of any attorneys' fees awarded [*1399] by the court in which such case is located, to the Attorney General, resulting from such class representation."

In 1977, there were further amendments to section 16750, although the previously quoted subdivisions remained unchanged. (See Stats. 1977, ch. 540, § 1, pp. 1741, 1743-1744.) Among the 1977 amendments were the following additions to section [***9] 16750:

"(g) The district attorney of any county may prosecute any action on behalf of such county or any city or public agency or political subdivision located wholly within such county which the Attorney General is authorized to bring pursuant to subdivision (c) of this section, whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county.... In any investigation or action undertaken or brought by a district attorney pursuant to this section, if the Attorney General deems it necessary and in the public interest, the Attorney General may take full charge of any such investigation or prosecution, ..." "

"....

"(i) In any action brought pursuant to subdivision (g) a district attorney may represent any political subdivision located within his [or her] county directly, in which case he [or she] shall notify in writing such political subdivision of his [or her] intention to bring any such action on its behalf, and at any time within 30 days thereafter, such political subdivision may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of **[***10]** the district attorney to bring the intended action. In any action in which a district attorney directly represents any political subdivision located within his county, the district attorney shall retain out of the proceeds [a certain ****606**] amount]. In any action brought pursuant to subdivision (g) in which the county, through the district attorney, is the class representative of political subdivisions located within such county, the district attorney shall retain [any attorneys' fees awarded by the court]...."

In addition to the foregoing amendments to [section 16750](#), the Legislature also enacted section 16760 in 1977. (Stats. 1977, ch. 543, [§ 1](#), pp. 1747-1748.) That section, in relevant part, provides:

"(a)(1) The Attorney General may bring a civil action in the name of the people of the State of California, as *parens patriae* on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this **[*1400]** section for injury sustained by such natural persons to their property by reason of any violation of this chapter...."

"....

"(g) The district attorney of any county may prosecute **[***11]** any action on behalf of the natural persons residing in such county which the Attorney General is authorized to bring pursuant to subdivision (a) whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county...."

B. APPLICATION OF CODE SECTIONS IN THE PRESENT CASE.

In applying [section 16750](#) to the facts before us, we seek to vindicate the legislative intent underlying that section. "[HN1](#) 'In determining intent, we look first to the words [of the statute] themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]' " ([Granberry v. Islay Investments \(1995\) 9 Cal.4th 738, 744 \[38 Cal.Rptr.2d 650, 889 P.2d 970\]](#), quoting from [People v. Woodhead \(1987\) 43 Cal.3d 1002, 1007-1008 \[239 F.2d 121 Cal.Rptr. 656, 741 P.2d 154\]](#)).

In the present case, determination of whether [section 16750](#) is clear on its face or is instead ambiguous, thus necessitating construction and interpretation, requires that we first provide a historical or political context for the language the Legislature has chosen to use. This context is provided by focusing on the nature of the offices of Attorney General and district attorney.

Fundamentally, both offices have a dual character. (See [State of Fla. ex rel. Shevin v. Exxon Corp. \(5th Cir. 1976\) 526 F.2d 266, 268](#) [historical overview of office of Attorney General].) First, each is the attorney for the government, whether at the state or local level. Thus, for example, the Attorney General is the legal adviser to all state departments in matters relating to the department or the powers and duties of its officers. ([Gov. Code, § 11157](#); see also [Gov. Code, § 11040- 11041](#).) Similarly, the district attorney "shall render legal services to the county

without fee and may render legal services to school districts and to other local public entities as [*1401] requested. . . ." ([Gov. Code, § 26520](#)).⁶ We will refer to this as the "government [***13] [**607] lawyer" function of the Attorney General and the district attorney.

[***14] In their other capacity, by contrast, the Attorney General and the district attorney are public officials invested with the powers of the sovereign; they act directly and on behalf of the public. The most obvious example of this power is in bringing criminal prosecutions in the name of the People. While the district attorney's staff is "the lawyer" for the People, there is no "client" who must be consulted or obeyed. (In a significant sense, the district attorney is both "client" and "lawyer.")

There are other examples of sovereign power vested in the Attorney General or district attorney. The district attorney may file an action to abate a nuisance in his county. ([Gov. Code, § 26528](#)) The Attorney General may institute actions in the name of the state or a state agency concerning title, boundaries or possession of real property in which the state has an interest. ([Gov. Code, § 12518](#)) Closer to the subject of the present case, the Attorney General may bring an action "in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state" to recover damages for violations of the Cartwright Act. (§ 16760, subd. (a)(1).) The [***15] district attorney has the same power to prosecute such actions "on behalf of the natural persons residing in such county." (§ 16760, subd. (g).) We will refer to this as the "public official" function of the Attorney General and district attorney.

Thus, the Attorney General and the district attorney in some instances function as lawyers for actual clients, i.e., the state or political subdivisions [*1402] thereof, and sometimes they function as public officials in their own right.⁷ The primary difference, for present purposes, is that in the first instance the client decides whether to litigate or to settle. In the second instance, the Attorney General or the district attorney exercises the statutory discretion to litigate or to settle.

[***16] Recognition of these two different historical roles is necessary to properly discern the legislative intent embodied in [section 16750](#). When [section 16750](#) is viewed as addressing only the "public official" Attorney General or district attorney--that is, the official who directly exercises statutory power and who does not have an actual "client" in any traditional sense--the legislative intent becomes clear and unambiguous. Ambiguity and the need for statutory construction appear only if we try, as appellant does, to apply the language of [section 16750](#) to the "government attorney" function of the Attorney General and the district attorney.

The focus of the Legislature on the "public official" role of the Attorney General and the district attorney is reflected in the language used in [section 16750](#). For example, the Attorney General must "notify in writing any political subdivision or public agency of his or her intention to bring any such action on its behalf" ([§ 16750, subd. \(c\)](#).) Thus, the initial decision to bring suit lies with the Attorney General, not with the injured entity. This "on behalf of"

⁶ County counsel serves as legal adviser to the county if the county has created such position. ([Gov. Code, § 26526](#)) Further, "whenever the board of supervisors appoints a county counsel pursuant to this chapter, he shall discharge all the duties vested by law in the district attorney other than those of a public prosecutor." ([Gov. Code, § 27642](#)) In the federal class action, the county is represented by county counsel and by private counsel. To the extent the county has an independent right of action under [section 16750, subdivisions \(a\)](#) and [\(b\)](#), appellant does not contend county counsel and private counsel are inappropriate attorneys for the county. Appellant simply disagrees there is such a right of action in the present circumstances. Appellant does argue that the [section 16750, subdivision \(g\)](#) powers of the district attorney cannot be exercised by county counsel pursuant to [Government Code section 27642](#). Because we hold that the power to prosecute the Cartwright Act class action arises from [section 16750, subdivision \(a\)](#), and not [section 16750, subdivision \(g\)](#), we need not reach appellant's contention. The right to sue under federal antitrust laws is conferred by those laws. (See, e.g., [Georgia v. Evans \(1942\) 316 U.S. 159, 162 \[86 L. Ed. 1346, 1350, 62 S.Ct. 972\]](#).)

⁷ A case cited by both parties is a clear example of this duality. In [People ex rel. Freitas v. City and County of San Francisco \(1979\) 92 Cal.App.3d 913 \[155 Cal.Rptr. 319\]](#), the district attorney, in his "public official" role sued his own government entity, the City and County of San Francisco, for antitrust violations in setting taxi fares. The city and county was represented by the city attorney, acting in the role of "government lawyer."

language again appears in section 16760, the parens patriae section, where [***17] the Attorney General even more clearly acts as a “public official,” not as the lawyer for a government entity.

A further example of the “public official” orientation of the legislation is found in the requirement that the Attorney General retain any attorney fees awarded in an action “in which the Attorney General is the class representative of political subdivisions, public agencies, or citizens of the state” ([§ 16750, subd. \(d\)](#).) This phrasing contemplates that the Attorney General “is” the class representative, i.e., the party plaintiff. The district attorney is likewise required to retain such fees in any action “in which the county, through the district attorney, is the class representative” ([§ 16750, subd. \(i\)](#).)

This unambiguous reference in [section 16750](#) to the “public official” function of the [**608] Attorney General and the district attorney is confirmed when [*1403] we look at the informal legislative history of [section 16750](#). Although the materials submitted by respondents from the legislative author's file are very weak indications of legislative intent and by no means have dictated our conclusions in this case, the materials provide some confirmation that [***18] our plain reading of the statutes is not misguided. (Cf. [Producers Dairy Delivery Co. v. Sentry Ins. Co. \(1986\) 41 Cal.3d 903, 914 \[226 Cal.Rptr. 558, 718 P.2d 920\]](#) [statutes as confirming plain language of insurance policy].)

In an early staff explanation of the proposed 1961 amendment to [section 16750](#), we find: “[T]he bill would authorize the Attorney General to bring damage actions on behalf and in the name of public subdivisions and public agencies of the State, as well as of the State itself. The need for such standing authority was recently demonstrated in the case now pending to recover treble damages on behalf of more than 100 school districts throughout the State. For want of existing authority, it was necessary to contact each school district which had been injured and to secure individual resolutions authorizing the Attorney General to act on behalf of such district.” (Author file, document 2, p. 3.)

The foregoing reflects that, prior to the 1961 amendments, the Attorney General already exercised the authority to serve as “government lawyer” for governmental clients in antitrust actions; the proposed legislation conferred “public official” status on the Attorney [***19] General independently to bring such actions in the name of the injured agency or political entity. This duality is reflected again in a questionnaire prepared by the author of the amendments: “The bill is permissive only. It does not curtail or restrict the authority of any local agency of government from independently bringing its own action whenever it desires.” (Author file, document 3, pp. 2-3.)

The amendments to [section 16750](#), as originally introduced in the Legislature, omitted the proviso now contained in the first sentence of [section 16750, subdivision \(c\)](#).⁸ A critic of the proposed legislation, general counsel for the Sacramento Municipal Utility District, E. R. Davis, objected by letter to the bill's author that the “bill presumably would enable the Attorney [*1404] General to bring a suit for damages in antitrust matters with or without the concurrence of the public agency.... However, public agencies ... in the utility business [] would want to make their own decision whether antitrust claims should be pursued.” (Letter dated Mar. 28, 1961, addressed to Wallace Howland, Assistant Attorney General.) Davis suggested as an alternative “that the Attorney General [***20] may bring the action unless there is objection by the public agency.” (*Ibid.*) Such language was added by amendment to the bill and is now contained in [section 16750](#).

Thus, the plain language of [section 16750](#) and the available legislative [***21] history both confirm that the Legislature, in amending [section 16750](#) in 1961, (a) *did not* intend to alter the then existing ability of local

⁸That sentence now reads: “The Attorney General may bring an action on behalf of the state or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of federal law, **provided that the Attorney General shall notify in writing any political subdivision or public agency of his or her intention to bring any such action on its behalf, and at any time within 30 days thereafter, such political subdivision or public agency may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the Attorney General to bring the intended action.**” The portion set out in boldface was not contained in the amendments as originally proposed.

governments to institute antitrust actions through their own lawyers and did not alter the ability of the Attorney General's office to serve as such lawyers for the local entity;⁹ and (b) *did* [**609] intend to vest in the Attorney General the power to exercise, within limits, the right of state and local governmental entities to bring suit for antitrust violations.

Similarly, in the 1977 [**22] amendments, some of the "public official" power of the Attorney General was delegated to the district attorney. Thus where the anti-competitive "activities ... or effects of such activities" are local in nature, the district attorney may bring suit in the name of local governments, subject to divestment of that authority by the local government on written notice or by the Attorney General when "necessary and in the public interest."¹⁰

[**23] Having reviewed the duality of the "government lawyer" and "public official" functions of the Attorney General and the district attorney underlying the language and legislative history of [section 16750](#), we return to appellant's primary argument on appeal and the erroneous premise of the argument. Appellant summarizes its argument, as follows: "The state, its [*1405] political subdivisions and public agencies have standing to sue as plaintiffs, but the Cartwright Act vests the authority to *represent* these entities in the Attorney General. In other words, public agencies have a right to claim damages under the act, but this right can only be enforced by the Attorney General. In 1977 the legislature delegated a segment of the Attorney General's exclusive representation authority to district attorneys who were allowed to file *local* antitrust actions after notice to the Attorney General. But the Cartwright Act remains steadfast that only the Attorney General can file statewide antitrust actions in state or federal court."

We conclude that [section 16750](#) has nothing to do with "representation" of governmental entities by the Attorney General. Instead, such representation [**24] in antitrust actions *initiated by local government* is governed by general statutory law and common law permitting the Attorney General and district attorney to represent governmental entities in litigation and by general statutory provisions governing the hiring of outside counsel by local entities. (See, e.g., [Gov. Code, § 31000](#).) Rather than regulating representation, [section 16750](#) creates in the Attorney General and the district attorney the authority to exercise, within limits, the governmental power to sue for antitrust injuries to the governmental entity and to settle such suits in the public interest.¹¹

[**25] It is true, as appellant argues, that subdivisions (c), (d), and (i) of [section 16750](#) contemplate that the Attorney General and the district attorney may bring an action as either a class action or as an ordinary lawsuit. Also, subdivision (i) only permits a district attorney to file a class action on behalf of governmental entities within his or her county. But the distinction being drawn in subdivision (i) only concerns the power of the district attorney in his or her "public official" capacity--i.e., the degree of such power delegated by the 1977 amendments from the Attorney General (and, thus, in turn from the body politic) to the district attorney, namely the power to act "on his

⁹We find nothing at all implausible or absurd, as suggested by amicus curiae, about a statutory scheme that reserves to the local elective governing body the determination to use local resources to sue on a statutory cause of action. Such power is normal for a local governing body. (See [Gov. Code, § 23005](#) ["A county may exercise its powers only through the board of supervisors or through agents and officers acting under authority of the board or authority conferred by law".].)

¹⁰Thus, properly viewed, subdivisions (d) and (g) of [section 16750](#) are new and supplementary grants of enforcement power. As such, there is no anomaly in the Attorney General's responsibility to supervise the new power of the district attorney, but lack of responsibility to supervise the previously existing enforcement authority of local governmental entities. Instead of such supervisory responsibility in the case of actions initiated by local governments, the Attorney General is authorized to "render legal services as special counsel to" the local entity under certain circumstances. (See [§ 16750, subd. \(e\)](#).)

¹¹This statutory scheme finds a parallel in section 16760. There, individuals retain all rights to sue for individual violations of antitrust laws, but the Attorney General and the district attorney are given concurrent power to sue on behalf and in the name of such individuals as a class. The creation of a concurrent power in the Attorney General or the district attorney does not divest individuals of the initial power to file suit on their own behalf, nor to "opt out" of such a suit, just as the local entity can under [section 16750](#). (See § 16760, subd. (b)(2); see [Bruno v. Superior Court \(1981\) 127 Cal.App.3d 120, 133 \[179 Cal.Rptr. 342\]](#).)

own" on behalf of the government. This transfer of power from the Attorney General to the district attorney did not remove from any governmental entity its own power to commence an antitrust action; that power was preserved to the governmental entities in the 1961 amendments. [**610] The 1977 amendments only took part of the power the Attorney General had obtained in 1961 and further delegated that power to the district attorney.

[*1406] This view of [section 16750](#) as addressing only the "public official" [***26] function of the Attorney General and the district attorney, and not their "government lawyer" function, provides a cohesive framework for understanding [section 16750](#) and its legislative history. Appellant and amicus curiae argue, however, that any interpretation that permits an individual county or other entity to sue as class representative for other counties or local entities would present the risk of a county running amok, doing violence to statewide antitrust policy. Appellant paints a picture of every mosquito abatement district in the state engaging in class actions about which they cannot reasonably expect to exercise competent judgment. Amicus curiae states that only the Attorney General "has the duty and expertise to coordinate antitrust enforcement on a statewide basis, ..."

The answer to these concerns lies in the law of class actions, however, and not in the law conferring upon local governments rights under the antitrust laws. Issues about a litigant's ability to provide adequate legal representation for the class or to tender claims typical of the class are part of the decisionmaking matrix of the trial court in determining whether to certify a particular action as [***27] a class action. (See [Fed. Rules Civ. Proc., rule 23](#), especially (b)(2), (c), (e); [City of San Jose v. Superior Court \(1974\) 12 Cal.3d 447, 453 \[115 Cal.Rptr. 797, 525 P.2d 701, 76 A.L.R.3d 1223\]](#) [California procedures to be guided by federal [rule 23](#) procedures].) Provisions governing "(b)(3)" class actions such as this one require notice to class members, the opportunity to opt out of the class and other protection for class members not found in [section 16750](#). (See [Fed. Rules Civ. Proc., rule 23\(c\)](#) and [\(e\)](#).)

HN2 [↑] In summary, on the one hand, the existence of a private cause of action for damages does not inherently include the right to prosecute that cause of action in a class action lawsuit; [Federal Rules of Civil Procedure, rule 23](#) and [Code of Civil Procedure section 382](#) are the basis for the right to bring a class action. On the other hand, problems that might make a class action inappropriate in a particular case do not undermine the individual cause of action of the governmental entity provided by the Cartwright Act; those problems are to be addressed as provided by the body of class action law.¹²

[***28] This brings us to appellant's next argument, that the county has no independent power to bring an antitrust action under the Cartwright Act apart from the limited standing it says is conferred by subdivisions (c) and [*1407] (g) of [section 16750](#). Appellant says *People ex rel. Freitas v. City and County of San Francisco, supra, 92 Cal.App.3d 913* and *County of San Luis Obispo v. Abalone Alliance (1986) 178 Cal.App.3d 848 [223 Cal.Rptr. 846]* stand for the proposition that [Government Code section 23004](#), which provides that a county may "sue or be sued," does not give the county independent power to sue under the Cartwright Act.

[Government Code section 23004](#) does not, of itself, create any cause of action, under the Cartwright Act or otherwise. [Government Code section 23004](#) merely makes the county a proper party in a lawsuit. That is the meaning of *Freitas* and *Abalone Alliance*. *Freitas* holds that a city and county is not a "person" made liable under the Cartwright Act by section 16702, and the fact that it may "be sued" pursuant to [Government Code section 23004](#) does not, in itself, create liability. Yet *Freitas* specifically notes that the Cartwright [***29] Act does make a city or county a "person" who can be injured and can sue under [Government Code section 16750, subdivision \(b\)](#). (*People ex rel. Freitas v. City and County of San Francisco, supra, 92 Cal.App.3d at p. 920.*)

Abalone Alliance merely holds that a county must have a recognized cause of action on which to sue, even though it is given a [**611] generalized capacity to sue by [Government Code section 23004](#). (*County of San Luis Obispo v. Abalone Alliance, supra, 178 Cal.App.3d at pp. 860-861.*) Accordingly, *Abalone Alliance* is inapplicable here,

¹² We express no opinion about the validity of a legislative restriction that expressly prevented local governments from seeking an otherwise available federal court remedy, such as a class-wide damages judgment under the Sherman Act. We have concluded in the present case that [section 16750](#) is not such a legislative restriction on local government entities.

since the county does have a cause of action under [section 16750, subdivisions \(a\)](#) and [\(b\)](#) of the Cartwright Act, upon which it has sued pursuant to the capacity to sue set forth in [Government Code section 23004](#).

The interpretation of [section 16750](#) outlined above is coherent and in keeping with the language of that section and the available legislative history. Appellant's interpretation is not. For example, consider a five-county emergency medical services agency established pursuant to [section 1797 et seq. of the Health and Safety Code](#). If ambulance companies in that five-county area conspired to fix the price [***30] for emergency services charged to each county, the activities and effects would not be "primarily in" any single county. Under appellant's interpretation, neither the district attorney nor the counties involved could sue the ambulance providers; only the Attorney General would be able to bring the action under [section 16750, subdivision \(c\)](#).

We find nothing in the statutory scheme that would leave counties and other local governmental entities wholly subject to the discretion of the [*1408] Attorney General to provide representation in the circumstances just described. Nor can we conceive of any public policy reason that would permit the ambulance companies' anti-competitive activity to continue just because the Attorney General had insufficient resources to address the matter.

Yet such a situation is a necessary component of appellant's interpretation of the statute. That interpretation is not limited to class actions, but instead would divide the universe of permissible antitrust litigation by local governments, whether by class action or not, into just two fields, activities with sufficient "statewide effect" to attract the Attorney General's interest and those "primarily [***31] in one county," which the district attorney may address. As we have seen, there are important examples of anti-competitive action, such as that involving the hypothetical regional emergency medical services authority, that may fit into neither category. We believe an interpretation that does not leave gaping holes in the enforcement structure more probably reflects the intent of the Legislature.

Notwithstanding the ample reasons supporting our interpretation of [section 16750](#), there is an inconsistency between that interpretation and section 16754. Section 16754, it will be recalled, provides in relevant part: "The Attorney General, or the district attorney of any county ... shall initiate civil actions or criminal proceedings for violation of this chapter. Civil actions and criminal proceedings for violation of this chapter initiated by the Attorney General or district attorney may be brought in the superior court in and for any county where the offense or any part thereof is committed or where any of the offenders reside or where any corporate defendant does business...."

We are unable to find any straightforward meaning for the use of "shall" in the first sentence of section [***32] 16754. It is obvious that the sentence does not mean, "Only the attorney general or the district attorney shall initiate civil actions" This reading would preclude civil actions by private persons, whose rights are created in the same subdivision of [section 16750](#) that, indistinguishably, creates the rights of governmental entities. (See [§ 16750, subd. \(a\)](#).)

Clearly, the first sentence of section 16754 does not mean, "The attorney general or the district attorney shall, upon request of a government entity, initiate civil actions" Where the Legislature has imposed a mandatory duty on government lawyers, it has done so explicitly: "The district attorney may, and when directed by the board of supervisors shall, bring a civil action in the name of the people of the State of California to abate a public nuisance in his county." ([Gov. Code, § 26528](#).)

[*1409] In examining the prior version of section 16754 that was replaced in 1961 with, essentially, the present version, we find the use of "shall" IN A MORE INTELLIGIBLE CONTEXT: "[**612] Every person who violates this chapter shall for each day that such violations are committed or continued, after due notice given by the Attorney [***33] General or any district attorney, forfeit and pay the sum of fifty dollars (\$ 50), which may be recovered in the name of the people of this State in any county where the offense is committed, or where either of the offenders resides. The Attorney General, or the district attorney ... shall prosecute for the recovery of the forfeit. When the action is prosecuted by the Attorney General against a corporation or an association of persons, he may begin the action in the superior court in and for the county where the defendant resides or does business." (See Stats. 1941, ch. 526, [§ 1](#) p. 1837.)

The most plausible explanation for the present use of “shall” is that the 1961 amendment was drafted by the “blue pencil” method, where unnecessary language from the old section is stricken through and the necessary new language is inserted. Thus, in 1961, at the same time the Attorney General was permitted to sue on behalf of local government entities, forfeiture was deleted as an available enforcement mechanism; the first sentence of the old section 16754 was therefore stricken out. The remaining sentences of the old section 16754 were modified by inserting “initiate civil actions or criminal [***34] proceedings” instead of “prosecute for the recovery of the forfeit,” in order to make section 16754 a general venue state for antitrust suits brought by the government. In other words, the first sentence, including the use of the word “shall,” became surplusage. “Shall” meant neither “must,” as it had in the phrase “shall prosecute for recovery of the forfeit,” nor did it mean “only the attorney general shall ...” because there is no textual or historical support for such a meaning. We conclude that the first sentence of section 16754 simply means: “The attorney general, or the district attorney of any county ... shall, *when appropriate*, initiate civil actions or criminal proceedings for violation of this chapter.”

The legislative history of section 16754 confirms this interpretation. The Legislative Counsel's Digest of Assembly Bill No. 894, which enacted the 1961 amendments to section 16754, states that the bill “provides for venue of actions brought under [statutes prohibiting combinations in restraint of trade] under certain circumstances.” The bill questionnaire states that the bill “clarifies and establishes the venue of all actions, either civil or criminal, for [***35] violation of the Cartwright Act brought by the Attorney General or by a District Attorney” As the bill memorandum dated June 8, 1961, to Governor Edmund G. Brown states: “The venue provision was mainly for the purpose of giving the Superior Courts jurisdiction in criminal Cartwright [*1410] cases rather than the Municipal Courts as presently provided.” Nothing in the legislative history of section 16754 indicates it was intended to restrict the ability of local governments to prosecute civil antitrust actions in their own behalves and with their own resources.

For the reasons we have expressed, we conclude that [HN3](#)[] the plain language of [section 16750, subdivisions \(a\)](#) and [\(b\)](#), permits counties and other governmental entities with the capacity to sue to bring and prosecute Cartwright Act actions on an equal footing with any other “person.” This includes the option to proceed on a class action basis when the trial court certifies that such basis is appropriate in the particular lawsuit. Neither subdivision (c) nor (g) of [section 16750](#), individually or read together, limits the prosecution of the subdivision (a) cause of action. Subdivisions (c) and (g) simply provide a further [***36] mechanism by which anti-competitive activity may be attacked.

Disposition

The judgment is affirmed. Costs on appeal are awarded to respondents.

Ardaiz, P. J., and Thaxter, J., concurred.

Lucas Indus. v. Kendiesel

United States District Court for the District of New Jersey

June 9, 1995, Decided

Civil Action No. 93-4480

Reporter

1995 U.S. Dist. LEXIS 7979 *; 1995 WL 350050

LUCAS INDUSTRIES, INC., et al., Plaintiff, v. KENDIESEL, INC., et al., Defendant.

Notice: [*1] NOT FOR PUBLICATION

Core Terms

pumps, replacement, counterclaim, Sherman Act, alleges, monopolization, conspiracy, antitrust, tying arrangement, motion to dismiss, distributors, products, branded, tying product, tied product, contracts, prospective economic advantage, fuel injection, monopoly, repair, relevant market, market power, controls, selling, tortious interference, restraint of trade, diesel fuel, manufacturer, competitor, injection

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

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

HN1[Involuntary Dismissals, Failure to State Claims

In determining whether a complaint should be dismissed for failure to state a claim pursuant to [Rule 12\(b\)\(6\)](#), the Court must limit its consideration to the facts alleged in the complaint. Moreover, in its examination of the complaint, the Court is required to accept all of the allegations contained therein and all inferences arising therefrom as true. If plaintiff can prove any set of facts in support of his claim that would entitle him to relief, his complaint should not be dismissed.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[**HN2**](#) [down] Summary Judgment, Entitlement as Matter of Law

The Federal Rules of Civil Procedure only require that a claimant present a short and plain statement of the claim showing that the pleader is entitled to relief. [Fed. R. Civ. P. 8](#). As a general rule a complaint is sufficient if it enables the defendant to file a responsive pleading. This rule is no different in antitrust cases.

Civil Procedure > Discovery & Disclosure > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

[**HN3**](#) [down] Civil Procedure, Discovery & Disclosure

The Supreme Court has expressly stated that motions to dismiss under [Rule 12\(b\)\(6\)](#) should be granted very sparingly in antitrust cases. In antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Thus, plaintiff is not required to plead all of the facts in support of his antitrust claims, as much of this evidence will likely be unearthed during discovery.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

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

[**HN4**](#) [down] Attempts to Monopolize, State Regulation

This Court is bound by the rule that an antitrust claim should not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it to relief. Conclusory allegations are sufficient if they provide an outline or notice of the antitrust violation charged. The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. Similarly, allegations of fact and conclusory statements of the pleader must be taken into account when deciding whether a claim for relief has been stated.

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

[**HN5**](#) [down] Regulated Practices, Price Fixing & Restraints of Trade

Some types of conduct have been deemed to be per se unreasonable. Activities that have been identified as per se unreasonable include price fixing, group boycotts, market allocation and certain types of tying arrangements.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

HN6 Antitrust & Trade Law, Sherman Act

A violation of Section I of the Sherman Act for a contract, combination or conspiracy to unlawfully restrain trade requires a showing of: that defendants contracted, combined or conspired among each other; that the contract or conspiracy produced adverse anticompetitive effects with the relevant product and geographic markets; that the objects of the conduct pursuant to that contract or conspiracy were illegal; that the plaintiff was injured as a proximate result of that contract or conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN7 Sherman Act, Claims

The elements of a monopolization claim in violation of [Section 2](#) of the Sherman Act include: the possession of monopoly power in a relevant market, and willful acquisition or maintenance of that power in an exclusionary manner.

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

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

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

HN8 Scope, Monopolization Offenses

Attempted monopolization is a lesser included offense to a claim of monopolization under [section 2](#) of the Sherman Act. A claimant must merely allege that the defendant has a dangerous probability of achieving a monopoly in the relevant market. The federal courts have held that a dangerous probability of success can be satisfied by a showing of market share in excess of fifty percent.

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

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN9 Regulated Practices, Price Fixing & Restraints of Trade

A claim for tortious interference with prospective economic advantage must allege: a claimant has a reasonable expectation of an economic benefit; the defendant's knowledge of that expectancy; the defendant's wrongful,

intentional interference with that expectancy; in the absence of interference, the reasonably probability that the claimant would have received the anticipated economic benefit; and damages resulting from the defendant's interference.

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Judges: ALFRED M. WOLIN, U.S.D.J.

Opinion by: ALFRED M. WOLIN

Opinion

OPINION

WOLIN, District Judge

This matter is before the Court on the motion of plaintiff to dismiss defendant's counterclaims pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for failure to state a claim upon which relief can be granted. For the reasons set forth herein, plaintiff's motion will be denied in part and granted in part.

BACKGROUND

This lawsuit was initiated by Lucas UK and Lucas USA ("Lucas") alleging that Kendiesel, Inc. and the other defendants were selling counterfeit Lucas products in violation of Lucas' trademark rights. Kendiesel filed a four-part counterclaim alleging that Lucas has violated the antitrust laws and tortiously interfered with Kendiesel's prospective economic advantage.

Lucas [*2] sells diesel fuel injection systems to diesel engine manufacturers for use in their engines. These fuel injection systems are incompatible with fuel injection systems designed for other diesel engines. Likewise, diesel fuel injection pumps and parts designed for Lucas systems are not ready substitutes for diesel fuel injection pumps and parts designed for other fuel injection systems.

Aftermarkets exist for the distribution and sale of replacement diesel fuel injection pumps and parts for Lucas branded fuel injection systems and for the repair of such systems.

Kendiesel is one of a handful of United States distributors of replacement diesel fuel injection pumps and parts for Lucas branded pumps. Kendiesel is not a manufacturer or engaged in the retail business of servicing or repairing such systems. Rather, Kendiesel sells replacement pumps and parts to (1) authorized Lucas service distributors ("SDs") and (2) independent service shops. Kendiesel receives replacement pumps and parts from current or former original equipment manufacturers and from foreign subsidiaries of Lucas.

Lucas controls 75% of the market for sale of replacement diesel fuel injection pumps and parts. (Lucas [*3] Br. at 4). Lucas admits candidly that Kendiesel is one of Lucas USA's leading competitors in the sale of replacement pumps and parts. (Lucas Br. at 4).

Lucas has entered into contractual relationships with each of the SDs to create a nationwide network of authorized service distributors. The contracts provide that Lucas will provide the SDs with technical literature to aid in their repairs, if the SDs agree not to disclose the technical literature to anyone else. The contracts also provide that in

return for receiving the technical literature, the SDs agree to buy all of their replacement pumps and parts only from Lucas and to use only products purchased from Lucas in the course of their repairs of the Lucas fuel-injection systems. Further, Lucas conditions the sale of replacement pumps to the SDs upon the SDs agreeing to purchase all of their replacement parts from Lucas. Lucas also has required its foreign subsidiary to cease selling any Lucas pumps or parts to Kendiesel and other independent distributors.

Kendiesel alleges that the contracts with the SDs cutoff Kendiesel's main source of customers and that the agreement with the foreign subsidiary effectively cuts-off one of Kendiesel's [*4] main sources of supply. Kendiesel alleges that Lucas is unlawfully attempting to drive Kendiesel out of the market. Kendiesel, therefore, filed counterclaims against Lucas alleging violations of the antitrust law and tortious interference with prospective economic advantage.

Lucas has filed a motion to dismiss each of the counterclaims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Lucas states in its motion to dismiss: "As Lucas UK and Lucas USA saw their market share for sales of Lucas branded fuel injection systems threatened, they took steps to maintain and increase their dominant share in that market by forestalling Kendiesel and other competitors from obtaining [replacement pumps and parts] and/or selling [replacement pumps and parts] to Lucas SDs. These actions included preventing authorized foreign distributors of Lucas branded products from selling them to Kendiesel, terminating Lucas UK's manufacturing agreement with defendant WSK [a subsidiary of Kendiesel], instituting this suit against Kendiesel and WSK and reminding SDs of their contractual obligations to Lucas USA." (Lucas Br. at 4-5).¹

[*5] DISCUSSION

A. Standard of Review

HN1 In determining whether a complaint should be dismissed for failure to state a claim pursuant to Rule 12(b)(6), the Court must limit its consideration to the facts alleged in the complaint. Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir. 1978). Moreover, in its examination of the complaint, the Court is required to accept all of the allegations contained therein and all inferences arising therefrom as true. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). If plaintiff can prove any set of facts in support of his claim that would entitle him to relief, his complaint should not be dismissed. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); D.P. Enterprises v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984).

HN2 The Federal Rules of Civil Procedure only require that a claimant present a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8. As a general rule a complaint is sufficient if it enables the defendant to file a responsive pleading. Hickman v. Taylor, 329 U.S. 495, 501, [*61] 91 L. Ed. 451, 67 S. Ct. 385 (1947). This rule is no different in antitrust cases. Niagara of Buffalo Inc. v. Niagara Mfg. & Distrib. Corp., 262 F.2d 106 (2d Cir. 1958); Nagler v. Admiral Corp., 248 F.2d 319, 322 (2d Cir. 1957) ("it is quite clear that the federal rules contain no special exceptions for antitrust cases"); Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 3 (9th Cir. 1963) ("we are of the opinion that there are no special rules of pleading in antitrust cases"). Thus, defendant's counterclaims will be subject to the same liberal rules of pleading as in all other types of cases.

HN3 The Supreme Court has expressly stated that motions to dismiss under Rule 12(b)(6) should be granted "very sparingly" in antitrust cases. In Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746-47, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976) the Court held: "In antitrust cases, where the 'proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." (citing, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct.

¹ The Court notes that the sur-reply brief filed by Kendiesel violates the rules of this Court and, therefore, was not considered by the Court in rendering its decision.

[486 \[*7\] \(1962\)](#). Thus, plaintiff is not required to plead all of the facts in support of his antitrust claims, as much of this evidence will likely be unearthed during discovery.

HN4 [↑] This Court is bound by the rule that an antitrust claim should not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it to relief. [Conley, 355 U.S. at 45-46; D.P. Enterprises, 725 F.2d at 944](#). Conclusory allegations are sufficient if they provide an outline or notice of the antitrust violation charged. [Trans World Airlines Inc. v. Hughes, 332 F.2d 602 \(2d Cir. 1964\)](#), cert. dismissed, [380 U.S. 248 \(1965\)](#) ("The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes."). Similarly, allegations of fact and conclusory statements of the pleader must be taken into account when deciding whether a claim for relief has been stated. As the Third Circuit held in [Knuth v. Erie-Crawford Dairy Cooperative Assn., 395 F.2d 420 \(3d Cir. 1968\)](#):

Decisions of the United States Supreme Court [*8] indicate that we should be extremely liberal in construing antitrust complaints. See, [Radiant Burners Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 660, 5 L. Ed. 2d 358, 81 S. Ct. 365 \(1961\)](#); [Radovich v. National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 \(1957\)](#); and [United States v. Employing Plasterers Assn., 347 U.S. 186, 98 L. Ed. 618, 74 S. Ct. 452 \(1954\)](#).

Indeed, in the *Employing Plasterers* case, the Supreme Court made it clear that, whether [the] charges be called "allegations of fact" or "mere conclusions of the pleader" they must be taken into account in deciding whether a claim for relief is stated.

The liberal approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all details and specific facts relied upon cannot properly be set forth as part of the pleadings.

[*Id. at 423.*](#)

With these legal principles in mind, the Court will examine each of Kendiesel's counterclaims to determine whether Kendiesel has alleged a cause of action for violation of the antitrust laws and for intentional interference with prospective economic advantage.

B. Tying [*9] Arrangement

Count I of the counterclaim alleges that Lucas has engaged in an unlawful tying arrangement in violation of [Section 1](#) of the Sherman Act.² There are two elements essential to a claim under [Section 1](#) of the Sherman Act: (1) a "contract, combination or conspiracy" and (2) unreasonable restraint of trade. There is no doubt that Kendiesel has sufficiently alleged a contract, combination or conspiracy when it refers to contracts between Lucas and the SDs. Lucas argues, however, that Kendiesel has failed to alleged an unreasonable restraint of trade.

[*10] **HN5** [↑] Some types of conduct have been deemed to be *per se* unreasonable. Activities that have been identified as *per se* unreasonable include price fixing, group boycotts, market allocation and certain types of tying arrangements. [Jefferson Parish Hospital District v. Hyde, 466 U.S. 2, 9, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). Defendant's counterclaim suggests that plaintiff's contract with the SDs is an unlawful tying arrangement. A tying

² [Section 1](#) of the Sherman Act states in relevant part: "Every contract, combination in the form a 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](#). [Section 2](#) of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C. § 2](#).

arrangement is "an agreement by a party to sell one product [tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agreed that he will not purchase that product from any other supplier." [*Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). "Such an agreement violates [Section 1](#) of the Sherman Act if the seller has 'appreciable market power' in the tying product market and if the arrangement effects a substantial volume of commerce in the tied markets." [*Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 \(1992\)](#).³

[*11] Specifically, in Count I, Kendiesel alleges that Lucas has violated [Section 1](#) of the Sherman Act by engaging in two separate unlawful tying arrangements, as follows:

1. Lucas USA conditions the "availability" of Lucas technical literature to its SDs (tying product) upon their agreeing to sell and use only Lucas branded pumps and parts in repairing or replacing Lucas fuel injection pumps (tied product).
2. Lucas USA conditions the sale of Lucas branded fuel injection pumps (tying product) to SDs upon their agreeing to purchase all of their replacement parts for Lucas branded fuel injection systems from Lucas (tied product).

The Supreme Court in *Kodak* articulated four elements of an illegal tying arrangement:

1. there are two separate products or services;
2. the sale of one of the products is conditioned on the purchase of the other product;
3. the seller has the power in the market for the tying product; and
4. a "not insubstantial" amount of commerce in the market for the tied product is foreclosed.

See also, [*Jefferson Parish*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551](#).

1. Separate Products

Lucas alleges that Kendiesel [*12] has failed to state a claim for an illegal tying arrangement because Kendiesel has failed to identify two separate products or services that were tied by Lucas. Specifically, Lucas argues that its literature is not a separate product that is sold or in demand. Lucas does not sell its technical literature to anyone but provides the technical information at no cost to authorized service dealers. Likewise, Lucas argues that its parts are not a separate product that is sold or in demand.

For literature to be considered distinct in an antitrust analysis, "there must be sufficient consumer demand so that it is efficient for a firm to provide [literature] separately from parts." [*Kodak*, 112 S. Ct. at 2079](#) (citing [*Jefferson Parish*, 466 U.S. 2, 21-22](#)). Thus, the Supreme Court has held that the defining characteristic that makes a product distinct is the demand for the product.

Lucas' argument that literature is not a separate product because it is given away at no charge must fail in light of *Kodak* and *Jefferson Parish*. A reasonable inference from the counterclaim is that there is a great demand for technical literature separate and apart from demand for parts. Certainly, [*13] if the technical literature lacked any market value, Lucas would not require the SDs to keep this information confidential. The very fact that Lucas restricts access to the technical literature reveals there is demand and a market for the technical literature. The market for the technical literature would include any person, such as Kendiesel, wishing to repair a Lucas brand

³In *Kodak*, the Supreme Court affirmed the denial of summary judgment in a case where the plaintiff was accused by the defendant of tying the sale of parts to the sale of service in an attempt to drive out independent service dealers. Importantly, the Court in *Kodak* analyzed the defendant's antitrust allegations under the more stringent standards of [Federal Rule of Civil Procedure 56](#). In this case, the Court is analyzing defendant's antitrust allegations under the more lenient standard of [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

pump without having to purchase a Lucas replacement pump or Lucas parts. Therefore, this Court holds that Kendiesel's allegation that literature is a separate product is sufficient to withstand Lucas' motion to dismiss.

Lucas' reliance on *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606, 609-10 (6th Cir. 1987) and *Kellam Energy Inc. v. Duncan*, 668 F. Supp. 861, 881 (D. Del. 1987) is misplaced. In these cases the defendant charged for the alleged tying product and then gave away the alleged tied product. In contrast, in this case, Lucas gives away the alleged tying product (technical literature) and then charges for the tied product (pumps and parts). Lucas is alleged to be exploiting the demand for the free tying product in order to force buyers into the purchase of the tied product. [*14] This is the essence of the claim under *Section 1* of the Sherman Act.

Lucas next challenges whether pumps and parts can be separate products. Again, the Court must analyze whether there is a demand for pumps separate from the demand for parts. *Kodak*, 112 S. Ct. at 2072; *Jefferson Parish*, 466 U.S. at 2. The case law squarely holds that equipment and parts are separate products. See e.g., *Mercoid Corp v. Mid-Continent Inv. Co.*, 320 U.S. 661, 88 L. Ed. 376, 64 S. Ct. 268 (1944) (heating system and stoker switch); *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 86 L. Ed. 363, 62 S. Ct. 402 (1942) (salt machine and salt); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 82 L. Ed. 371, 58 S. Ct. 288 (1938) (process patent and material used in the patented process); *International Business Machines Corp. v. United States*, 298 U.S. 131, 80 L. Ed. 1085, 56 S. Ct. 701 (1936) (computer and computer punch cards); *Carbice Corp. v. Am. Patents (Development) Corp.*, 283 U.S. 27, 75 L. Ed. 819, 51 S. Ct. 334 (1931) (ice cream transportation package and coolant). In this case, Kendiesel's allegation that pumps are separate from parts is sufficient to withstand Lucas' motion to [*15] dismiss. The market of persons wishing to buy Lucas pumps but not Lucas parts, could include those persons wishing to buy parts directly from the manufacturer or to use parts from old Lucas pumps. The fact that the demand for pumps and parts often will go hand in hand is irrelevant. In *Kodak*, the Supreme Court expressly rejected Kodak's argument "that because there is no demand for parts separate from service, there cannot be separate markets for service and parts." *Id. at 2080*. The Court stated that by that logic, "we would be forced to conclude that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires." *Id.*

2. Coercion

Lucas also alleges that Kendiesel has failed to state a claim for illegal tying because Kendiesel has failed to allege that coercion was used to force SDs to purchase tied products from Lucas. "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control of the tying product to force the buyer into the purchase of a tied product the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. [*16] When such forcing is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Jefferson Parish*, 466 U.S. at 12. As the Third Circuit has noted:

Coercion is implicit -- both logically and linguistically -- in the concept of leverage upon which the illegality of tying is premised: the seller with market power in one market uses that power as a "lever" to force acceptance of his product in another market. If the product in the second market would be accepted anyway, because of its own merit, then, of course, no leverage is involved

Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1218 (3d Cir.), cert. denied, 429 U.S. 823, 50 L. Ed. 2d 84, 97 S. Ct. 74 (1976).

In this case, Lucas admits that it controls 75% of the market for replacement diesel fuel-injection pumps and parts. There also can be no dispute that Lucas controls 100% of the market for its technical literature. Thus, a reasonable inference from the facts alleged is that Lucas is using its control over technical literature to force SDs to purchase pumps and parts from Lucas. Likewise a reasonable inference from the facts alleged [*17] is that Lucas is using its control over the diesel pump market to force SDs to purchase parts from Lucas. The Service Distributor Agreements themselves are evidence that SDs do not purchase tied products of their own free will. If SDs always purchased pumps and parts from Lucas of their own free will then there would be no need for Lucas to institute contracts that require SDs to purchase pumps and parts only from Lucas.

3. Market Power

The final element of a tying claim is that the defendant have sufficient market power in the tying market to impose a tying arrangement. Market power is the power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish, 466 U.S. at 14*. "The existence of such power is ordinarily inferred from the seller's possession of the a predominant share of the market." *Kodak, 112 S. Ct. at 2081*. As stated above, Lucas controls 100% of the market for technical literature and about 75% of the aftermarket for replacement pumps and parts. Thus, there can be no doubt that Lucas is alleged to have sufficient market power.

Finally, Lucas claims that Lucas U.K. should be dismissed from this litigation. This [*18] claim is premature at this stage of the litigation. Until the parties have had an opportunity to conduct discovery the Court cannot say that there is no possibility that Kendiesel will be able to prove an antitrust claim against Lucas U.K.

C. Conspiracy to Restrain Trade

HN6 A violation of Section I of the Sherman Act for a "contract, combination or conspiracy" to unlawfully restrain trade requires a showing of:

- (1) that defendants contracted, combined or conspired among each other;
- (2) that the contract or conspiracy produced adverse anticompetitive effects with the relevant product and geographic markets;
- (3) that the objects of the conduct pursuant to that contract or conspiracy were illegal;
- (4) that the plaintiff was injured as a proximate result of that contract or conspiracy.

J.F. Feeser Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524 (3d Cir. 1990), cert. denied, 499 U.S. 921, 113 L. Ed. 2d 246, 111 S. Ct. 1313 (1991).

Count II of the counterclaim alleges that Lucas Industries, Lucas USA and the SDs and other unnamed conspirators have combined to unreasonably restrain trade in violation of Section I of the Sherman Act. Specifically, [*19] Kendiesel alleges that Lucas USA and the SDs agreed not to disclose the technical literature to unauthorized parties. Likewise, Kendiesel alleges the Lucas USA and the SDs unlawfully agreed that SDs will only purchase pumps and parts from Lucas USA and will only use Lucas parts in repair of Lucas branded pumps. Kendiesel also alleges in paragraph 10 that actions were taken to (a) prevent foreign Lucas distributors from selling Lucas branded products to Kendiesel; (b) to terminate Lucas UK's manufacturing relationship with WSK; (c) to commence this litigation against Kendiesel and WSK; and (d) to remind Service Distributors of their contractual obligation to Lucas USA.⁴

As stated earlier, there are two elements essential to a claim under *Section 1* of the Sherman Act: (1) a "contract, combination or conspiracy" and (2) unreasonable restraint of trade. [*20] Proof of a "contract, combination or conspiracy" entails two essential elements: (1) two or more legally independent actors who (2) engage in concerted action. There can be no question that Lucas and the SDs are legally independent actors. Likewise, there can be no question that the contract requires the SDs and Lucas to act in concert. The question is whether the contract requires the SDs and Lucas to act in concert to unlawfully restrain trade. In other words, the question is whether the contract has anticompetitive effects. Courts have held that harm to even a single competitor can at times support an inference of harm to competition. 16A Von Kalinowski, *Business Organizations: Antitrust Laws and Trade Regulation*, § 6.02[2] n. 109 (listing cases).

⁴ The Court can see nothing unlawful in Lucas reminding the SDs of the contractual commitments. Therefore, the Court will strike this portion of paragraph 10.

In this case, Kendiesel has alleged that the contract between Lucas and the SDs has harmed Kendiesel and other independent distributors of parts. Paragraph 7 alleges that in order to obtain technical literature, SDs must agree to purchase replacement pumps and parts *only* from Lucas. Such an agreement effectively shuts Kendiesel and other independent suppliers of replacement pumps and parts out of the market. This allegation [*21] is deemed to be true during a motion under [Rule 12\(b\)\(6\)](#). Thus, Counterclaim II sufficiently alleges anticompetitive conduct and states a cause of action.

Lucas also claims that Kendiesel has failed to alleged the relevant product market or the relevant geographic market. The Court disagrees. A fair reading of the allegations in Counterclaim II is that Kendiesel is a competitor of Lucas in the distribution and sale of replacement pumps and parts (the relevant product market) to SDs in the United States (the relevant geographic market). The essence of the Counterclaim II is that Lucas has forced Kendiesel out of the market by forcing SDs to sign a contract that prohibits them from buying replacement pumps and parts from Kendiesel. Such an allegation states a claim for an antitrust violation.

Likewise there can be no question that Lucas has market power in this market. The Court has already noted that Lucas controls about 75% of the aftermarket for replacement pumps and parts and 100% of the market for technical literature needed to repair Lucas fuel-injection pumps. This is clearly sufficient. *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 201-02 (3d Cir. 1992), [*22] cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993) (*prima facie* monopoly power shown by market share significantly larger than 55%).

Finally, the Court declines to follow Lucas' invitation to analyze each act separately. Rather, the Court holds that Counterclaim II, when read as a whole, sufficiently states a cause of action for a violation of Section I of the Sherman Act.

D. Monopoly Claims

Count III of the counterclaims alleges the Lucas attempted to monopolize, and/or maintained a monopoly, and/or conspired to monopolize in violation of [Section 1](#) and [Section 2](#) of the Sherman Act. The acts alleged to have been committed in support of these allegations are the same acts described in Count II of the counterclaim. [HN7](#) The elements of a monopolization claim in violation of [Section 2](#) of the Sherman Act include:

- (1) the possession of monopoly power in a relevant market.
- (2) willful acquisition or maintenance of that power in an exclusionary manner.

[U.S. v. Grinnell Corp.](#) 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).

Lucas argues that Kendiesel has failed to identify the relevant market as required. [Spectrum Sports Inc. v. McQuillan](#), U.S. , 113 S. Ct. 884, 892 (1993). As discussed earlier, the relevant market is the sale of replacement pumps and parts to SDs in the United States. Kendiesel is a competitor of Lucas in this market. Thus, Kendiesel has fairly described the relevant market.

Kendiesel also has alleged facts sufficient to indicate the Lucas possesses monopoly power in the relevant market. A fair inference is that Lucas controls about 75% of the aftermarket for replacement pumps and parts for use in Lucas fuel-injection pumps. This is clearly sufficient. *Fineman*, 980 F.2d at 201-02.

Lucas next argues the Kendiesel has failed to allege conduct indicating willful acquisition or maintenance of a monopoly. In paragraph 7 Kendiesel alleges that Lucas required SDs to sign contracts that prohibited SDs from purchasing replacement pumps and/or parts from Kendiesel. This allegation is sufficient to indicate a willful attempt by Lucas to grab the entire market for sale of replacement pumps and parts to SDs.

[HN8](#) Attempted monopolization is a lesser included offense to a claim of monopolization under [Section 2](#) of the Sherman Act. A claimant must merely allege that the defendant [*24] has a "dangerous probability" of achieving a monopoly in the relevant market. [Spectrum Sports, Inc.](#), 122 L. Ed. 2d 247, 113 S. Ct. 884, 890. The federal courts

have held that a "dangerous probability of success" can be satisfied by a showing of market share in excess of fifty percent (50%). *Barr Laboratories Inc. v. Abbott Laboratories*, 978 F.2d 98, 112-115 (3d Cir. 1992); *M&M Medical Supplies and Services Inc. v. Pleasant Valley Hospital Inc.*, 981 F.2d 160, 169-69 (4th Cir. 1992) (en banc), cert. denied, 125 L. Ed. 2d 662, 113 S. Ct. 2962 (1993). Consequently, Kendiesel's allegation that Lucas controls about 75% of the aftermarket is sufficient to satisfy the "dangerous probability of success" component of an attempted monopolization claim.

Lucas next argues that Kendiesel has failed to allege a claim for conspiracy to monopolize because Kendiesel has not alleged facts showing concerted activity. Again, Lucas' claim must fail. A fair reading of the counterclaim indicates that Kendiesel alleges that Lucas acted in concert with SDs to drive Kendiesel and other independent distributors out of the relevant market.

Therefore, the Court holds that Kendiesel has adequately [*25] stated a claim for attempt to monopolize, and/or maintenance of a monopoly, and/or conspiracy to monopolize in violation of [Section 1](#) and [Section 2](#) of the Sherman Act.

E. Tortious Interference With Prospective Economic Advantage

HN9 [↑] A claim for tortious interference with prospective economic advantage must allege:

- (1) a claimant has a reasonable expectation of an economic benefit;
- (2) the defendant's knowledge of that expectancy;
- (3) the defendant's wrongful, intentional interference with that expectancy;
- (4) in the absence of interference, the reasonably probability that the claimant would have received the anticipated economic benefit; and
- (5) damages resulting from the defendant's interference.

Fineman, 980 F.2d 171, 186 (3d Cir. 1992) (citing, *Printing Mart-Morristown v. Sharp Electronics*, 116 N.J. 739, 751-52, 563 A.2d 31 (1989)).

In *Fineman* the Third Circuit held that an element of this cause of action is "a sufficiently concrete prospective contractual relation." *Id.* at 195. In *Fineman*, the Court found that the plaintiff had failed to prove he would have gotten new customers in his consulting business. *Id.* [*26] The Court held the record was "devoid of any objective evidence that Fineman had any concrete plan for future consulting work." *Id.*

In this case, Kendiesel need not prove at this stage of the litigation that it had sufficiently concrete prospective contracts with its customers. However, Kendiesel must at least allege specific prospective contracts that were interfered with by Lucas. Kendiesel has failed to identify a single customer or a single contract that it was likely to consummate, but failed to consummate, due to the actions taken by Lucas. As a result, Kendiesel has failed to allege a claim for tortious interference with prospective economic advantage.

Therefore, Kendiesel's claim for intentional interference with prospective economic advantage will be dismissed without prejudice pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

CONCLUSION

For the reasons set forth above, this Court holds that Kendiesel has adequately alleged claims for: (1) illegal tying in violation of [Section 1](#) of the Sherman Act; (2) conspiracy to restrain trade in violation of [Section 1](#) of the Sherman Act; and (3) monopolization and/or attempted monopolization and/or conspiracy to monopolize [*27] under [Section](#)

2 of the Sherman Act. Lucas' motion to dismiss is based on a patently erroneous misunderstanding "of the limited role of the complaint in federal practice." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977). "It is not necessary to plead evidence, nor is it necessary to plead the facts upon which the claim is based. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests." *Id.* Kendiesel's federal antitrust counterclaims pass this simple test. However, the Court holds that Kendiesel has not stated a claim for tortious interference with prospective economic advantage.

An appropriate order is attached.

Dated: June 9, 1995

ALFRED M. WOLIN, U.S.D.J.

ORDER

In accordance with the Court's Opinion filed herewith,

It is on this 9th day of June, 1995

ORDERED that plaintiff Lucas Industries PLC's motion to dismiss Kendiesel's counterclaim for illegal tying in violation of Section 1 of the Sherman Act is denied; and it is further

ORDERED that plaintiff Lucas Industries PLC's motion to dismiss Kendiesel's counterclaim [*28] for conspiracy to restrain trade in violation of Section 1 of the Sherman Act is denied; and it is further

ORDERED that plaintiff's motion to dismiss Kendiesel's counterclaims for monopolization and/or attempted monopolization and/or conspiracy to monopolize under Section 1 and Section 2 of the Sherman Act is denied; and it is further

ORDERED that plaintiff's motion to dismiss Kendiesel's counterclaim for tortious interference with economic advantage is granted and Kendiesel's claim is dismissed without prejudice pursuant.

ALFRED M. WOLIN, U.S.D.J.

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Slagle v. ITT Hartford Ins. Group

United States District Court for the Northern District of Florida, Tallahassee Division

June 9, 1995, Decided ; June 9, 1995, FILED, ENTERED

TCA 94-40563-WS

Reporter

904 F. Supp. 1346 *; 1995 U.S. Dist. LEXIS 7935 **

JEANINE SLAGLE, for herself and all others similarly situated, Plaintiff, vs. ITT HARTFORD INSURANCE GROUP, et al., Defendants.

Prior History: [\[**1\]](#) Adopting Order of September 11, 1995, Reported at: [1995 U.S. Dist. LEXIS 17047](#).

Core Terms

boycott, windstorm, terms, insurers, reinsurance, transactions, concerted, rates, recommendation, artificial, premium, open market, regulated, McCarran-Ferguson Act, Defendants', pleadings, coverage, policies, insurance business, anti trust law, consumers, contracts, alleges, exempt

LexisNexis® Headnotes

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Judgments > Pretrial Judgments > General Overview

[**HN1**](#) **Pretrial Judgments, Judgment on Pleadings**

On a motion for judgment on the pleadings pursuant to [Fed. R. Civ. P. 12\(c\)](#), all matters pleaded in the complaint must be accepted as true.

Business & Corporate Compliance > ... > Insurance Law > Industry Practices > Joint Underwriting Associations

Insurance Law > ... > Property Insurance > Coverage > Hurricanes & Tornadoes

Insurance Law > ... > Property Insurance > Coverage > Natural Phenomena

[**HN2**](#) **Industry Practices, Joint Underwriting Associations**

The Florida Windstorm Underwriting Association (FWUA) is an insurer of last resort that insures windstorm risk in the coastal areas of Florida by joint underwriting for consumers unable to obtain such insurance by "ordinary methods." *Fla. Stat. ch. 627.351(2)(a), (b)*. It is mandated by state law that members of FWUA participate in the

FWUA. State law provides that the Department of Insurance may regulate the rates charged by the FWUA. *Fla. Stat. ch. 627.351(2)(a)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN3 Exemptions & Immunities, McCarran-Ferguson Act Exemption

The McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in [§ 1013\(b\)](#). A finding that conduct is the "business of insurance" depends upon: 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.

Insurance Law > Industry Practices > Rate Regulation > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > ... > Property Insurance > Coverage > Hurricanes & Tornadoes

HN4 Industry Practices, Rate Regulation

Fla. Stat. ch. 627, and particularly [Fla. Stat. ch. 627.062](#) (1993) and such regulations as may have been adopted by the Florida Department of Insurance, regulate all activities of members of the Florida Windstorm Underwriting Association with respect to the rates and terms of windstorm insurance on the open market in Florida. Florida also provides for regulation of concerted anticompetitive conduct pursuant to The Unfair Insurance Trade Practices Act, [Fla. Stat. ch. 626.951 et seq.](#)

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN5 Exemptions & Immunities, McCarran-Ferguson Act Exemption

The McCarran-Ferguson Act renders the federal antitrust laws inapplicable when state legislation generally prescribes, permits, or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

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Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

[HN6](#) Exemptions & Immunities, Collectives & Cooperatives

The McCarran-Ferguson Act exempts cooperative ratemaking from **antitrust law** sanctions so long as the conduct is regulated by the state.

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

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

Insurance Law > Industry Practices > Federal Regulations > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

[HN7](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Section 3(b) of the McCarran-Ferguson Act, [15 U.S.C.S. § 1013\(b\)](#), provides an exception for a Sherman Act claim with respect to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. A concerted agreement to seek particular terms in particular transactions is not a "boycott" as intended by § 3(b), although such agreements would otherwise be unlawful under the Sherman Act.

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

Insurance Law > Industry Practices > Federal Regulations > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

[HN8](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A "boycott" as intended by § 3(b) of the McCarran-Ferguson Act, [15 U.S.C.S. § 1013\(b\)](#), is a refusal to deal in transactions that are unrelated to the underlying transaction as to which a change of terms is sought.

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Judges: WILLIAM C. SHERRILL, JR., UNITED STATESMAGISTRATE JUDGE

Opinion by: WILLIAM C. SHERRILL, JR.

Opinion

[*1347] REPORT AND RECOMMENDATION

Defendants have moved for judgment on the pleadings. Doc. 28. Defendants contend that Plaintiff's claims are barred by the McCarran-Ferguson Act and are not exempt under § 3(b) of that Act, which exempts boycotts. Defendants also contend that the relief sought is barred by the Keogh doctrine enunciated in Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922). Plaintiff filed a response, doc. 38, and Defendants replied, doc. 39.

The motion was referred for a report and recommendation by Judge Stafford. Docs. 43 and 46. Oral argument was held on June 6, 1995. The motion should be granted as to the first argument. If this recommendation is adopted, the court need not address the Keogh defense.

HN1 [↑] On a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c), all matters pleaded in the complaint must be accepted as true. Swerdloff v. Miami National Bank, 584 F.2d 54, 57 (5th Cir. 1979). This report and recommendation assumes the truth of the allegations of the complaint. Materials outside of the complaint have not been considered.

I. The allegations of the complaint

****2** Plaintiff explained in her response to the motion: "The Complaint sets forth, with clarity, the existence of a boycott, condemned under § 3(b) of the McCarran-Ferguson Act, that was made possible only through the defendants' cartelization of what properly should be a competitive market." Doc. 38, p. 4. This is an accurate and concise statement of Plaintiff's claim.

The complaint alleges that this suit is brought pursuant to Section One of the Sherman Act, 15 U.S.C. § 1, and Section Four of the Clayton Act, 15 U.S.C. § 15. Doc. 1, para. 1. Plaintiff, Jeanine Slagle, is a consumer of windstorm insurance as an owner of property in Florida. Id., para. 4. Defendants are alleged to be members of the Florida Windstorm Underwriting Association (FWUA) and are insurance companies licensed to transact insurance business in Florida. Id., para. 2.

The FWUA is alleged to have been organized in 1970 under the enabling authority of Chapter 70-234, Laws of Florida, codified as Fla.Stat. § 627.351(2) (1993). The FWUA is an association comprised of insurers who participate in profits and losses on a proportionate basis. It is also a joint underwriting association, funded ****3** and governed by the defendants. Id., para. 3. See also Fla.Stat. § 627.351(2)(b)2.

As a matter of law it is noted that the **HN2** [↑] FWUA is an insurer of last resort which insures windstorm risk in the coastal areas of Florida by joint underwriting for consumers unable to obtain such insurance by "ordinary methods." Fla.Stat. § 627.351(2)(a) and (b); American Insurance Ass'n v. Florida Dept. of Insurance, 646 So. 2d 784, 785 (Fla. 1st DCA 1994), rev. dismissed, 651 So. 2d 1193 (Fla. 1995). It is mandated by state law that Defendants participate in the FWUA. American Insurance Ass'n, 646 So. 2d at 785. Further, state law provides that the Department of Insurance may regulate the rates [*1348] charged by the FWUA. Fla.Stat. § 627.351(2)(a).

Defendants are generally alleged to have engaged in concerted anticompetitive conduct by "fixing, pegging or stabilizing of insurance premiums and prices among ostensible competitors through horizontal price fixing and unlawful allocation of markets, customers and territories and the establishment and agreement upon a boycott." Id., para. 7. It is further alleged that:

The unlawful horizontal agreements alleged herein include [**4] effectuating such agreements through various subterfuges, shams and corporate manipulations of reinsurance entities owned entirely, or in part, and dominated by the defendant members of the FWUA, by the unlawful exchange of competitive information to cause the market for windstorm insurance in the affected coastal regions to be noncompetitive, by meetings at which windstorm insurance rates were fixed and agreed upon by formulae for pegging or stabilizing such rates, and by a boycott (a concerted refusal to deal) imposed against the class.

Id.

Plaintiff further alleges that these activities are not exempt from the antitrust laws as the "business of insurance" because "the unlawful concerted conduct herein alleged do not [sic] have the effect of spreading or transferring policy holder risk." Id., para. 13. It is alleged that Defendants had as a purpose the elimination of competition in the writing of windstorm insurance by stabilizing windstorm insurance rates at artificially high, noncompetitive amounts not reasonably required by actuarial calculations. Id. By elimination of competition, it is alleged Defendants unlawfully allocate consumers among themselves. [**5] Id. It is alleged that these acts are not immune from antitrust laws because not an integral part of the policy relationship between the insured and the insurer. Id., para. 14.

Plaintiff further alleges that Defendants have engaged in a boycott "by agreeing among themselves that windstorm policies in the affected areas of Florida would be written in the noncompetitive environment created by the agreement alleged." Id., para. 17. It is alleged that: "Irrespective of the other types of coverage offered by the defendants . . . the defendants and coconspirators refused to write windstorm coverage and directed consumers to the FWUA as the only source of windstorm coverage in the affected geographic coastal areas." Id. The effect, alleges Plaintiff, is that she must pay the premiums pegged and stabilized [by the FWUA--the Defendants acting in concert].

For relief, Plaintiff seeks for herself and the class alleged

a refund of the amount of money paid to the defendant insurance companies which may be found by this Court and a properly impaneled jury to constitute the excess of premium payment occasioned by the unlawful conduct alleged in contrast to what a reasonable [**6] premium rate would have been if established in a competitive environment and absent the defendants' unlawful collaborative conduct.

Id., para. 18. At oral argument, Plaintiff expressed a desire to amend the complaint to add a count for injunctive relief.

In short, Plaintiff claims that Defendants have fixed prices for windstorm insurance in certain Florida markets by (1) concertedly refusing to sell windstorm insurance individually on the open market, (2) thereby forcing Plaintiff and other consumers to buy windstorm coverage from the FWUA, where (3) the Defendants, as enabled by state law, concertedly peg the price at a level not reasonably related to risk. The monetary damages which are sought would be measured by the FWUA regulated premium less a hypothetical lower premium which would have been charged had Defendants competed against one another in the individual open market.

HN3 [↑] "The McCarran-Ferguson Act, 59 Stat. 33, as amended, [15 U.S.C. §§ 1011-1015](#), renders the federal antitrust laws inapplicable to the 'business of insurance' to the extent such business is regulated by state law and is not subject to the 'boycott' exception stated in [§ 1013\(b\)](#)." Group Life & [**7] [Health Insurance Company v. Royal Drug Company, 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 \(1979\)](#) (Brennan, Marshal, Powell, J., and Burger,

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C.J., dissenting). Accord, *Hartford Fire Insurance Co. v. California, [*1349] U.S. , 113 S. Ct. 2891, 2900-2901, 125 L. Ed. 2d 612 (1993)*. A finding that conduct is the "business of insurance" depends upon:

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.

Hartford, 113 S. Ct. at 2901, quoting *Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 3009, 73 L. Ed. 2d 647 (1982)*.

All of Defendants' conduct as alleged in the complaint is the "business of insurance" as so defined. All of the conduct pertains to transferring and spreading a policyholder's risk. The setting of premium rates and terms is an integral part of the policy relationship between the insurer and the insured, and that activity is limited to entities in the insurance **[**8]** industry.

All of the conduct is also regulated by comprehensive statutes enacted by the State of Florida. The statute which regulates the rates set by the FWUA has been discussed above. *HN4* Chapter 627, Fla.Stat., and particularly *Fla.Stat. § 627.062 (1993)* and such regulations as may have been adopted by the Florida Department of Insurance, regulate all other activities of Defendants with respect to the rates and terms of windstorm insurance on the open market in Florida. Florida also provides for regulation of the conduct alleged in the complaint pursuant to Chapter 626, Part X, *§§ 626.951, et seq.*, the Unfair Insurance Trade Practices Act.

This is enough regulation to make the McCarran-Ferguson Act exemption applicable. *HN5* "The McCarran-Ferguson Act renders the federal antitrust laws inapplicable when state legislation generally prescribes, permits, or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision." *Crawford v. American Title Insurance Co., 518 F.2d 217, 218 (5th Cir. 1975); Uniforce Temporary Personnel v. National Council on Compensation Insurance, Inc., et al., slip opinion, Case No. 94-8343-CIV-RYSKAMP [**9] (S.D. Fla., April 6, 1995) (attached to doc. 44), pp. 9-11.*¹

At oral argument, Plaintiff conceded that if her claim were only that Defendants had acted in concert to fix premium rates on their own windstorm insurance in Florida, then the McCarran-Ferguson Act would preclude her antitrust claim. Unquestionably this is true. *HN6* The McCarran-Ferguson Act exempts cooperative ratemaking from *antitrust law* sanctions so long as the conduct is regulated by the state. *Royal Drug, 440 U.S. 205 at 221, 99 [**10] S. Ct. 1067 at 1078, 59 L. Ed. 2d 261*. Plaintiff contends, however, that her suit is saved from that end by the allegation that Defendants have entirely refused to deal in the individual open market in order to force customers to buy from another entity, the FWUA. She contends that this is a § 3(b) boycott.

HN7 Section 3(b) of the McCarran-Ferguson Act, *15 U.S.C. § 1013(b)*, provides an exception for a Sherman Act claim² with respect to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." A concerted agreement to seek particular terms in particular transactions is not a "boycott" as intended by § 3(b), although such agreements would otherwise be unlawful under the Sherman Act. *Hartford, 113 S. Ct. at 2912-2917*.

In the *Hartford* **[**11]** case, the Court held that *HN8* a "boycott" as intended by § 3(b) of the McCarran-Ferguson Act is a refusal to deal in transactions which are unrelated to the underlying transaction as to which a change **[*1350]** of terms is sought. As an example, the Court said that "no one would call [a labor strike] a boycott,

¹ Plaintiff's citation to *Federal Trade Commission v. Ticor Title Insurance Co., 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)* is inapposite. That case concerned state-action immunity from antitrust laws. *112 S. Ct. at 2175*. The state-action doctrine is premised upon "principles of federalism," *112 S. Ct. at 2176*, citing *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 187 L. Ed. 315 (1943)*, where the doctrine was first announced. The state-action doctrine has nothing to do with the McCarran-Ferguson Act.

² The exception does not apply to a Clayton Act claim. Thus, the analysis above is sufficient basis for judgment on the pleadings in favor of Defendants with respect to the Clayton Act claim without considering the boycott exception.

because the conditions of the 'refusal to deal' relate directly to the terms of the refused transaction (the employment contract)." [113 S. Ct. at 2913](#). In contrast, it said: "A refusal to work changes from strike to boycott only when it seeks to obtain action from the employer unrelated to the employment contract." *Id.*

Hartford thus held that it was not a boycott for the defendant reinsurers to refuse to deal with primary insurers until they changed certain terms of their primary insurance contracts. [113 S. Ct. at 2914](#). It reasoned that the terms of the primary coverages "are what is reinsured." *Id.*, emphasis by the Court. It said:

What matters is that the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured. The terms of the primary policies are the "subject-matter insured" [**12] by reinsurance, . . . so that to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way "artificial"; and hence for a number of reinsurers to insist upon such terms jointly is in no way a "boycott."

[113 S. Ct. at 2915.](#)

Hartford did not entirely reject all claims of boycott made by plaintiffs. The Court noted that in one of the complaints, it was alleged that the defendant reinsurers had threatened to withdraw entirely from the business of reinsuring primary insurers who continued to use the disfavored insurance form. Construing this as a concerted refusal to insure not only for primary insurance on the disfavored form, but also for any other insurance written by the same primary insurers on other forms, the Court held this to state a claim of a McCarran-Ferguson boycott. [113 S. Ct. at 2916](#). This is so because a refusal to deal with respect to insurance other than on the disfavored form would have an "artificial" relationship to the terms of insurance on the disfavored form.

The reference in the Hartford case to an "artificial" relationship between the refusal to deal and the contractual terms sought is to the Court's decision [**13] in [St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 \(1978\)](#). In the St. Paul case, plaintiffs were licensed physicians. Defendant St. Paul Fire & Marine Insurance Company wished to alter the terms of medical malpractice insurance policies it had issued to plaintiffs, and it intended to do so when those policies were renewed. To coerce this result, St. Paul had entered into an agreement with three competing medical malpractice insurers such that the competitors would refuse to sell medical malpractice insurance to a former St. Paul customer who had refused to agree to St. Paul's new contractual terms. After setting forth these facts, Hartford said of the St. Paul case: "The insisted-upon condition of the boycott (not being a former St. Paul policyholder) was 'artificial': it bore no relationship (or an 'artificial' relationship) to the proposed contracts of insurance that the physicians wished to conclude with St. Paul's competitors." [113 S. Ct. at 2914.](#)

Plaintiff argues that she has alleged a circumstance similar to that found in the St. Paul case. She points out: "It is hardly an exercise in market leverage directed toward [**14] the 'targeted transaction' . . . when it is not the same insurance company to whom the business is routed." Doc. 38, p. 10. Plaintiff argues that because the insurance is ultimately issued by the FWUA instead of by an individual Defendant, the refusals to deal constitute "a clear use of coercive force used to achieve an *unrelated* transaction." *Id.*, emphasis added.

The case at bar, however, is more like the Hartford claim found not to be a boycott than the St. Paul claim. The transactions which have been refused here are not unrelated to the transactions the terms of which Defendants seek to control. Defendants are alleged to have concertedly refused to sell windstorm insurance in certain parts of the open market in Florida so that their customers are forced to seek windstorm insurance from the FWUA. Given the nature and composition of the FWUA, the policy issued by the FWUA is, in effect, issued by all Defendants and all Defendants share the risk. The concerted behavior achieves particular terms for the FWUA transactions: joint liability and, as Plaintiff alleges, higher rates. There is no artificial relationship between the [**1351] transactions refused and the terms of the [**15] transaction sought. The subject matter of the transactions refused and the transactions coerced, a risk of windstorm damage in particular areas in Florida, is the same. Judge Ryskamp's decision in the Uniforce case, *supra*, supports this conclusion.

That the relationship is not artificial can be seen if viewed from another perspective. Defendants could have continued to issue policies in the open market. They could have achieved the same end as now alleged by an agreement that each would use a single form of contract and charge common rates for coverage. They could also have achieved joint liability as to each contract separately written by entering into an omnibus or umbrella reinsurance agreement (or a series of such agreements) making all Defendants jointly liable for the contracts of each. While that might have been cumbersome and expensive, it would have not have been a boycott because the concerted activity would have been clearly directed to the terms of the contracts issued. That instead they agreed to withdraw all contracts from the open market, regardless of terms, to force this result through contracts issued by the FWUA, is a distinction without any difference.

[**16] Thus, Plaintiff has not alleged a § 3(b) boycott. Defendants' motion for judgment on the pleadings should be granted. This disposition, if adopted by the court, will moot consideration of Defendants' second argument for judgment on the pleadings.

Accordingly, it is RECOMMENDED that the court GRANT Defendants' motion for judgment on the pleadings, doc. 28, and direct the Clerk to enter judgment in their favor.

IN CHAMBERS at Tallahassee, Florida, this 9th day of June, 1995.

WILLIAM C. SHERRILL, JR.

UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

End of Document



Delta Life & Annuity Co. v. Freeman Fin. Servs. Corp.

United States Court of Appeals for the Ninth Circuit

April 10, 1995, Argued and Submitted, San Francisco, California ; June 15, 1995, FILED

No. 93-16999

Reporter

1995 U.S. App. LEXIS 14897 *; 1995-2 Trade Cas. (CCH) P71,141

DELTA LIFE AND ANNUITY COMPANY, Plaintiffs-Appellants, v. FREEMAN FINANCIAL SERVICES CORPORATION; JAMES G. FREEMAN & ASSOCIATES, INC.; THE MANUFACTURERS LIFE INSURANCE COMPANY, et. al., Defendants-Appellees.

Notice: [*1] RULES OF THE NINTH 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: 57 F.3d 1076, 1995 U.S. App. LEXIS 22113.

Prior History: Appeal from the United States District Court for the Northern District of California. DC No. CV-93-01205-CAL. Charles A. Legge, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

boycott, insurance business, annuities, McCarran-Ferguson Act, regulated, insurer, immune, doctrine of res judicata, state court, antitrust, insurance industry, district court, argues

LexisNexis® Headnotes

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN1 [] **Preclusion of Judgments, Res Judicata**

Under 28 U.S.C.S. § 1738, a court must give the preclusive effect of a prior state court no wider scope than that which the state itself would give the judgment. A federal court will accord the same res judicata effect to state court judgments that the jurisdiction of their rendition would give them.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN2 [] **Preclusion of Judgments, Res Judicata**

Res judicata forecloses relitigation of a cause of action or issue that was determined in a prior case, involving the same party or one in privity to it, and which ended in a final judgment on the merits. In California, final judgments, even if erroneous, are a bar to further proceedings based on the same cause of action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN3 [down] **Preclusion of Judgments, Res Judicata**

The doctrine of res judicata is of fundamental importance to the law and no equitable principles sanction the rejection of its application.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN4 [down] **Preclusion of Judgments, Res Judicata**

California courts apply the primary right theory in determining the res judicata effects of California judgments. A California judgment bars all claims that were brought or that could have been brought to vindicate the same primary right, even if a claim was not actually asserted in the action that proceeded to final judgment.

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

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN5 [down] **Standards of Review, De Novo Review**

A dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim is a ruling on a question of law that an appeals court will review de novo. Review is limited to the contents of the complaint. If matters outside the pleadings are submitted, the motion to dismiss is treated as one for summary judgment. 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 that would entitle him to relief.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN6 [down] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

Section 2(b) of the McCarran-Ferguson Act grants antitrust immunity to acts constituting the business of insurance to the extent such activities are regulated by state law. [15 U.S.C.S. § 1012\(b\)](#). Section 3(b) of the Act creates an exception to this general immunity for acts amounting to a boycott. [15 U.S.C.S. § 1013\(b\)](#).

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

[HN7](#) Federal Regulations, McCarran-Ferguson Act

The United States Supreme Court has recently reiterated what constitutes the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act. In determining whether an activity is "the business of insurance," a court must focus on the activity in question rather than on the nature of the entity conducting the activity. Three criteria are relevant to this inquiry: 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.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

Insurance Law > Types of Insurance > Life Insurance > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > Regulators > State Insurance Commissioners & Departments > General Overview

[HN8](#) Federal Regulations, McCarran-Ferguson Act

The McCarran-Ferguson Act exempts from federal antitrust law the business of insurance to the extent that such business is regulated by the state. California Insurance Code § 101 specifically includes the purchasing and disposing of annuities as part of the business of life insurance. Life insurance includes insurance upon the lives of persons or appertaining thereto, and the granting, purchasing, or disposing of annuities. Section 700(a) of the California Insurance Code states: A person shall not transact any class of insurance business in this state without first being admitted for that class. Therefore, even if a business that is not strictly an "insurance company" is selling annuities, it would be transacting a class of insurance business as regulated by California law and would, by definition, be part of the insurance industry. Thus, the activity of buying and selling annuities is limited to the insurance industry.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

[HN9](#) Federal Regulations, McCarran-Ferguson Act

Section 3(b) of the McCarran-Ferguson Act, 15 U.S.C.S. § 1013(b), states that nothing in it shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. Thus, this section creates an exception to the general rule that state regulated insurance activities are immune from federal regulation.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

[HN10](#) Federal Regulations, McCarran-Ferguson Act

The United States Supreme Court offers the most recent guidance on identifying boycott activities for purposes of an exemption to the McCarran-Ferguson Act. Boycotts, unlike the other activities, employ economic coercive pressure outside of the targeted transaction to achieve the desired result. In other words, where a group of workers refuses to work until they get higher wages, they are engaged in a strike. But, where the workers also refuse to

otherwise deal with the employer, e.g., by not buying the employer's products or by not dealing with anyone who buys the employer's products, then the activity becomes a boycott.

Judges: Before: GIBSON, ** HUG, and FERGUSON, Circuit Judges.

Opinion

MEMORANDUM *

Appellant, Delta Life and Annuity Company, filed an action in federal district court alleging appellees' violation of federal antitrust law and RICO. Delta also alleged violation of several state statutes. The district court dismissed all of Delta's claims pursuant to a motion under Federal Rule of Civil Procedure [*2] 12(b)(6). We conclude that because a state court in a parallel action has issued a final judgment, the doctrine of res judicata prevents us from examining the RICO and state law claims. We also affirm the district court's dismissal of the Sherman Act claim as barred by the McCarran-Ferguson Act.

I. Res Judicata

Delta filed parallel actions in both state and federal court. In the California action, Delta alleged violation of the same RICO and state statutory provisions as it alleged in federal district court. The only difference between the two actions was that the federal complaint also alleged violation of the Sherman Antitrust Act, the subject of the next section of this memorandum disposition, and violation of California Insurance Code § 790.03. Delta's action was dismissed in the state trial court pursuant to an order sustaining a demurrer to Delta's complaint. Delta promptly appealed the decision to the California Court of Appeals. On February 22, 1995, the California Court of Appeals dismissed Delta's appeal. The California Court of Appeals' dismissal became final on March 24, 1995.

HN1 [↑] Under 28 U.S.C. § 1738, we must give the preclusive effect of a prior state court no [*3] wider scope than that which the state itself would give the judgment. Ross v. International Bhd. of Elec. Workers, 634 F.2d 453, 457 (9th Cir. 1980). "We accord the same res judicata effect to state court judgments that the jurisdiction of their rendition would give them." Eichman v. Fotomat Corp., 759 F.2d 1434, 1438 (9th Cir. 1985). Therefore, we apply California's law of res judicata to determine whether Delta is precluded from bringing in federal court those claims already brought in state court.

HN2 [↑] Res judicata "foreclose[s] relitigation of a cause of action or issue that was determined in a prior case, involving the same party or one in privity to it, and which ended in a final judgment on the merits." Victa v. Merle Norman Cosmetics, Inc., 19 Cal. App. 4th 454, 24 Cal. Rptr. 2d 117, 120 (Ct. App. 1993). Under California law, the State Court of Appeals' dismissal constituted an affirmation of the judgment in favor of Appellees on the merits below. See In re Jasmon O., 8 Cal. 4th 398, 878 P.2d 1297, 1303 (Cal. 1994) (holding that normally involuntary dismissal of appeal leaves trial court judgment in tact), cert. denied, ___ U.S. ___, 115 S. Ct. [*4] 1826 (1995); In re Conservatorship of Oliver, 192 Cal. App. 2d 832, 13 Cal. Rptr. 695, 698 (Ct. App. 1961); Crowley v. Modern Faucet Mfg. Co., 44 Cal. 2d 321, 323, 282 P.2d 33 (1955). "In California, final judgments, even if erroneous, are a bar to further proceedings based on the same cause of action." Eichman, 759 F.2d at 1438.

The technical requirements of the doctrine of res judicata being met, namely that there be a final decision on the merits and that the previous litigation involved the same claims and same parties, we conclude that Delta is barred from pursuing the same claims in this court. See Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 874, 151 Cal. Rptr. 285, 587 P.2d 1098 (1978); Victa v. Merle Norman Cosmetics, Inc., 19 Cal. App. 4th 454, 460-64 (1993). Although

** Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

* 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.

Delta may pursue parallel actions, it runs the risk that the first action to proceed to judgment will give res judicata effect in the other. *Rutledge v. Arizona Bd. of Regents*, 859 F.2d 732, 735-36 (9th Cir. 1988). As the Supreme Court has previously made clear, [HN3](#)[↑] the doctrine of res judicata is of fundamental importance to our law and no equitable principles sanction the rejection of [*5] its application. *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 401, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981). Accordingly, we conclude that Delta's RICO claim and state statutory claims brought in state court are barred in this court by the preclusive effect of res judicata.

We also conclude that Delta's claim under [California Insurance Code § 790.03](#), which was brought in the federal action but not in the state, is barred by the doctrine of res judicata. [HN4](#)[↑] California courts apply the primary right theory in determining the res judicata effects of California judgments. See *Eichman*, 759 F.2d at 1438. A California judgment bars all claims that were brought or that could have been brought to vindicate the same primary right, even if a claim was not actually asserted in the action that proceeded to final judgment. *Slater v. Blackwood*, 15 Cal. 3d 791, 543 P.2d 593, 594-95, 126 Cal. Rptr. 225 (Cal. 1975). Because we conclude that Delta's claim under [California Insurance Code § 790.03](#) arose from the identical facts and "primary right" as the state court action, the doctrine of res judicata also operates to bar that claim.

II. Delta's Federal Antitrust Claim

[HN5](#)[↑] A dismissal [*6] under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim is a ruling on a question of law that we review *de novo*. *Everest and Jennings v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). 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). If matters outside the pleadings are submitted, the motion to dismiss is treated as one for summary judgment. *Del Monte Dunes at Monterey, Ltd. v. Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Everest and Jennings*, 23 F.3d at 229. A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

[HN6](#)[↑] Section 2(b) of the McCarran-Ferguson Act grants antitrust immunity to acts constituting "the business of insurance" to the extent such activities are regulated by state law. [15 U.S.C. § 1012\(b\)](#); see also *Hartford Fire Ins. Co. v. California*, ___ U.S. ___; [113 F.3d 2891](#); [125 L. Ed. 2d 612](#) (1993). Section 3(b) of the Act creates an exception to this general immunity for acts amounting to a boycott. [15 U.S.C. § 1013\(b\)](#). In this case, the district court held that McCarran-Ferguson immunized the appellees' activities as the business of insurance and that the boycott exception did not apply.

A) The "Business of Insurance"

In *Hartford Fire Ins. Co. v. California*, [HN7](#)[↑] the Supreme Court recently reiterated what constitutes the "business of insurance" within the meaning of section 2(b) of the McCarran-Ferguson Act. In determining whether an activity is "the business of insurance," we must focus on the activity in question rather than on the nature of the entity conducting the activity. *Id. at 2900*. Three criteria are relevant to this inquiry: "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.* Delta argues that the appellees' activities do not meet any of the three prongs of this test.

[*8] Annuities, like life insurance policies, are formulated on the basis of actuarial tables. Life insurance protects against the economic risk of premature death while an annuity protects against the risk of outliving one's resources. We conclude that, in this case, the business of annuities entails the transfer of policyholder risk. [California Insurance Code §§ 101, 700\(a\)](#) (West 1993). Accordingly, this prong of the "business of insurance" test is met.

Delta argues that the act of issuing TDA's is not integral to the business of insurance. Delta misunderstands the nature of this prong. The activity does not have to be integral to the business of insurance, but rather to the policy relationship between the insurer and insured. We agree with the appellees that the change in identity of the insurer is of fundamental importance to the policy relationship between insurer and insured.

Delta also argues that buying and selling annuities is not an activity limited to the insurance industry because entities outside the insurance industry engage in the annuity business. Because these other entities are not immune from antitrust laws, Delta argues, then neither should the appellees be immune [*9] simply because they are insurance companies.

HN8 The McCarran-Ferguson Act exempts from federal antitrust law the business of insurance to the extent that such business is regulated by the state. California Insurance Code § 101 specifically includes the purchasing and disposing of annuities as part of the business of life insurance. (West 1993) ("Life insurance includes insurance upon the lives of persons or appertaining thereto, and the granting, purchasing, or disposing of annuities."). Section 700(a) of that same code states: "A person shall not transact any class of insurance business in this state without first being admitted for that class." Therefore, even if a business that is not strictly an "insurance company" were selling annuities, it would be transacting a class of insurance business as regulated by California law and would, by definition, be part of the insurance industry. Thus, the activity in issue, buying and selling annuities, is limited to the insurance industry and the third prong of the "business of insurance" test is met. We conclude that the activities at issue in the present case are regulated by the State of California as the business of insurance and, accordingly, [*10] the McCarran-Ferguson Act applies to bar Delta's claims.

B) Boycott Exception

HN9 Section 3(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1013(b), states that nothing in it "shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Thus, this section creates an exception to the general rule that state regulated insurance activities are immune from federal regulation. Delta argues that the appellees' activities constituted a boycott. We disagree.

Again, **HN10** the Supreme Court in Hartford offers the most recent guidance on identifying boycott activities for purposes of an exemption to the McCarran-Ferguson Act. See Hartford, 113 S. Ct. at 2911. In Hartford, the Court differentiated between boycotts and other related activities such as cartelization, and strikes. Id. at 2912. Although all of these activities involve coercive pressure against a target to achieve a specific result, the Court noted that boycotts, unlike the other activities, employ economic coercive pressure outside of the targeted transaction to achieve the desired result. Id. In other words, where a group of workers [*11] refuses to work until they get higher wages, they are engaged in a strike. But, where the workers also refuse to otherwise deal with the employer, e.g., by not buying the employer's products or by not dealing with anyone who buys the employer's products, then the activity becomes a boycott.

The acts alleged by Delta do not rise to the level of a boycott. The only coercive pressure alleged was applied to the TDA holders, not Delta. Delta alleged that the TDA holders were duped into believing the only available charge-free transfer of their accounts was through Freeman and Safeco Insurance Company. This alleged act, though not an admirable business practice, does not constitute a boycott. We agree with the district court's characterization of this activity as nothing more than the sale of one business's accounts to another, although involving alleged misrepresentation. We conclude that the boycott exception to McCarran-Ferguson does not apply. Accordingly, the acts of which Delta complain are immunized from federal regulation by the McCarran-Ferguson Act because they are regulated as the business of insurance by the State of California.

III. Conclusion

Based upon the foregoing [*12] analysis, we conclude that Delta's state law and RICO claims are barred by the doctrine of res judicata. We also agree with the district court that the McCarran-Ferguson Act bars Delta's claims under the Sherman Act. Accordingly, the district court's order dismissing Delta's claims is affirmed.

AFFIRMED.



Solla v. New York State HMO Conf.

United States District Court for the Eastern District of New York

June 19, 1995, Decided ; June 20, 1995, Filed

CV 93-5473

Reporter

1995 U.S. Dist. LEXIS 21752 *

DR. PHILLIP J. SOLLA, DR. ANDREW LACERENZA, DR. NICHOLAS NAPOLITANO, INDIVIDUALLY, AND DOING BUSINESS AS THE CHIROPRACTIC ALLIANCE FOR EQUAL ACCESS TO HEALTH CARE ORGANIZATIONS, Plaintiffs, - against - NYS HEALTH MAINTENANCE ORGANIZATION CONFERENCE, INC., NYS HEALTH MAINTENANCE ORGANIZATION COUNCIL, INC., MANAGED HEALTH CARE ASSOCIATION, INC., HEALTH INSURANCE ASSOCIATION OF AMERICA INC., CHOICE CARE OF LONG ISLAND INC., CHOICE CARE MANAGED SYSTEMS, INC., METLIFE HEALTHCARE NETWORK OF NEW YORK, INC., METROPOLITAN LIFE INSURANCE CO. and AFFILIATED COMPANIES, OXFORD HEALTH PLANS OF NEW YORK INC., PRUCARE OF NEW YORK INC., TRAVELERS HEALTH NETWORK OF NEW YORK, INC., CIGNA HEALTHPLAN OF NEW YORK, INC., U.S. HEALTHCARE, INC., AETNA HEALTH PLANS OF NEW YORK, INC., EMPIRE BLUE CROSS and BLUE SHIELD, HEALTHNET INC., HEALTH INSURANCE PLAN OF GREATER NEW YORK, INC., MANAGED HEALTH INC., SANUS HEALTH PLAN OF GREATER NEW YORK, INC., AMERICAN MEDICAL ASSOCIATION INC., MEDICAL SOCIETY OF NEW YORK STATE INC., NASSAU COUNTY MEDICAL SOCIETY INC., SUFFOLK COUNTY MEDICAL SOCIETY INC., and NEW YORK COUNTY MEDICAL SOCIETY INC., Defendants.

Core Terms

medical society, further order, health maintenance organization, antitrust, healthcare, chiropractors, Chiropractic, replead

Counsel: [*1] WEBER & WEBER, Attorneys for Plaintiffs, Hauppauge, New York, By: William E. Weber, Esq., Laurence P. Myer, Esq.

STROOCK & STROOCK & LAVAN, Attorneys for Health Insurance Plan of Greater New York, Inc., By: Bruce H. Schneider, Esq.

SIDLEY & AUSTIN, Attorneys for American Medical Association, New York, New York, By: Steven M. Bierman, Esq.

MICHAELS, WISHNER & BONNER, Attorneys for Health Insurance Association of America, Inc., Washington, D.C., By: Arthur Lerner, Esq.

Judges: ARTHUR D. SPATT, United States District Judge.

Opinion by: ARTHUR D. SPATT

Opinion

ORDER

SPATT, District Judge.

This is an antitrust action brought by the Plaintiffs Phillip Solla, Andrew Lacerenza and Nicholas Napolitano, who are individual chiropractors and The Chiropractic Alliance for Equal Access to Health Care Organizations, an association of chiropractors. The action was commenced on December 3, 1993. In the complaint it is alleged that the defendant medical societies, health maintenance organizations and insurance associations, as well as unnamed co-conspirators, have illegally combined efforts to exclude chiropractic services from the relevant health care market. It is alleged that [*2] the defendants' conduct violates Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2, as well as New York state antitrust law, N.Y. Gen. Bus. Law § 240, The Donnelly Act.

Three motions to dismiss the Third Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(6) were brought before the Court. Each of these motions was submitted by a group of defendants as follows: (1) HIP Health Maintenance Organization, Health Maintenance Conference and Council, Inc., Managed Health, Inc., Sanus Health Plan of Greater New York, Inc., CIGNA Healthplan of New York, Empire Blue Cross and Blue Shield Healthnet, Inc., Travelers Health Network of New York, Inc., Choice Care Managed Systems, Inc., Aetna Health Plans of New York, Inc., U.S. Healthcare, Inc., Prucare of New York, Metropolitan Life Healthcare Network of New York, Inc. and Metropolitan Life Insurance Co.; (2) The American Medical Association Inc., Medical Society of the State of New York Inc., Nassau County Medical Society Inc., Suffolk County Medical Society Inc., and New York County Medical Society Inc.; and (3) the Health Insurance Association of America Inc. joined by Managed Health Care Association Inc.

Having reviewed [*3] the papers submitted by the parties in support of and in opposition to this motion, having heard their respective positions at oral argument on June 16, 1995, and for the reasons stated on the record on June 16, 1995 it is hereby

ORDERED, that the motion, pursuant to Fed. R. Civ. P. 12(b)(6), by the American Medical Association Inc., Medical Society of New York State Inc., Nassau County Medical Society Inc., Suffolk County Medical Society Inc. and New York County Medical Society Inc. is granted and the complaint is dismissed in its entirety as to these defendants with prejudice and without leave to replead; it is further

ORDERED, that the motion, pursuant to Fed. R. Civ. P. 12(b)(6), by HIP Health Maintenance Organization, Health Maintenance Conference and Council, Inc., Managed Health, Inc., Sanus Health Plan of Greater New York, Inc., CIGNA Healthplan of New York, Empire Blue Cross and Blue Shield Healthnet, Inc., Travelers Health Network of New York, Inc., Choice Care Managed Systems, Inc., Aetna Health Plans of New York, Inc., U.S. Healthcare, Inc., Prucare of New York, Metropolitan Life Healthcare Network of New York, Inc. and Metropolitan Life Insurance Co. is denied, [*4] except as to the Fourth Cause of Action under 15 U.S.C. § 2 for joint monopolization, which is dismissed with prejudice and without leave to replead; it is further

ORDERED, that the motion, pursuant to Fed. R. Civ. P. 12(b)(6) by Health Insurance Association of America Inc. and Managed Health Care Association, Inc. is denied; it is further

ORDERED, that the caption of this case shall now read as follows:

and it is further

ORDERED, that the defendants shall serve and file and answer to the Third Amended Complaint on or before thirty days from June 16, 1995.

SO ORDERED.

Uniondale, New York

June 19, 1995

ARTHUR D. SPATT

United States District Judge

End of Document



Lago & Sons Dairy v. H.P. Hood, Inc.

United States District Court for the District of New Hampshire

June 20, 1995, Decided

Civil No. 92-200-SD

Reporter

892 F. Supp. 325 *; 1995 U.S. Dist. LEXIS 8894 **; 1995-2 Trade Cas. (CCH) P71,097

Lago & Sons Dairy, Inc.; Michael Lago v. H.P. Hood, Inc.

Core Terms

trucks, retailers, antitrust, products, damages, customers, dairy product, antitrust violation, recoupment, direct-buy, purchasing, contends, factors, retail store, compete, prices, counterclaim, lost profits, parties, summary judgment, invoices, asserts, Dairy, Clayton Act, delivery, profits, price discrimination, breach of contract, causal connection, anti trust law

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[] Entitlement as Matter of Law, Genuine Disputes

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the evidence before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Civil Procedure > ... > 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

HN2[] Summary Judgment, Opposing Materials

The summary judgment process involves shifting burdens between the moving and the nonmoving parties. Initially, the onus falls upon the moving party to aver an absence of evidence to support the nonmoving party's case. Once the moving party satisfies this requirement, the pendulum swings back to the nonmoving party, who must oppose the motion by presenting facts that show that there is a genuine issue for trial.

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

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

HN3 **Summary Judgment, Entitlement as Matter of Law**

Fed. R. Civ. P. 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. When the nonmoving party bears the burden of proof at trial and fails to make such a showing, there can no longer be a genuine issue as to any material fact: the failure of proof as to an essential element necessarily renders all other facts immaterial, and the moving party is entitled to judgment as a matter of law.

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

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

HN4 **Entitlement as Matter of Law, Appropriateness**

In determining whether summary judgment is appropriate, the court construes the evidence and draws all justifiable inferences in the nonmoving party's favor.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN5 **Consideration, Detrimental Reliance**

The essential elements of equitable estoppel are: (1) a representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it to its prejudice.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN6 **Consideration, Detrimental Reliance**

It is well established that the application of estoppel rests largely on the facts and circumstances of the particular case. Further, the party invoking estoppel has the burden of proving that its application is warranted, and its existence is a question of fact to be resolved by the trier of fact.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN7 [] Consideration, Detrimental Reliance

Since the function and purpose of the doctrine of estoppel are the prevention of fraud and injustice, there can be no estoppel where there is no loss, injury, damage, detriment, or prejudice to the party claiming it. Further, the injury or prejudice involved must be actual and material or substantial and not merely technical or formal.

Contracts Law > Contract Formation > Offers > General Overview

HN8 [] Contract Formation, Offers

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Further, an offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain.

Contracts Law > Contract Formation > Offers > General Overview

HN9 [] Contract Formation, Offers

Whether a given factual transaction is or is not an offer is a question of law.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Contracts Law > Statute of Frauds > General Overview

HN10 [] Consideration, Detrimental Reliance

Estoppel is generally defined as a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth by his own deed, acts, or representations, either express or implied.

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Contracts Law > Statute of Frauds > General Overview

[HN11](#) [blue document icon] Consideration, Enforcement of Promises

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 the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

[HN12](#) [blue document icon] Types of Damages, Compensatory Damages

N.H. Rev. Stat. Ann. § 515:7 (1974) provides that if there are mutual debts or demands between the plaintiff and defendant at the time of the commencement of the plaintiff's action, one debt or demand may be set off against the other.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

[HN13](#) [blue document icon] Types of Damages, Compensatory Damages

N.H. Rev. Stat. Ann. § 515:8 (1974) provides that no debt or demand shall be set off as aforesaid unless a right of action existed thereon at the beginning of the plaintiff's action.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

[HN14](#) [blue document icon] Types of Damages, Compensatory Damages

Recoupment has traditionally been viewed as the right of a defendant to reduce or eliminate the plaintiff's demand either because the plaintiff has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposes upon him in the making or performance of that contract.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

[HN15](#) [blue document icon] Types of Damages, Compensatory Damages

Recoupment is in a sense not a separate cause of action, like set-off, but it is a defense to the plaintiff's cause of action, diminishing it because of some damage done to the defendant. This is especially true in contract cases, where the respective damages to both parties arise out of the same transaction and affect each party's legal rights and liabilities on the contract.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

[HN16](#) [blue document icon] Types of Damages, Compensatory Damages

Under New Hampshire law, recoupment may be used defensively to defeat or diminish plaintiff's recovery or affirmatively to obtain full relief, a complete determination of all controversies arising out of matters alleged in the original petition, and to allow the defendant affirmative relief against the plaintiff.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN17 [+] **Types of Damages, Compensatory Damages**

Where the plea of recoupment seeks affirmative relief, rather than mitigation of the plaintiff's demand, it is subject to the operation of the statute of limitations. However, where the plea of recoupment is raised as a defense arising out of the same transaction as the plaintiff's claim, the defense ordinarily survives as long as the cause of action upon the claim continues to exist.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN18 [+] **Types of Damages, Compensatory Damages**

As a defense, it is well established that recoupment may result only in the reduction of the plaintiff's claim, not in affirmative judgment for any excess over that claim. Further, such a defense is not barred by [N.H. Rev. Stat. Ann. § 508:4](#), I, the applicable statute of limitations.

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

HN19 [+] **Antitrust & Trade Law, Robinson-Patman Act**

See [15 U.S.C.S. § 13\(a\)](#).

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

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

HN20 [+] **Coverage, Commerce Requirement**

[15 U.S.C.S. § 13\(d\)](#) makes it unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any service or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

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Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

[HN21](#) [blue download icon] Standing, Clayton Act

Despite the broad language and remedial purpose of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), the class of persons entitled to recover damages under § 4 of the Clayton Act has been limited by caselaw through the doctrine of antitrust standing.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

[HN22](#) [blue download icon] Clayton Act, Claims

To determine whether a plaintiff has the requisite standing to bring a private action under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), the court must evaluate each of the following factors: (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 > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > 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 > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

[**HN23**](#) [] Remedies, Damages

By its terms the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), is a prophylactic statute which is violated merely upon a showing that the effect of such discrimination may be substantially to lessen competition. The Clayton Act, [15 U.S.C.S. § 15](#), in contrast, is essentially a remedial statute. It provides treble damages to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. It must prove more than a violation of the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), since such proof establishes only that injury may result.

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 > 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 > Clayton Act

[**HN24**](#) [] Clayton Act, Claims

In order to determine whether plaintiff's injuries are too remote from defendant's antitrust violation to give plaintiff standing to sue for damages under the Clayton Act, [15 U.S.C.S. § 15](#), the court is required to apply the elusive concept of proximate cause. This analysis requires the court to look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under the Clayton Act, [15 U.S.C.S. § 15](#).

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

[**HN25**](#) [] Private Actions, Standing

In considering the 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.

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Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN26 [] Clayton Act, Claims

To recover damages under the Clayton Act, [15 U.S.C.S. § 15](#), a private 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. Further, 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. Otherwise stated, the alleged injury must be of the type that the antitrust statute was intended to forestall.

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

HN27 [] Private Actions, Remedies

The First Circuit recognizes the general rule that a supplier who suffers because an antitrust violation curtails a business that would otherwise have purchased from the supplier is held not to have suffered antitrust injury.

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

HN28 [] Private Actions, Remedies

Even though a plaintiff was not the direct victim of defendant's antitrust violation, under a broad interpretation of the antitrust caselaw, a plaintiff may still establish antitrust injury by proof 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.

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

HN29 [] Private Actions, Remedies

Damages may be considered speculative where the plaintiff's injury was indirect and possibly the result of intervening factors unrelated to the defendant's conduct.

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

HN30[] Private Actions, Remedies

See [N.H. Rev. Stat. Ann. § 524:1-a.](#)

Counsel: **[**1]** For LAGO & SONS DAIRY, INC., MICHAEL LAGO, plaintiffs: Charles J. Dunn, Esq., Wadleigh, Starr, Peters, Dunn & Chiesa, Manchester, NH.

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For H.P. HOOD, INC., counter-claimant: John V. Dwyer, Esq., Deasy & Dwyer, PA, Nashua, NH. Philip D. O'Neill, Jr., Esq., Edwards & Angell, Boston, MA.

For LAGO & SONS DAIRY, INC., counter-defendant: Charles J. Dunn, Esq., Wadleigh, Starr, Peters, Dunn & Chiesa, Manchester, NH.

Judges: Shane Devine, Senior Judge United States District Court.

Opinion by: SHANE DEVINE

Opinion

[*329] ORDER

Before the court are a series of summary judgment motions and a motion for reconsideration, all of which were filed by defendant H.P. Hood, Inc. Plaintiff Lago & Sons Dairy, Inc., has interposed objections to each motion.

Background

Defendant Hood is a manufacturer of dairy products. Hood sells its dairy products directly to certain retailers and indirectly, through a distributor, to other retailers.

This action arises out of the breakdown of a long-term relationship between Hood and one of its distributors, plaintiff Lago & Sons Dairy, Inc.

[*330] Lago began distributing Hood products in 1979 pursuant to a written wholesale distribution agreement, under which Lago delivered products to Hood's direct-buy customers--its "house accounts"--and received a case commission fee in return. Lago also purchased Hood products to sell to its own retail customers. Lago continued to distribute Hood products under a written contract until February 1990, when Hood exercised its contractual right not to renew the written agreement then governing the parties' relations. Thereafter Lago and Hood continued **[**2]** to do business together under an oral agreement. However, Lago alleges that in March 1992 Hood breached that oral agreement by taking away its house account business from Lago.

At this point the already strained relationship between Hood and Lago completely broke down. The instant action, which includes claims by Lago and counterclaims by Hood based on the distribution relationship between the parties, followed.

Discussion

1. Summary Judgment Standard

HN1[] Under [Rule 56\(c\), Fed. R. Civ. P.](#), summary judgment is appropriate if the evidence before the court shows "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."

HN2 [↑] The summary judgment process

involves shifting burdens between the moving and the nonmoving parties. Initially, the onus falls upon the moving party to aver "an absence of evidence to support the nonmoving party's case." [Garside v. Osco Drug, Inc., 895 F.2d 46, 48 \(1st Cir. 1990\)](#) (quoting [Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#)). Once the moving party satisfies this requirement, the pendulum swings back to the nonmoving party, who must oppose the motion by presenting [**3] facts that show 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 \(1986\)](#) (citing [Fed. R. Civ. P. 56\(e\)](#)). . . .

[LeBlanc v. Great American Ins. Co., 6 F.3d 836, 841 \(1st Cir. 1993\)](#), cert. denied, ____ U.S. ___, 114 S. Ct. 1398 (1994).

"Essentially, [HN3](#) [↑] [Rule 56\(c\)](#) mandates the entry of summary judgment 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" [Mottolo v. Fireman's Fund Ins. Co., 43 F.3d 723, 725 \(1st Cir. 1995\)](#) (quoting [Celotex Corp., supra, 477 U.S. at 322](#)). When the nonmoving party bears the burden of proof at trial and fails to make such a showing, "there can no longer be a genuine issue as to any material fact: the failure of proof as to an essential element necessarily renders all other facts immaterial, and the moving party is entitled to judgment as a matter of law." [Smith v. Stratus Computer, Inc., 40 F.3d 11, 12 \(1st Cir. 1994\)](#) (citing [Celotex Corp., supra, 477 U.S. at 322-23](#)), cert. denied, 131 L. Ed. 2d 850, 115 S. Ct. 1958 (1995).

[HN4](#) [↑] In determining whether summary [**4] judgment is appropriate, the court construes the evidence and draws all justifiable inferences in the nonmoving party's favor. [Anderson, supra, 477 U.S. at 255; Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1159 \(1st Cir. 1994\)](#)

2. Hood's Renewed Motion for Summary Judgment on Count V and Part of Count VIII

In Count V of its complaint, Lago alleges that Hood breached the parties' oral agreement that Lago would continue to distribute Hood products until May 17, 1993, when, on February 14, 1992, Hood notified Lago that it was terminating Lago's service of Hood's fluid group house accounts in six weeks. Complaint PP 61-62. In Count VIII, Lago alleges, in relevant part, that Hood's wrongful termination of Lago and willful breach of contract constituted an unfair trade practice [*331] in violation of New Hampshire's Consumer Protection Act, New Hampshire Revised Statutes Annotated (RSA) 358-A.

Hood, in due course, moved for summary judgment on Count V on the ground that the alleged oral contract was unenforceable under New Hampshire's Statute of Frauds, [RSA 506:2](#).¹ The court, in its order of September 6, 1994, determined that a genuine issue of material [**5] fact existed as to whether the doctrine of equitable estoppel prevented Hood from denying the enforceability of the oral contract and accordingly denied Hood's summary judgment motion. See Order of Sept. 6, 1994, at 18-21.

After additional discovery, Hood now renews its motion for summary judgment as to Count V on the ground that Lago is not entitled to invoke the doctrine of equitable estoppel because it cannot establish that it suffered the requisite injury.²

¹ [RSA 506:2](#) "requires all agreements not to be performed within one year to be in writing and signed by the party to be charged." [Phillips v. Verax Corp., 138 N.H. 240, 245, 637 A.2d 906, 910 \(1994\)](#).

² To the extent that Count VIII is based on the conduct which forms the basis of Count V, defendant seeks summary judgment as to Count VIII on the same grounds.

HN5 [**6] The [**6] essential elements of equitable estoppel are:

"(1) a representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it to [its] prejudice."

Hawthorne Trust v. Maine Sav. Bank, 136 N.H. 533, 538, 618 A.2d 828, 831 (1992) (quoting *Nottingham v. Lee Homes, Inc.*, 118 N.H. 438, 442, 388 A.2d 940, 942 (1978)). See also *Great Lakes Aircraft Co. v. Claremont*, 135 N.H. 270, 292, 608 A.2d 840, 854 (1992).³

[**7] **HN6** [**7] It is well established that "the application of 'estoppel rests largely on the facts and circumstances of the particular case.'" *Great Lakes Aircraft, supra*, 135 N.H. at 289, 608 A.2d at 852-53 (quoting *Monadnock School Dist. v. Fitzwilliam*, 105 N.H. 487, 489, 203 A.2d 46, 48 (1964)). Further, "the party invoking estoppel has the burden of proving that its application is warranted, and 'its existence is a question of fact to be resolved by the trier of fact'" *Id.*, 135 N.H. at 289, 608 A.2d at 853 (quoting *Olszak v. Peerless Ins. Co.*, 119 N.H. 686, 690, 406 A.2d 711, 714 (1979)). See also *Concord v. Tompkins*, 124 N.H. 463, 468, 471 A.2d 1152, 1154 (1984) ("Each element of estoppel requires a factual determination.").

HN7 [**8] "Since the function and purpose of the doctrine of estoppel are the prevention of fraud and injustice, there can be no estoppel where there is no loss, injury, damage, detriment, or prejudice to the party claiming it." *28 AM. JUR. 2D ESTOPPEL AND WAIVER § 78*, at 715-16 (1966). Further, "the injury or prejudice involved must be actual and material or substantial and not merely technical or formal." *Id. at 716*.

Lago asserts that [**8] in early 1991 it purchased 17 trucks in reliance on Hood's assurances that the three-year oral contract between the parties was valid. Affidavit of Robert W. Lago PP 6-9 (attached to Lago's Objection as Exhibit B); Lago's Answer Interrogatory No. 11 of Hood's First Set of Interrogatories (attached to Defendant's Motion as Exhibit B). Lago spent approximately \$ 600,000 to purchase the trucks in question. Lago Affidavit P 9.

Hood now contends that Lago suffered no detriment from this truck purchase because (1) Lago's subsequent distribution agreement with Weeks/Crowley Dairy (Weeks) allowed Lago to meet its expenses as to thirteen of the trucks and (2) the remaining four trucks were sold, but at no loss to Lago. Hood further contends that even if Lago did incur [*332] a loss on the four trucks that were sold, it cannot rely on that loss to show injury here because Hood offered to buy the trucks from Lago at book value.

a. Lago's Agreement with Weeks

Hood allegedly breached its three-year oral distribution agreement with Lago on February 14, 1992, "by assuming the responsibility for delivery of dairy products to the house accounts then being delivered by Lago." Affidavit of Robert [**9] L. Lago P 5 (Plaintiff's Exhibit C). Following Hood's termination of its oral agreement with Lago, Lago entered into an oral agreement with Weeks whereby Lago became a distributor of frozen and fluid Weeks products. Lago states that the distribution agreement with Weeks "was reached approximately one week prior to March 9, 1992 to commence on March 9, 1992." Lago's Supplemental Answers to Hood's Interrogatory No. 16 (Defendant's Exhibit C).

³ Since the only element challenged by defendant's motion is that of injury, the court limits its discussion herein to said element and assumes, consistent with its September 6, 1994, order, that a genuine issue of material fact exists as to the remaining elements of plaintiff's equitable estoppel claim.

Hood asserts that Lago suffered no detriment as a result of its 1991 truck purchase because Lago's agreement with Weeks allowed Lago to meet its expenses as to thirteen of the seventeen trucks purchased.

Lago's agreement with Weeks is "a verbal agreement to purchase fluid, frozen or cultured products from Weeks with no specified time period and no restrictions to purchasing other competitive products." Lago's Supplemental Answer to Hood's Interrogatory No. 4. Lago concedes that this agreement "gave Lago a number of benefits and savings, such as seven week credit terms, turning over \$ 2.2 million in direct bill ice cream business to Lago, inventorying Weeks/Crowley products free of charge, and free freight from Concord to Portsmouth." Affidavit [**10] of Robert L. Lago ⁴ P 15. Lago further concedes that, after losing Hood's house account business, it needed the Weeks contract to stay in business. *Id. PP 14-15.*

However, Lago maintains that they "projected that even with all the benefits and savings we realized from Weeks/Crowley we would still lose approximately \$ 200,000 during the first year of our agreement with Weeks/Crowley. We believed that it was better to go forward with a bad year than to suffer a total financial loss." *Id. P 16.* Lago further states that due to "the loss that we sustained in the first year of our agreement with Weeks/Crowley of approximately \$ 200,000.00, it is clear that we could not afford to carry the cost of the new trucks and costs associated with those trucks. The trucks cost [**11] us \$ 14,729.00 per month from April 1992 through May 1993 for a total of \$ 176,747.00 in damages." *Id. P 20.*

The court finds that the evidence before it creates a genuine issue of material fact as to whether Lago suffered any injury from its 1991 truck purchase.

b. Lago's Sale of Four Trucks

Sometime after March of 1992, Lago had to sell four of the seventeen trucks it had purchased in 1991. Deposition of Robert W. Lago, Vol. I at 98-99, Vol. IV at 72-73 (Defendant's Exhibit F). However, at his January 12, 1995, deposition, Robert W. Lago was unable to recall what the book values of the four trucks were at the time of their sale, what the sales prices were, or whether the sales resulted in a profit or loss to Lago. *Id.*, Vol. IV at 73.

The court finds that the evidence before it regarding the sale of the four trucks goes to the amount of damages suffered by Lago as a result of the oral distributor contract, but does not alter the court's previous finding that a genuine issue of material fact exists as to whether Lago suffered any injury from its 1991 truck purchase.

c. Waiver

Hood argues that even if Lago incurred a loss on its sale of the four trucks, [**12] "Lago now may not seek from Hood compensation for that hypothetical loss since Lago declined Hood's March, 1992 offer to purchase the trucks at their book value and to assume the fleet without any negative impact on Lago." Hood's Memorandum in Support of its Renewed [*333] Motion for Summary Judgment at 9. Hood contends that Lago's voluntary relinquishment of Hood's offer constitutes a waiver and bars Lago's claim of damages with respect to the four trucks Lago had to sell. In response, Lago argues, *inter alia*, that a genuine issue exists as to whether Hood's offer was valid.

HN8 [↑] "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *RESTATEMENT (SECOND) OF CONTRACTS* § 24 (1979). Further, "an "offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain.""⁵ *Phillips, supra* note 1, *138 N.H. at 245, 637 A.2d at 910* (quoting *Chasan v. Village Dist. of Eastman, 128 N.H. 807, 815, 523 A.2d 16, 21 (1986)* (quoting *RESTATEMENT* [**13] *OF CONTRACTS* § 32 (1932))). **HN9** [↑] "Whether a given factual transaction is or is not an 'offer' is a question of law . . ." *Jay Edwards, Inc. v. Baker, 130 N.H. 41, 45, 534 A.2d 706, 708 (1987)*.

⁴ The court assumes that Robert "L." Lago and Robert "W." Lago (referred to elsewhere in this order) are the same person. Their signatures appear to be the same, and the circumstances of their actions seem to indicate that they are the same person.

Lago concedes in its answers to Hood's interrogatories that Hood expressed an interest in purchasing its trucks. Lago's Answer to Hood Interrogatory No. 18 (attached to Hood's Motion as Exhibit B). Lago further states that

Mark Bigelow wanted a list of all trucks that we could have available. He said Hood could look into taking over Lago's payments. He wanted the year, VIN #, model, specifications, and all financial information from Natistrar, A.S.A.P., the next day if possible, or at least the number of trucks that will be available.

Id.

Mark Bigelow similarly states that after Hood canceled Lago's handling of the house accounts in 1992, he made "a phone call to Bobby . . . to ask him if he had any vehicles that were going to be available or he needed to get rid of that Hood could purchase . . ." Deposition of Mark Bigelow, Vol. II at 60 (Defendant's Exhibit G).

Robert Lago, recalling his conversations with Bigelow about the trucks, testified at his deposition as follows:

[**14] Q. . . . My question to you is did Hood offer to purchase the trucks in February of 1992?

A. As to the exact date, whether it was February or March, I'm not exactly sure, but I recall having a conversation with Mark Bigelow where Mark Bigelow had asked me if we had any trucks that we were planning on not using as a direct result of the loss of case fees.

Q. And did he offer to purchase those trucks from you at that time?

A. He may have offered to purchase them from me.

Q. And what was your response to that offer?

A. Well, there again, there was no specific number of trucks that he proposed to purchase. I never told him that he could purchase a certain amount of vehicles from us. I never gave him a figure that you could -- you may buy ten trucks, for example. I never gave him that.

Q. Did you ever offer in February or March of 1992 to sell any trucks to Hood?

A. We had a couple conversations regarding the purchase of trucks. I wasn't exactly sure what trucks, if any trucks, would be available for sale either to him or to whomever.

Q. That doesn't quite answer my question. Did you ever offer in February or March of 1992 to sell any trucks to Hood?

A. No.

Q. After March [**15] of 1992 did you ever offer to sell any trucks to Hood?

A. No.

Deposition of Robert W. Lago, Vol. IV at 71-72 (Defendant's Exhibit F).

Representatives from Hood and Lago met on February 19, 1992, to discuss various issues, including Hood's purchase of Lago's trucks. The agenda for that meeting states in relevant part,

2.) Truck Purchase

- Specifications on all vehicles need to be supplied by Lago.

[*334] - Hood will purchase all dairy vehicles that Lago does not require.

- Purchase price of vehicles will be negotiated on the basis of their book value.

Lago & Sons, Inc., Meeting Agenda, Feb. 19, 1992 (Defendant's Exhibit H) (emphasis added). Robert Lago's notes of that same meeting indicated that Bigelow "talked about truck purchases, the trucks available to him by Lago. Discussed possible buyback and lease at book value." Handwritten Notes of Robert Lago (Defendant's Exhibit H).

Robert Lago also states in his affidavit of April 10, 1995, that during the February 19 meeting "Mark Bigelow talked about 'possibly' buying back and leasing the Lago trucks at book value. There was never any discussion as to the actual price per truck and we never reached an agreement [**16] regarding how many trucks Hood was willing to purchase." Affidavit of Robert L. Lago P 11.

The court finds, as a matter of law, that Hood's oral and written statements to Lago regarding the purchase of Lago's trucks do not constitute an offer because they do not contain certain material terms, including the quantity of trucks to be purchased and the purchase price. Instead, Hood's statements constitute preliminary negotiations towards an eventual offer by one of the parties to purchase or sell one or more trucks. See RESTATEMENT, supra, §§ 26, 33.

Given the absence of a definite offer from Hood, the court further finds that Lago could not have waived any rights associated with such an offer until the material terms of the offer were made known to Lago. See generally 28 AM. JUR. 2D Estoppel and Waiver § 158 ("It must generally be shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of his rights or of all the material facts upon which they depended.").

d. Damages

Defendant contends that even if Lago is able to demonstrate that an exception to the Statute [**17] of Frauds applies in this case, Lago cannot recover lost profits under the oral agreement, but is instead limited to reliance damages.

The section of the Statute of Frauds invoked by Hood as an affirmative defense to Lago's claim for breach of the oral distribution agreement, RSA 506:2, renders unenforceable "those contracts which cannot be performed according to their terms within a year from the time of their inception." Phillips, supra note 1, 138 N.H. at 246, 637 A.2d at 911 (quoting Davis v. Grimes, 87 N.H. 133, 135, 175 A. 238, 240 (1934)).

HN10[] Estoppel is generally "defined as 'a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth . . . by his own deed, acts, or representations, either express or implied.'" Great Lakes Aircraft, supra, 135 N.H. at 289, 608 A.2d at 852 (quoting 28 AM. JUR. 2D Estoppel and Waiver § 1, at 600 (1966)). Here, if Lago can prove all of the essential elements of equitable estoppel, then the doctrine will operate to bar Hood's Statute of Frauds defense. E.g. Demirs v. Plexicraft, Inc., 781 F. Supp. 860, 863-64 (D.R.I. 1991); [**18] Hoffman v. Optima Sys., Inc., 683 F. Supp. 865, 869-70 (D. Mass. 1988). In so doing, the doctrine of equitable estoppel allows plaintiff to enforce the oral distribution contract and to seek damages from defendant for its breach thereof.

The application of the doctrine of equitable estoppel to bar a Statute of Frauds defense is consistent with section 139(1) of the *RESTATEMENT (SECOND) OF CONTRACTS*, which provides:

HN11[] 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 the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 139(1) (1979).

The court finds that if plaintiff proves its equitable estoppel theory, it is not, as defendant contends, limited as a matter of law to [*335] recovering reliance damages, but is instead entitled to seek damages for breach of contract. However, due to the equitable nature of an estoppel, such damages may be limited by the court as justice requires.

For **[**19]** the reasons set forth hereinabove, the court denies Hood's renewed motion for summary judgment on Count V and on part of Count VIII.

3. Hood's Motion for Partial Summary Judgment on Counts I and II of its Counterclaims

In Count I of its counterclaims, Hood asserts, inter alia, that Lago breached its contract with Hood by failing to pay certain invoices for dairy products Lago received in 1989. In Count II, Hood asserts that Lago has been unjustly enriched by its failure to pay for said dairy products.

The evidence submitted by Hood in support of its motion for partial summary judgment on Counts I and II of its counterclaims establishes that Lago failed to pay invoices totaling \$ 210,436.43 between June 1989 and September 1989. See Affidavit of Frank J. Jamgochian PP 9-11; Hood's Account Summaries for Lago & Sons (attached to Jamgochian Affidavit as Exhibit A).

Lago admits that it did not pay certain invoices for dairy products received during the June 1989 through September 1989 time period. See Deposition of Paul Gallant at 59-60; Lago's March 1992 A/P Hood Report (attached to Gallant Deposition as Exhibit 2).⁵ However, Lago contends that its failure to **[**20]** pay said invoices does not constitute a breach of contract because, at the time said invoices were due, Hood owed Lago \$ 335,640 for credit not properly given to Lago for its delivery of dairy products to Hood's house account customers between 1985 and 1988. Lago further asserts that Hood was obligated under the terms of the same contract to credit Lago's account for said amount, thereby obviating the need for Lago to pay the invoices in question.

In support thereof, Lago submits a copy of the written contract governing the parties' relationship during the time period in question. Said contract states, in relevant part, that (1) Distributor shall sell and transfer to the Company all of the Products delivered to House Accounts. Such sale and transfer shall be effected and title shall pass to the Company upon the delivery of the Products to the House Account and the **[**21]** signing by the House Account of a delivery ticket furnished by the Company showing the date, the items and quantities delivered.

(2) Upon proper submission to the Company of the said signed delivery tickets, the Distributor will be issued a credit by Hood in the amount of the Distributor's purchase price for the Products delivered to said House Account.

Wholesale Distributor Agreement § 8.B(1)-(2) (attached to Lago's Objection as Exhibit B).

Paul R. Gallant, Lago's accountant, was hired in early 1988 because Michael Lago believed Lago "was losing or missing income that should have been generated and received from the sale of dairy products." Affidavit of Paul R. Gallant P 5 (attached to Lago's Objection). Gallant states that he "quickly discovered that Hood had not been giving proper credit to Lago for deliveries Lago made to the Hood House Accounts because Hood frequently failed to input into their computer the Lago delivery slip/invoices. For the customers who paid Hood in full, Hood often failed to give proper credit to Lago for deliveries made to those customers." Id. P 8.

Lago and Hood subsequently undertook to investigate this purported credit problem. Gallant states,

On **[**22]** August 9, 1989 at 9:30 a.m. I met with Frank Jamgochian to discuss the resolution of the outstanding credit owed to Lago. The meeting with Jamgochian, then the Director of Treasury Services at Hood, took place at the Hood plant in Charlestown, Massachusetts.

[*336] During that meeting, Jamgochian presented me with the report entitled Lago Final Report and dated June 16, 1989. That report was the result of the research by Hood to determine the credit which Hood owed Lago from June 1985 through February 1988. This report entitled "Lago Final Report" which indicates "Lago correct \$ 335,640.00" is attached herein as Exhibit A.

⁵ Lago's March 1992 Accounts Payable Report shows that between June 1989 and September 1989 Lago did not pay Hood invoices totaling \$ 215,358.84.

During that meeting, Jamgochian told me that Hood did in fact owe Lago approximately \$ 335,640.00 for credit which was not properly given to Lago for products Lago delivered to Hood's House Account customers.

Id. PP 12-14.

Gallant further states that Lago did not pay the invoices at issue here because of Hood's admission that it had failed to properly credit Lago's account in the amount of \$ 335,640. Gallant Affidavit PP 16-18, 21.

In response to Lago's objection, Hood contends that Lago's defense fails as a matter of law because it is simply a reassertion **[**23]** of Lago's debt claim which was rejected by the court in its order of September 6, 1994.

Count VII of Lago's original complaint was a debt claim in which Lago asserted that Hood owed it between \$ 500,000 and \$ 700,000 as the result of the erroneous administration of accounts between the two parties from 1985 to 1988. In its September 6, 1994, order, this court granted Hood's motion for summary judgment on Count VII after finding that the debt claim asserted therein was barred by the three-year statute of limitations set forth in [RSA 508:4](#), I. See Order of Sept. 6, 1994, at 28. The court further held that because Lago's debt claim was time-barred, Lago was not entitled to offset the amounts allegedly due to Lago under said claim against any amounts determined to be due to Hood from Lago in the course of this action. *Id.*

It is Hood's position that these rulings preclude Lago from asserting what Hood characterizes as a "setoff" defense in response to Hood's breach of contract counterclaim. Hood maintains that said defense amounts to no more than a revival of Lago's time-barred debt claim and is itself time-barred for the same reasons.

New Hampshire has two statutory provisions **[**24]** which govern the availability of a set-off claim. [HN12](#)  The first statute, [RSA 515:7](#) (1974), provides, "If there are mutual debts or demands between the plaintiff and defendant at the time of the commencement of the plaintiff's action, one debt or demand may be set off against the other." [HN13](#)  The second statute, [RSA 515:8](#) (1974) provides, "No debt or demand shall be set off as aforesaid unless a right of action existed thereon at the beginning of the plaintiff's action."

Here, [RSA 515:7](#) and [515:8](#) operate to preclude Lago from setting off the debt Lago sought to recover from Hood in Count VII against any debts or demands asserted by Hood because Lago's debt claim is time-barred and therefore "no right of action existed thereon at the beginning of [Lago's] action." [RSA 515:8](#).

That being said, the court finds that the defense asserted by Lago is more akin to a recoupment than a set-off.

[HN14](#)  Recoupment has traditionally been viewed as the right of a defendant to reduce or eliminate the plaintiff's demand either because the plaintiff has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposes upon him in the making or **[**25]** performance of that contract.

[Zurback Steel Corp. v. Edgcomb](#), 120 N.H. 42, 44, 411 A.2d 153, 155 (1980) (citing 20 AM. JUR. 2D Counterclaim, Recoupment and Setoff § 1 (1965) [hereinafter 20 AM. JUR. 2D]). See also [Varney v. General Enolam Co.](#), 109 N.H. 514, 516, 257 A.2d 11, 13 (1969) ("Recoupment 'was originally a deduction from damages because of part payment, former recovery, or some analogous fact.'" (quoting James, CIVIL PROCEDURE § 10.14 (1965))).

The availability of recoupment does not depend on set-off statutes such as [RSA 515:7](#) and [515:8](#). [Stanley v. Clark](#), 159 F. Supp. 65, 66-67 (D.N.H. 1957); see also [Varney, supra](#), 109 N.H. at 515, 257 A.2d at 12.

[*337] This is because [HN15](#)  recoupment is in a sense not a separate cause of action, like set-off, but it is a defense to the plaintiff's cause of action, diminishing it because of some damage done to the defendant. This is especially true in contract cases, where the respective damages to both parties arise out of the same transaction and affect each party's legal rights and liabilities on the contract.

Stanley, supra, 159 F. Supp. at 67.

HN16[] Under New Hampshire law, recoupment may be used [**26] "defensively to defeat or diminish plaintiff's recovery . . . [or] affirmatively to obtain full relief, a complete determination of all controversies arising out of matters alleged in the original petition, and to allow the defendant affirmative relief against the plaintiff." Zurback Steel, supra, 120 N.H. at 44, 411 A.2d at 155.

HN17[] Where the plea of recoupment "seeks affirmative relief, rather than mitigation of the plaintiff's demand, it is subject to the operation of the statute of limitations." Id. (citing 51 AM. JUR. 2D, *Limitations of Actions* § 78 (1970) [hereinafter 51 AM. JUR. 2D]; W. W. Allen, Annotation, *Claim Barred by Limitation as Subject of Setoff, Counterclaim, Recoupment, Cross Bill, or Cross Action*, 1 A.L.R. 2d 630, 640, § 4 (1948) [hereinafter 1 A.L.R. 2d]). However, where the plea of recoupment is raised as a defense arising "out of the same transaction as the plaintiff's claim, [the defense] ordinarily survives as long as the cause of action upon the claim continues to exist." 51 AM. JUR. 2D § 77. "Stated in another way, the defense of recoupment may be asserted even though the claim as an independent cause of action is barred by limitations." [**27] Id.; see also 1 A.L.R.2d at 666, § 14 ("if a defendant's claim is in fact a recoupment the general statutes of limitation do not defeat it; on the contrary it may be availed of defensively so long as plaintiff's cause of action exists").

A full and fair reading of Lago's objection to the motion sub judice reveals that Lago has invoked the right of recoupment as a defense to Hood's breach of contract counterclaim, and not as an avenue for obtaining affirmative relief. **HN18**[] As a defense, it is well established that recoupment "may result only in the reduction of the plaintiff's claim, not in affirmative judgment for any excess over that claim." 20 AM. JUR. 2D § 12, at 236. Further, such a defense is not barred by RSA 508:4, I, the applicable statute of limitations.

In short, the court finds that Lago is entitled to assert a recoupment defense in response to Hood's breach of contract counterclaim. The availability of such a defense creates a genuine issue of material fact as to whether Lago's admitted failure to pay the invoices in question constitutes a breach of the contract between the parties. Assuming that Lago's failure to pay the invoices in question constitutes a breach [**28] of contract, Lago's recoupment defense creates a genuine issue of material fact as to the amount of damages suffered by Hood because of said breach.

The court further finds that the facts which form the basis of Lago's recoupment defense also preclude the court from finding, as a matter of law, that Hood is entitled to recover under a theory of unjust enrichment. The court accordingly denies Hood's motion for partial summary judgment as to Counts I and II of its counterclaims.

4. Hood's Motion for Summary Judgment on Counts IX and X of Lago's Amended Complaint

In Counts IX and X of its amended complaint, Lago asserts that Hood violated sections 2(a) and 2(d) of the Clayton Antitrust Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a) and 13(d), by selling Hood products to its direct-buy retailers "at prices lower than those offered to Lago for Lago's resale to its retailers," Amended Complaint P 82, and by providing its direct-buy retailers "with perks, such as free delivery and guaranteed product, not offered to Lago for Lago's resale to its retailers," id. P 94.⁶ Lago contends that as a result of [*338] Hood's

⁶ Section 2(a) provides, in relevant part,

HN19[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them"

15 U.S.C. § 13(a) (1973). **HN20**[] Section (d) makes it unlawful

discriminatory pricing and allowances practices, **[**29]** Lago's retail customers were unable to compete with Hood's direct-buy retail customers. *Id. PP 85, 96*. Lago further contends that Hood's discriminatory practices "substantially lessened competition and/or injured, destroyed, or prevented competition," *id. PP 87, 98*, and caused Lago to suffer "actual injury including a loss in sales and profits as a result of its retail customers['] inability to compete with the favored chain and retail stores," *id. PP 88, 99*.

[30]** As a result of Hood's allegedly discriminatory conduct and the injury caused to Lago thereby, Lago seeks treble damages, expenses, and attorney's fees under § 4 of the Clayton Act, which provides in pertinent part, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . ." [15 U.S.C. § 15\(a\) \(Supp. 1995\)](#).

Hood moves for summary judgment as to Counts IX and X on the ground that Lago does not have the antitrust standing necessary to bring a private action for treble damages under § 4 of the Clayton Act.

a. Antitrust Standing Generally

A literal reading of § 4 of the Clayton Act is admittedly "broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." [Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#). This lack of restrictive language "reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement **[**31]** mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." [Blue Shield of Virginia v. McCready, 457 U.S. 465, 472, 73 L. Ed. 2d 149, 102 S. Ct. 2540 \(1982\)](#) (quoting [Pfizer, Inc. v. India, 434 U.S. 308, 313-14, 54 L. Ed. 2d 563, 98 S. Ct. 584 \(1978\)](#)).

HN21 [↑] Despite the broad language and remedial purpose of section 4, "the class of persons entitled to recover damages under Section 4 has been limited by caselaw through the doctrine of 'antitrust standing.'" [Sullivan v. Tagliabue, 25 F.3d 43, 45 \(1st Cir. 1994\)](#) (citing [Associated Gen. Contractors, supra, 459 U.S. at 529-35; McCready, supra, 457 U.S. at 472-73](#)). As recently explained by the First Circuit, the doctrine of antitrust standing involves the following concept: "even where an [antitrust] violation exists and a plaintiff has been damaged by it,⁷ the courts--for reasons of prudence--have sought to limit the right of private parties to sue for damages or injunctions." [SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 43 \(1st Cir. 1995\)](#).

[32] [*339]** Although "the courts have never been able to create an intelligible theory of private antitrust standing capable of being applied across the full range of potential cases," *id.* (quoting H. Hovenkamp, [Federal Antitrust Policy](#), 543 (1994)), the prudential concerns which courts have relied on to limit the rights of plaintiffs to bring antitrust actions have been delineated into a list of factors. **HN22** [↑] To determine whether a plaintiff has the

for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any service or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[15 U.S.C. § 13\(d\) \(1973\)](#).

⁷ Hood concedes, for the purpose of the present motion only, that an antitrust violation has occurred and that Lago has been damaged by it. Hood's Reply Memorandum at 2. Accordingly, the court assumes that Hood's conduct, in selling its dairy products to its direct-buy retailers at lower prices than it sold those same products to Lago for resale to other retailers, may have lessened, injured, destroyed, or prevented competition for the sale of Hood dairy products at the retail level in violation of the Robinson-Patman Act. The court further assumes that Lago was damaged thereby.

requisite standing to bring a private action under § 4 of the Clayton Act, the court must evaluate each of the following factors:

(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.

[Sullivan, supra, 25 F.3d at 46](#) (citing [Associated Gen. Contractors, supra, 459 U.S. at 537-45](#)).

The court [**33] considers these factors in light of the First Circuit's recent interpretation of [Associated General Contractors](#) as requiring courts to evaluate the balance of these factors "in each case in an effort to guard against 'engrafting artificial limitations on the § 4 remedy.'" [Sullivan, supra, 25 F.3d at 46](#) (quoting [McCready, 457 U.S. 465, 472](#)); see also [Donovan v. Digital Equip Corp., 883 F. Supp. 775, 1994 WL 790887](#), at * 4 (D.N.H. Dec. 13, 1994).

b. The Applicability of the Sullivan Factors to Lago's Treble Damages Claim

Lago perceives there to be some injustice in requiring a plaintiff whose claims are based on the Robinson-Patman Act to prove a causal connection between the price discrimination complained of and the actual damages suffered by plaintiff in order to recover damages under § 4 of the Clayton Act when such proof is not required to make out a Robinson-Patman Act claim at trial. See Lago's Memorandum at 12-14. The court finds that the justification for imposing additional requirements on Robinson-Patman Act plaintiffs who seek treble damages was adequately explained by the Supreme Court in [J. Truett Payne Co. v. Chrysler F^{**341} Motors Corp., 451 U.S. 557, 561-62, 68 L. Ed. 2d 442, 101 S. Ct. 1923 \(1981\)](#), as follows:

[HN23](#) By its terms § 2(a) [of the Robinson-Patman Act] is a prophylactic statute which is violated merely upon a showing that 'the effect of such discrimination may be substantially to lessen competition.' (Emphasis supplied.) . . . Section 4 of the Clayton Act, in contrast, is essentially a remedial statute. It provides treble damages to 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . .' (Emphasis supplied.) To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. . . . It must prove more than a violation of § 2(a), since such proof establishes only that injury may result.

(Citations omitted.) See also [J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 \(3d Cir. 1990\)](#) ("To recover treble damages a plaintiff must prove more than a violation of section 2(a); it must show the extent of actual injury attributable to the harm to competition."), cert. denied, 499 U.S. 921, 113 L. Ed. 2d 246, 111 S. Ct. 1313 (1991); [World of Sleep, Inc. v. La-Z-Boy Chair Co., F^{**351} 756 F.2d 1467, 1479](#) (10th Cir.), cert. denied, 474 U.S. 823, 88 L. Ed. 2d 63, 106 S. Ct. 77 (1985) (same); ABA ANTITRUST SECTION, [ANTITRUST LAW DEVELOPMENTS](#), chp. IV, § K (2d ed. 1984) [hereinafter [ANTITRUST LAW DEVELOPMENTS](#) (SECOND)] (same).

Accordingly, the court concludes that consideration of the Sullivan factors is the appropriate method for determining whether Lago has the requisite antitrust standing to seek damages under § 4 of the Clayton Act and turns its attention to that task.

c. Causal Connection and Directness of Injury

The first factor the court must consider is whether there is a causal connection between [*340] the alleged antitrust violation--price and allowances discrimination by Hood in violation of the Robinson-Patman Act--and the harm

suffered by Lago. Related to this first factor is the fourth Sullivan factor, which requires the court to consider the directness with which the alleged antitrust violation caused the asserted injury.

"By its nature, 'an antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy.'" *Donovan, supra, 883 F. Supp. 775* at ___, 1994 WL 790887, at * 5 (quoting *McCready, supra, 457 U.S. at 476-77*). [**36] "However, because not 'every person tangentially affected by an antitrust violation' is entitled to maintain a claim under the Clayton Act, courts examine the causal connection between the alleged violation and harm and also the directness with which the alleged market restraint caused the asserted injury." *Id.* (quoting *McCready, supra, 457 U.S. at 477*).

Lago has submitted evidence which shows that Hood was selling certain Hood products to its direct-buy retailers at lower prices than it was selling those same products to Lago for resale to Lago's retail customers. See Affidavit of Frances M. Nugent PP 6-7 (Lago Exhibit B) and documents attached thereto.⁸

As a result of this alleged price discrimination, [**37] Lago contends that its customers, small retail grocery stores characterized by Lago as "mom and pop stores", were unable to compete with Hood's direct-buy retailers for the sale of Hood products. In support thereof, Lago submits the affidavits from three of its retail stores that competed with Hood's direct-buy retailers for the sale of Hood products. One such Lago customer, Henry M. Cavaretti of Foyes Corner Market in Rye, New Hampshire, states,

5. The retail chain stores consistently sold their Hood milk, cream, O.J. and other products for a price that was less than the price that I was charged by Lago & Sons Dairy, Inc. for those same products.

6. My customers often told me that they believed that I was overcharging them by charging them higher prices for the same Hood products sold by those chain stores at a much lower price.

7. Because I could not compete with the prices charged by the retail chain stores in my area and because Lago could not offer me lower prices with which I could compete with the chain stores, I was forced to stop purchasing dairy products from Lago and began to purchase milk, cream, O.J. and other products from Weeks Dairy, Concord, New Hampshire.

[**38] 8. The reason that I stopped purchasing Hood milk, cream, O.J. and other products from Lago was because I lost business as a result of the prices charged by the retail chain stores in my area.

Affidavit of Henry M. Cavaretti PP 5-8 (Lago Exhibit C). For the same reasons detailed in Cavaretti's affidavit, Philip Smith of Bayberry Variety in Kingston, New Hampshire, states that he "was forced to stop purchasing dairy products from Lago and began to purchase milk and other products from Idlenot and Gaelic [sic] Farms." Affidavit of Philip Smith P 7 (Lago Exhibit E).

The third affidavit submitted by Lago is that of Robert A. Mastin of L&M Variety Store in Newmarket, New Hampshire. Mastin states that

7. Because I could not compete with the prices charged by the retail chain stores in my area and because Lago could not offer me lower prices with which I could compete with the chain stores, it was difficult for me to compete for those same customers for those Hood products.

8. We stayed with Lago because of our long time relationship--when they brought in Weeks products the pricing was a lot more competitive.

Affidavit of Robert A. Mastin PP 7-8 (Lago Exhibit D).

⁸ The court notes that the Affidavit of Josephine R. Raczkowski (Hood's Reply Exhibit B) reveals that some of Nugent's price comparisons are incorrect and further demonstrates that Lago received lower prices than Hood's direct-buy retailers on some Hood products during the time period in question.

Lago [**39] maintains that it suffered lost sales and profits when its retailers, such [*341] as Foyes Corner Market and Bayberry Variety, stopped buying Hood products from Lago and instead began buying their dairy products from other dairies. The court finds that the evidence presented is sufficient to demonstrate that there is a causal connection between the Hood's alleged antitrust violation and the harm suffered by Lago.⁹ There remains, however, the question of whether that causal connection is direct enough to give Lago antitrust standing in this action.

[**40] [**HN24**](#)[↑] In order to determine whether Lago's injuries are "too remote" from Hood's antitrust violation to give Lago standing to sue for damages under § 4, the court is required to apply the "elusive" concept of "proximate cause". [*McCready, supra, 457 U.S. at 477*](#). This analysis requires the court to

look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

[*Id. at 478*](#). Further, the First Circuit has recently stated,

[**HN25**](#)[↑] In considering the 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.

[*Sullivan, supra, 25 F.3d at 51 n.12*](#).

Lago, as a supplier of Hood dairy products to the retail market, [**41] is clearly not the most immediate victim of Hood's alleged discriminatory price and allowance practices. Instead, the retail stores which purchased Hood products from Lago and were consequently unable to compete with Hood's direct-buy retailers for the sale of Hood dairy products to consumers are the direct victims of Hood's alleged discriminatory conduct. See, e.g., SAS of Puerto Rico, supra, 48 F.3d at 44 (when a supplier "suffers because an antitrust violation curtails a business that would otherwise have purchased from the supplier . . . the failed business is the immediate victim and the preferred plaintiff") (citing II P. AREEDA & H. HOVENKAMP, **ANTITRUST LAW** P 375 (rev. ed. 1995) [hereinafter AREEDA & HOVENKAMP]).

"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 bring an action under § 4. [*Associated Gen. Contractors, supra, 459 U.S. at 542*](#). On the other hand, justification for

⁹ In so finding, the court has considered Hood's well-argued contention that there are numerous factors which could have rendered Lago's retailers unable to compete with Hood's direct-buy retailers for the sale of Hood dairy products. However, it is not necessary for Lago to prove that Hood's antitrust violation is the sole cause of its injury. Instead, as the Supreme Court stated in [*Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 114 n.9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)*](#), "It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." See also Sullivan v. National Football League, 34 F.3d 1091, 1103 (1st Cir. 1994) ("Plaintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause." (quoting [*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)**)), cert. denied, **115 S. Ct. 1252 (1995)**. Further, where there is evidence "that the decline in plaintiff's profits . . . was not caused by an antitrust violation and instead resulted from other factors, . . . resolution of the issue ordinarily is for the trier of fact." **ANTITRUST LAW** DEVELOPMENTS (SECOND), chp. VII, § C.1, at 408.

conferring standing on a "second-best plaintiff" such as Lago may exist when there is "no first best [**42] with the incentive or ability to sue." *SAS of Puerto Rico, supra, 48 F.3d at 45*.

Hood asserts that the retail stores that Lago supplied are the most appropriate parties to bring claims against Hood for injuring competition at the retail level. Lago counters [*342] that these retail stores do not have the incentive or ability to sue Hood for antitrust violations. Lago points out that Hood dairy products are just some of the many products these stores carry and that the volume of Hood dairy product sales on a per store basis is often small. Lago further asserts that the expense of pursuing a § 4 claim against Hood "would far exceed the actual injury sustained by an individual grocery store owner." Lago's Opposition Memorandum at 38. The court finds this reasoning to be persuasive and concludes that although Lago is not the party most directly affected by the alleged antitrust violation, it is in a better position to pursue an antitrust action against Hood than its retail store customers.

The court further finds that the physical and economic nexus between the alleged antitrust violation by Hood and the alleged injury to Lago is a close one. It is certainly foreseeable that Lago would [**43] lose sales and profits if its retailers were unable to compete with Hood's direct-buy retailers for the sale of Hood products. In addition, as set forth *infra* at 38-44, the alleged injury suffered by Lago is an "antitrust injury". Under these circumstances, the court finds the causal connection between Hood's alleged antitrust violation and Lago's asserted injury is close enough to confer standing on Lago in this action.

d. Antitrust Injury

HN26 To recover damages under § 4 of the Clayton Act, a private 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, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990) (quoting *Brunswick*, *supra*, 429 U.S. 477, 489) (emphasis in *Brunswick*). Further, "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.'" [**44] *Id.* (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)) (quoting *Brunswick*, *supra*, 429 U.S. at 488)). Otherwise stated, the alleged injury must be "of the type that the antitrust statute was intended to forestall." *Associated Gen. Contractors*, *supra*, 459 U.S. at 540 (citing *Brunswick*, *supra*, 429 U.S. at 487-88).

Conduct in violation of the antitrust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Atlantic Richfield, supra, 495 U.S. at 343-44.

The antitrust statute allegedly violated by Hood in this case is the Robinson-Patman Act, which "was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atlantic & Pacific Tea Co. v. [**45] Fed. Trade Comm'n*, 440 U.S. 69, 75-76, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979). See also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 n.25, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978) ("the political and economic stimulus for the Robinson-Patman Act was the perceived need to protect independent retail stores from 'chain stores'").

Lago contends that it was injured as a result of the inability of its retail customers (i.e., small independent retailers) to compete with Hood's direct-buy retailers (i.e., chain stores) for the sale of Hood dairy products to the ultimate consumers of those products. Lago contends that its retail store customers were forced to stop buying Hood

products from Lago and began purchasing their dairy products from other dairies and, as a result thereof, Lago suffered lost sales and profits.

[*343] [HN27](#)¹⁰ The First Circuit recognizes the general rule that a supplier "who suffers because an antitrust violation curtails a business that would otherwise have purchased from the supplier . . . is held not to have suffered 'antitrust injury'" [SAS of Puerto Rico, supra, 48 F.3d at 44](#) (citing AREEDA & HOVENKAMP P 375). The circumstances which form the basis of Lago's present claims fall squarely within the parameters of [*46] this general rule: Lago claims to have been injured because Hood's purported antitrust violation curtailed retail businesses that would otherwise have purchased Hood products from Lago. In other words, Hood's "conduct was deemed an antitrust violation because of the threat to the customer, not the supplier." [Id.](#)

[HN28](#)¹⁰ Even though Lago was not the direct victim of Hood's antitrust violation, under a broad interpretation of the antitrust caselaw, Lago may still "establish antitrust injury by proof . . . 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.'"'" [Sullivan, supra, 25 F.3d at 49](#) (quoting [Providence v. Cleveland Press Pub. Co., 787 F.2d 1047, 1052 \(6th Cir. 1986\)](#) (quoting [Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1086 \(6th Cir. 1983\)](#))). See also [Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 745-46 \(9th Cir. 1984\)](#); [Ashmore v. Northeast Petroleum Division, 843 F. Supp. 759, 769-70 \(D. Me. 1994\)](#); [Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423, 1435-39 \(S.D.N.Y. 1986\)](#).¹⁰

[**48] In order to effectuate a price discrimination scheme which favored Hood's direct-buy retailers over retailers that purchased Hood products through Lago, Hood necessarily had to use Lago as a conduit through which to pass its discriminatory pricing onto Lago's smaller retailers. However, even under such circumstances, Lago does not suffer an "antitrust injury" unless its losses "stem[] from a competition-reducing aspect or effect of [Hood's] behavior." [Atlantic Richfield, supra, 495 U.S. at 344](#).

The profits Lago seeks to recover in this action were lost because Lago's retail store customers stopped purchasing Hood dairy products from Lago and began purchasing dairy products from other dairies such as Idlenot and Garellick Farms. See, e.g., Affidavit of Philip Smith P 7 (discussed [supra at 34](#)). Hood contends that Lago has not suffered an antitrust injury because Lago's losses are "likely to have resulted from its customers switching to one or more of Hood's competitors--i.e., as a result of competition, not the lack of it" Hood's Motion at 25. Hood's argument, although appealing, relies on an expanded definition of the market in which Lago alleges [*49] that competition has been injured.

Lago defines the market in which competition was injured due to Hood's antitrust violation as the retail market for Hood dairy products. Hood's argument that there has been no antitrust injury relies, at least in part, on an expansion of that market to encompass the retail sale of all brands of dairy products. If the market is so defined, then, as Hood contends, there is indeed no antitrust injury as the result of the decision of Lago customers to stop purchasing Hood dairy products in favor of other brands of dairy products. Instead, Lago's losses would clearly

¹⁰ The court notes that 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." [Sullivan, supra, 25 F.3d at 49](#) (citing cases). Although the First Circuit has not yet decided which of these interpretations apply in this circuit, this court finds the reasoning employed by the courts following the broader rule to be persuasive and applies that rule herein. Those 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."

[Sullivan, supra, 25 F.3d at 49 n.11](#) (quoting [Ashmore, supra, 843 F. Supp. at 770](#) (quoting [McCready, supra, 457 U.S. at 472](#)); see also [Ostrofe, supra, 740 F.2d at 746-47](#).

stem from competition between various [*344] suppliers of dairy products and therefore would not constitute an "antitrust injury."

However, Lago's narrow definition of the affected market appears to the court to be proper under cases such as *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822 (1948), where the market allegedly affected by price discrimination was the sale of Morton's "Blue Label" table salt at the retail level. See *Morton, supra*, 334 U.S. at 49 ("Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a [**50] grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."). Accepting Lago's narrow definition of the affected market, which the court does at this time, the court finds that the effect of Hood's purported price discrimination was to reduce competition for the sale of Hood dairy products at the retail level between large direct-buy retailers and smaller independent retailers purchasing through Lago. This is precisely the type of problem that the Robinson-Patman Act was designed to address. Further, Lago's injuries stem from the "competition-reducing aspect or effect of [Hood's] behavior." *Atlantic-Richfield, supra*, 495 U.S. at 344. In other words, even though Lago was not a consumer or competitor in the relevant market, the injury Lago suffered was "inextricably intertwined" with the injury to competition caused by Hood's alleged price discrimination. *Sullivan, supra*, 25 F.3d at 49. Under these circumstances, the court finds that Lago has suffered an "antitrust injury."

The "existence of antitrust injury is a central factor in the standing calculus." *Sullivan, supra*, 25 F.3d at 47. Accordingly, [**51] the presence of antitrust injury here weighs heavily in favor of conferring antitrust standing on Lago.

e. Damages

The fifth and sixth *Sullivan* factors require the court to consider the speculative nature of Lago's damages and the risk of duplicative recovery or complex apportionment of damages.

HN29 [+] "Damages may be considered speculative where the plaintiff's injury was indirect and possibly the result of intervening factors unrelated to the defendant's conduct." *Donovan, supra*, 883 F. Supp. 775 at ___, 1994 WL 790887, at * 5 (citing *Associated Gen. Contractors, supra*, 459 U.S. at 540-42). That being said, the court notes that damage issues in antitrust cases "are rarely ""susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *J. Truett Payne, supra*, 451 U.S. at 565 (quoting *Zenith, supra* note 9, 395 U.S. at 123-24 (quoting *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946))). Acknowledging this problem, the Supreme Court

"has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' [**52] wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits, and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.'"

Id. (quoting *Zenith, supra* note 9, 395 U.S. at 123-24) (quoting *Bigelow, supra*, 327 U.S. at 264)).

The damages Lago claims to have suffered are the lost profits from "customers lost by Lago because of competition due to price during the four year period at issue in the price discrimination claims, April 1988 through March 1992." Affidavit of Paul R. Gallant P 6 (Lago Exhibit F). In other words, Lago does not seek lost profits from the inability of its retailers to compete with Hood's direct-buy retailers for the sale of Hood products during the time when Lago was selling Hood products to such retailers. Instead, Lago seeks lost profits from the sales it lost after certain retail customers stopped purchasing Hood dairy products from Lago and began purchasing dairy products from other

dairies because Lago's prices [*345] on Hood products were too high.¹¹ Lago's calculation of these lost profits is detailed in Paul [**53] Gallant's affidavit as follows:

6. I analyzed the lost income and profits in the following manner.

a. I consulted the customer list produced by Lago and identified as Robert Lago Deposition, Plaintiff's Exhibit No. 8 (hereinafter "customer list"). The customer list provides a list of all customers lost by Lago because of competition due to price during the four year period at issue in the price discrimination claims, April 1988 through March 1992.

b. I then added the total actual sales for all customers that Lago lost during April 1988 through March 1992 as a result of competition with the favored large retail chains.

c. I then multiplied the Actual Account sales Lost by the number of years that Lago lost that business during April 1988 through March 1992.

d. I then determined the total lost sales for each year which was \$ 394,584.00, \$ 212,669.00, \$ 613,587.00, and \$ 37,929.00 respectively. [**54] I then added all four years together for a total actual lost sales of \$ 3,481,446.00.

e. I then multiplied the total actual lost sales for all four years (\$ 3,481,446.00) by the average gross profit that the Lago's realized on their retail business to their customers, namely 24%.

f. I then arrived at the total gross profit lost due to price competition or \$ 835,547.00.

g. The \$ 835,547.00 does not include any trebling of damages or attorneys fees which the Lago's may be entitled to under the price discrimination statute.

Gallant Affidavit P 6.

Hood's initial challenge to Lago's damage claim is that said claim is in fact much broader than it has been characterized by Lago here. Hood points out that the lost customer list attached to Paul Gallant's affidavit includes schools and restaurants and argues that Lago cannot recover lost profits from the sales lost from such customers because they were not in competition with Hood's direct-buy retailers. Hood also points out that Lago's lost customer list includes Lago customers that went out of business. Hood argues that Lago cannot recover the profits it lost after said customers stopped purchasing Hood products from Lago because [**55] there is no evidence that the closure of those businesses was caused by Hood's alleged price discrimination.

The court agrees with Hood on these two points and holds that Lago cannot recover under Counts IX and X profits lost from schools and restaurants or from retail store customers that went out of business. However, the court finds that Lago, in its lost profits analysis for Counts IX and X, has correctly narrowed its damages claim to include only the retail store customers it lost to competitors because of price. It is this measure of damages that the court will consider in evaluating whether Lago has the requisite antitrust standing to pursue Counts IX and X.

As set forth supra at 31-38, Lago's damages are only indirectly related to the impact Hood's alleged price discrimination had on competition between Hood's direct-buy retailers and Lago's retail store customers. Further, as Hood argues, there are several possible "intervening factors unrelated to defendant's conduct," Donovan, supra, 883 F. Supp. 775 at ___, 1994 WL 790887, at * 5, that may have caused Lago's losses. Such factors include Lago's own markups on the Hood products it resold to retailers.

Moreover, [**56] Lago's lost profits analysis assumes that Lago would have continued to sell Hood products to the customers it lost between 1988 and 1992 but for Hood's price discrimination. As Lago's lost customer list reveals, Lago lost a large number of customers during the relevant time period because those customers went out of business.

¹¹ Lago's damages are, however, limited to the time period during which Lago was a distributor of Hood dairy products.

The court finds Lago's lost profits analysis to be somewhat speculative in [*346] light of the fact that Lago's "injury was indirect and possibly the result of intervening factors unrelated to defendant's conduct." *Donovan, supra, 883 F. Supp. 775* at ___, 1994 WL 790887, at * 5. This factor weighs against conferring antitrust standing on Lago.¹²

Finally, because Lago has limited its [**57] damages to lost profits, the court finds the risk of duplicative recovery to be negligible. See, e.g., Morris Elecs., Inc. v. Mattel, Inc., 595 F. Supp. 56, 60-61 (N.D.N.Y. 1984) (duplicative recovery is minimal when plaintiff's injuries are limited to its lost profits). Furthermore, "in the absence of an action by a party claiming a more direct antitrust injury . . . there is little risk of duplicative recovery." *Donovan, supra, 883 F. Supp. 775* at ___, 1994 WL 790887, at * 7. There has been no antitrust action filed by the direct victims of Hood's alleged antitrust violation--Lago's retail store customers. Consequently, there is also no complex apportionment of damages required in this action. These factors favor conferring antitrust standing on Lago.

f. Improper Motive

To the extent that the improper motive factor listed in Sullivan applies to the instant action, the court finds that the evidence showing that Hood was charging Lago higher prices for certain Hood products than it was charging to its direct-buy retailers is sufficient to support an inference of an improper motive. Accordingly, this factor weighs, if at all, in favor of conferring standing [**58] on Lago.

g. Balancing the Factors

Although Lago's damages appear at this stage to be rather speculative, the remaining factors, including the existence of an "antitrust injury," weigh in favor of conferring standing on Lago to pursue its § 4 claims. Hood's motion for summary judgment as to Counts IX and X, which was limited to the standing issue, is accordingly denied.¹³

5. Hood's Motion for Reconsideration of Award of Interest

In its order of September 6, 1994, the court granted Hood's [**59] motion for partial summary judgment on Hood's counterclaim for breach of contract as to the \$ 214,248.45 due from Lago to Hood for the time period from December 1991 to March 1992. However, the court denied Hood's motion insofar as it sought interest on the amount due because the court found that a genuine issue of material fact remained as to the date from which the interest should begin to accrue. See Order of Sept. 6, 1994, at 32-33.

Hood now moves for reconsideration of the court's determination on the matter of interest, arguing that the issue is one of law, not of fact. Lago objects to Hood's motion, arguing that the question of when interest should begin to accrue is one of fact.

Hood is entitled to interest at a rate of 10 percent on the \$ 214,248.45 due from Lago as a matter of law. See RSA 335.1 (1984) ("The annual rate of interest on judgments and in all business transactions in which interest is paid or secured, unless otherwise agreed upon in writing, shall equal 10 percent."). The question of when that interest begins to accrue is governed by RSA 524:1-a, which provides in pertinent part,

¹² The court further notes that Lago's lost profits analysis results in a lost gross profits figure. The correct measure of damages, which is the measure Lago must prove at trial, is lost net profits. See, e.g., Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379, 71 L. Ed. 684, 47 S. Ct. 400 (1927).

¹³ The court notes that the antitrust standing hurdle is only the first of several hurdles Lago must clear to recover treble damages under § 4 of the Clayton Act. At trial, Lago will be required to prove that Hood violated the Robinson-Patman Act in the manner alleged and that Lago suffered an actual injury attributable to said violation. J. Truett Payne, supra, 451 U.S. at 562. Lago must also submit sufficient evidence "to support a 'just and reasonable inference' of damage." Id. at 566.

HN30 [+] **Interest to be Added.** In the absence of a demand prior [**60] to the institution of suit, in any action on a debt or account stated or where liquidated damages are sought, interest shall commence to run from the time of the institution of suit.

RSA 524:1-a (1974).

It is undisputed that under RSA 524:1-a, interest shall accrue from the earlier of either [*347] the demand for payment or the institution of suit. However, the court finds, as it did in its order of September 6, 1994, that there is a genuine dispute in this case as to the date when Hood made its demand(s) for payment. This dispute is a factual one and precludes the court from determining as a matter of law the date from which interest shall accrue in this action. Defendant's motion for reconsideration is accordingly denied.

Conclusion

For the reasons set forth herein, Hood's Renewed Motion for Summary Judgment on Count V and Part of Count VIII (document 100) is denied; Hood's Motion for Partial Summary Judgment on Counts I and II of its Counterclaims (document 82) is denied; Hood's Motion for Summary Judgment on Counts IX and X (document 101) is denied; and Hood's Motion for Reconsideration of Award of Interest (document 80) is denied.

In light of these rulings, discovery [**61] in this action is herewith extended for a six-month period and shall close on December 22, 1995.

SO ORDERED.

Shane Devine, Senior Judge

United States District Court

June 20, 1995

End of Document



SBC Communs. v. FCC

United States Court of Appeals for the District of Columbia Circuit

May 16, 1995, Argued ; June 23, 1995, Decided

No. 94-1637 Consolidated with 94-1639

Reporter

56 F.3d 1484 *; 1995 U.S. App. LEXIS 15533 **; 312 U.S. App. D.C. 414; 1995-1 Trade Cas. (CCH) P71,047; 78 Rad. Reg. 2d (P & F) 733

SBC COMMUNICATIONS INC., ET AL., APPELLANTS v. FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE AT&T CORPORATION, ET AL., INTERVENORS Consolidated with 94-1639

Prior History: [\[**1\]](#) Appeals of an Order of the Federal Communications Commission.

Core Terms

cellular, customers, merger, carrier, public interest, documents, license, network, argues, cellular service, anti-competitive, conditions, bottleneck, contends, effects, service directly, interexchange, restrictions, facilities, consumers, marketing, telephone, protective order, relevant market, confidential, competitors, evidentiary hearing, pro-competitive, integrated, bundling

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Communications Law > ... > Orders & Hearings > Judicial Review > Standards of Review

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

[HN1](#) [down arrow] Standards of Review, Abuse of Discretion

The court reviews the Federal Communications Commission's decision only to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, [5 U.S.C.S. § 706\(2\)\(A\)](#).

Administrative Law > Judicial Review > Standards of Review > General Overview

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

Communications Law > ... > Orders & Hearings > Judicial Review > Standards of Review

[**HN2**](#) [down] **Judicial Review, Standards of Review**

The Federal Communications Commission's (FCC) decision that a license transfer is in the public interest is entitled to substantial judicial deference. So long as the FCC's action resulted from consideration of the relevant factors and the agency has not succumbed to a clear error of judgment, its decision must be upheld.

[Antitrust & Trade Law > Regulated Industries > Communications > General Overview](#)

[Antitrust & Trade Law > Regulated Industries > Communications](#)

[**HN3**](#) [down] **Regulated Industries, Communications**

The Federal Communications Commission (FCC) is not at liberty to subordinate the public interest to the interest of equalizing competition among competitors. Equalization of competition is not itself a sufficient basis for FCC action.

[Antitrust & Trade Law > Regulated Industries > Communications](#)

[Mergers & Acquisitions Law > Antitrust > General Overview](#)

[Mergers & Acquisitions Law > Merger Guidelines](#)

[**HN4**](#) [down] **Regulated Industries, Communications**

Relative competitive positions of telephone carriers are of little relevance in determining whether the public interest test is satisfied in a merger.

[Antitrust & Trade Law > Regulated Industries > Communications](#)

[Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services](#)

[Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview](#)

[**HN5**](#) [down] **Regulated Industries, Communications**

A consumer market need not be defined solely by reference to consumer demand. The substitutability of supply is also relevant.

[Antitrust & Trade Law > Regulated Industries > Communications](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[**HN6**](#) [down] **Regulated Industries, Communications**

Although not close substitutes for each other on the demand side, two products produced interchangeably from the same production facilities are in the same market.

Antitrust & Trade Law > Regulated Industries > Communications

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

HN7 **Regulated Industries, Communications**

Cross-elasticity of production facilities may be an important factor in defining a product market. The capability of other production facilities to be converted to produce a substitute product is referred to as cross-elasticity of supply. The higher this cross-elasticity, the more likely it is that similar products are to be counted in the relevant market.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN8 **Formal Adjudicatory Procedure, Hearings**

The Federal Communications Commission (FCC) is fully capable of determining which documents are relevant to its decision-making; for the court to hold that the FCC is bound to review every document deemed relevant by the parties would be an unwarranted intrusion into the agency's ability to conduct its own business and would arm interested parties with a potent instrument for delay.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN9 **Formal Adjudicatory Procedure, Hearings**

The decision of whether or not hearings are necessary or desirable is a matter in which the Federal Communications Commission's discretion is paramount.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Communications Law > Public Enforcement > Licensing > Qualifications

HN10 **Formal Adjudicatory Procedure, Hearings**

A party seeking to compel the Federal Communications Commission (FCC) to hold an evidentiary hearing must (1) file a petition to deny containing specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest; and (2) present to the FCC a substantial and material question of fact.

Counsel: Michael K. Kellogg argued the cause for appellant SBC Communications Inc. With him on the briefs were James D. Ellis, Liam S. Coonan and Martin E. Grambow.

L. Andrew Tollin argued the cause for appellants BellSouth Corporation, et al. With him on the briefs were Michael D. Sullivan, Robert G. Kirk, Craig E. Gilmore, Georgina M. Lopez-Ona, Walter H. Alford, John F. Beasley, William B. Barfield and Jim O. Llewellyn.

John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission, argued the cause for appellee. With him on the brief were William E. Kennard, General Counsel, Christopher J. Wright, Deputy General Counsel, Daniel M. Armstrong, Associate General Counsel, and Laurence N. Bourne, Counsel. John W. Berresford, Counsel, Federal Communications Commission, entered an appearance.

David W. Carpenter argued the cause for intervenor AT&T Corporation. With him on the brief were Peter D. Keisler and Mark C. Rosenblum.

Charles H. Helein and Julia A. Waysdorff were on the brief for intervenor Ad Hoc IXCs.

Michael [**2] E. Glover, John Thorne, James R. Young and Stephen M. Tuller entered appearances for intervenor Bell Atlantic Telephone Companies.

Judges: Before: GINSBURG, SENTELLE and RANDOLPH, Circuit Judges.

Opinion by: GINSBURG

Opinion

[*1488] GINSBURG, Circuit Judge: SBC Communications Inc. and BellSouth Corporation appeal an order of the Federal Communications Commission approving the transfer of radio licenses and other authorizations from McCaw Cellular Communications, Inc. to AT&T Corporation in connection with the merger of those two companies. See [Craig O. McCaw and American Telephone and Telegraph Co., Memorandum Opinion and Order, 9 F.C.C.R. 5836 \(1994\)](#) (Order), errata, slip op. (Enf. Div. Sept. 27, 1994). The appellants make three types of claims: first, that the Commission approved the merger only because it underestimated the anti-competitive impact of the merger; second, that in order to mitigate the anti-competitive impact of the merger it should have imposed certain conditions upon the transfer of licenses; and third, that its procedures were both arbitrary and inadequate. Finding no merit in any of those claims, we affirm the order in its entirety.

I. BACKGROUND

AT&T is the [**3] leading provider of interexchange (IX) service in the United States and one of the largest manufacturers in the U.S. [*1489] market for cellular telephone network equipment, i.e., cellular switches, radio transceivers, and the related network equipment and software necessary to operate a cellular carrier. In 1993 it announced a plan to merge with McCaw, the leading provider of cellular telephone service in the country; McCaw would become a subsidiary of AT&T and would transfer to AT&T control of its more than 400 radio licenses.

AT&T and McCaw applied to the Commission for approval of the license transfer under [47 U.S.C. § 310\(d\)](#) ("No ... station license ... shall be transferred ... to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby"). The Commission published notice of the application and solicited comments, see [Public Notice, 8 F.C.C.R. 7110 \(1993\)](#). A number of parties including BellSouth and SBC, both of which own Bell Operating Companies that provide cellular service in competition with McCaw, filed petitions to deny the application or to impose conditions upon [**4] the grant of the application. See *Order*, P 5.

Meanwhile, AT&T and McCaw had submitted to the Department of Justice extensive materials relating to the merger as required by the Hart-Scott-Rodino amendment to the Clayton Act (HSR), [15 U.S.C. § 18a](#). In May 1994, after the period for commenting upon the pending license transfer application had closed, the Commission staff asked AT&T and McCaw to submit the HSR materials to the FCC and to allow counsel for any party of record to review all the HSR materials pursuant to an order prohibiting the unauthorized release of confidential information. See [Protective Order, 9 F.C.C.R. 2613](#) (C.C.Bur. 1994). After reviewing indices identifying all HSR materials

relating to certain specified subjects, however, the staff narrowed its request for HSR materials and stated that it would not expand the scope of its examination "in the absence of extraordinary circumstances and a specific factual showing that good cause exists for delaying the Commission's decision." After reviewing the HSR indices themselves, however, BellSouth and SBC filed further comments suggesting, *inter alia*, that the Commission review certain additional HSR documents.

[**5] In July 1994 the DOJ simultaneously filed in the U.S. District Court for the District of Columbia a complaint charging that the merger would violate Section 7 of the Clayton Act, [15 U.S.C. § 18](#), see *United States v. AT&T Corp. and McCaw Cellular Communications, Inc.*, No. 94-CV01555 (D.D.C.) and a proposed consent decree to which AT&T and McCaw had already agreed, *Proposed Final Judgment* (PFJ), 59 Fed. Reg. 44,159, 44,159-66 (1994). The district court has not yet passed upon the PFJ.

For its part, the Commission approved the license transfers in September 1994. The portion of its public interest inquiry most central to this appeal is its "consideration of the effect of the transfer on competition," *Order*, P 9. The Commission analyzed the competitive impact of the merger in three markets: (1) the national market for IX services, see *id.* at WW 12-15, 21-34; (2) the local market for cellular service, see *id.* at WW 16-17, 36-41; and (3) the national market for cellular network equipment, see *id.* at WW 18-19, 42-56. It found that the merger would have significantly greater pro-competitive than anti-competitive effects, *id.* at P 62, and rejected most of the [**6] many conditions that the parties challenging the merger had urged it to impose upon the transfer, see *id.* at P 20. The Commission also rejected various objections to the procedures it had followed, see *id.* at WW 155-173.

BellSouth and SBC now appeal the Order, pursuant to [47 U.S.C. § 402\(b\)\(6\)](#). AT&T intervenes in support of the Commission, and the Ad Hoc IX Carriers (Ad Hoc IXC's), a "coalition of resellers of [IX] service," see *Order*, P 152, intervene in support of the appellants. In addition to supporting the appellants' arguments, however, the Ad Hoc IXC's challenge the Commission's refusal to consider their allegations that the merger would facilitate AT&T's continuation of certain allegedly anti-competitive practices, see *Order* at WW 152-154. Because "an intervening party may join issue only on a matter that has been brought before the court by another party," *Illinois Bell Telephone* [*1490] [Co. v. FCC, 286 U.S. App. D.C. 34, 911 F.2d 776, 786 \(D.C. Cir. 1990\)](#), we do not address the merits of that argument.

II. ANALYSIS

HN1 We review the Commission's decision only to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," [5 U.S.C. § 706\(2\)\(A\)](#). **HN2** The Commission's decision that a license transfer is "in the public interest" is entitled to "substantial judicial deference." [FCC v. WNCN Listeners Guild, 450 U.S. 582, 596, 67 L. Ed. 2d 521, 101 S. Ct. 1266 \(1981\)](#). So long as "the FCC's action resulted from consideration of the relevant factors" and the agency has not "succumbed to a clear error of judgment," its decision must be upheld. [GTE Service Corp. v. FCC, 251 U.S. App. D.C. 181, 782 F.2d 263, 268 \(D.C. Cir. 1986\)](#).

A. The Commission's Public Interest Analysis

BellSouth and SBC challenge different aspects of the Commission's public interest analysis, see *Order*, WW 1-61. BellSouth, supported by the Ad Hoc IXC's, contends generally that the Commission applied the wrong standard and that its public interest analysis was riddled with errors and inconsistencies. More particularly, SBC argues that the Commission should have analyzed the impact of the merger in the market for IX service available to cellular customers.

1. BellSouth's Appeal

BellSouth launches a diffuse attack, supported by a collection of loosely intertwined arguments, upon the Commission's public interest analysis. Here, we summarize and address first its broad claim and then [**8] each of its individual arguments.

First, BellSouth contends broadly that the Commission "manipulated the legal standards for analyzing competitive effects" by relying solely upon the antitrust laws in order to analyze the anti-competitive effects of the merger while

looking beyond antitrust considerations to gauge the pro-competitive benefits. Second, and more specifically, BellSouth argues that the Commission failed to consider "special circumstances affecting competition," particularly the fact that the Modified Final Judgment (MFJ)--the consent decree setting forth the terms by which AT&T divested the BOCs--prohibits a BOC (and consequently a BOC-owned cellular carrier) from selling IX service directly to its customers, see [United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 227 \(D.D.C. 1982\)](#). Third, BellSouth contends that the Commission's decision allows AT&T to be "the only facilities based national and local end-to-end service in the country since divestiture," which it would not have done had it properly focused its competitive analysis upon the market for the "integrated provision of nationwide and end-to-end cellular and interexchange service." Fourth, [\[**9\]](#) and relatedly, BellSouth challenges the Commission's determination that the market for cellular service is local. Fifth, BellSouth claims that the Commission ignored the HSR documents that were submitted to it. Finally, BellSouth argues, in the alternative, that the Commission should have imposed certain conditions upon its approval of the license transfers: (1) that AT&T not oppose modifications to the MFJ that would permit the BOCs to offer IX service directly to cellular customers; (2) that McCaw be made subject to the same equal access restrictions as the MFJ imposes upon the BOCs; and (3) that McCaw be prohibited from selling IX and cellular services as a single package ("bundling").

First. BellSouth's broad claim is wrong as a matter of fact. The Commission considered the competitive impact of the merger based upon antitrust principles and found the pro-competitive effects vastly to outweigh the few anti-competitive effects. When the Commission looked beyond the scope of [antitrust law](#) and considered the implications of the merger for the development of the telecommunications industry, technical innovation, international competitiveness, investment in infrastructure, and [\[**10\]](#) customer privacy, it found nothing but pro-competitive and otherwise beneficial effects. See, e.g., *Order*, P 57 (merger will lead to "broadened range of [\[*1491\]](#) consumer choices" because McCaw has pledged to give its customers equal access to all IX carriers); *id. at P 59* (merger will increase U.S. competitiveness in international market for telecommunications services). Nothing in the Commission's consideration of the pro-competitive and anti-competitive effects of the merger suggests that it "manipulated legal standards" and, notably, BellSouth contests none of the Commission's findings in this area. Insofar as there are any specific anti-competitive effects that BellSouth claims the Commission slighted, we address them below in the context of BellSouth's more specific arguments.

Second. BellSouth's specific argument that the Commission failed to consider the MFJ as a "special circumstance affecting competition" is also wrong as a matter of fact. The Commission considered the restrictions that the MFJ imposes upon the cellular affiliates of the BOCs and rejected BellSouth's notion that it should impose similar restrictions upon McCaw; that would serve the interests only of the [\[**11\]](#) BOCs rather than those of the public. In the Commission's own words, "assuming [with BellSouth] ... that the MFJ restricts competition in undesirable ways, expanding its application to the BOCs' competitors would only compound the harm". *Id.* at WW 32-35.

BellSouth gives us no reason to doubt the Commission's conclusion; it argues in effect that the BOCs' welfare should have been paramount in the Commission's analysis. [HN3](#) The Commission is not at liberty, however, to subordinate the public interest to the interest of "equalizing competition among competitors." [Hawaiian Telephone Co. v. FCC, 162 U.S. App. D.C. 229, 498 F.2d 771, 776 \(D.C. Cir. 1974\)](#); see also [W.U. Telephone Co. v. FCC, 214 U.S. App. D.C. 294, 665 F.2d 1112, 1122 \(D.C. Cir. 1981\)](#) ("equalization of competition is not itself a sufficient basis for Commission action"). Moreover, the Commission is currently addressing in a separate rulemaking the question whether it should require all cellular carriers to provide equal access to all IX carriers. *Order*, WW 68-70; see [Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking, 9 F.C.C.R. 5408 \(1994\)](#).

In addition, rather than launch a collateral [\[**12\]](#) attack upon the MFJ by requiring AT&T not to oppose its further modification, the Commission decided to consider in a separate proceeding the impact of the MFJ upon the ability of the BOCs to compete. See *id.* at WW 32, 35. That manner of proceeding is entirely reasonable: in the matter under review, the Commission was required to determine whether the merger of AT&T and McCaw would be in the public interest, not to review the overall level of competition in the cellular industry or the impact of the MFJ upon that competition. Finally, we note that the court administering the MFJ has since reviewed the impact of the restriction of which BellSouth complains, and has determined that the BOCs may offer IX service directly to their

cellular customers in some areas. See [United States v. Western Electric Co., Inc., 1995 U.S. Dist. LEXIS 5563](#), No. 82-CV0192 (D.D.C. Apr. 28, 1995).

Third. We find no merit to BellSouth's claim that, contrary to the Commission's conclusion, the merged company will have the power to restrain competition in the same way that the Bell System had prior to divestiture. The Commission specifically rejected BellSouth's analogy between AT&T/McCaw and the predivestiture Bell System, [**13](#) both because there is no "bottleneck" for wireless service comparable to the local "bottleneck" for wireline service, and because the cellular industry enjoys "a degree of rivalry not present in 'wireline' exchange services." [Id. at P 39](#). Those conclusions are well founded.

In the wireline market there is a bottleneck because virtually every call must go through the local BOC. Prior to divestiture, the BOC's control over this bottleneck allowed it to favor one IX carrier (AT&T) over others; the integrated Bell System had the power to constrict competition in the IX market. In the cellular market, however, there are two competing providers in every area of the country. Because no cellular carrier has control over all of the calls originated in its area, there is no "mobile bottleneck" parallel to the "landline bottleneck." Although nearly every cellular long distance call must travel across a BOC's landlines in [*1492](#) order to reach an IX carrier's network, see [United States v. Western Electric Co., Opinion, 1995 U.S. Dist. LEXIS 5563](#), No. 82-CV0192, op. at 6-8 (D.D.C. Apr. 28, 1995), this "mobile bottleneck" would raise concerns about competition only if a BOC cellular carrier were integrated with an IX carrier, [**14](#) which the BOC might then favor. Because a non-BOC cellular carrier, such as McCaw, has no "bottleneck" control over calls, its vertical integration with an IX carrier does not present the same problem.

Moreover, the merger is not as unusual as BellSouth suggests; non-BOC cellular carriers have always resold IX service directly to their customers. Indeed, prior to the merger, McCaw itself resold IX service (purchased from AT&T) directly to its customers. The merged company will merely internalize what had been a contractual relationship, and thereby (the parties to the merger believe) make them more efficient.

Finally, we note that the Commission found that the vertical integration of McCaw's cellular service with AT&T's IX service and manufacturing would not "preclude the entry or success of competitive firms," [id. at P 38](#). The Commission also noted that the imminent entry of so-called personal communications services, and the further expansion of existing wireless systems such as specialized mobile radio, mean that cellular carriers will be facing greater competition in the near future. *Id.* at WW 39-41. These findings, neither of which is challenged by BellSouth, further [**15](#) support the Commission's conclusion that the merger will not have an anti-competitive impact.

Fourth. We reject BellSouth's challenge to the Commission's determination that the relevant market for competitive analysis is the local market for cellular service. See *Order*, WW 16-17. The Commission reasoned that because it had licensed each cellular carrier to serve a Local Service Area and awarded two licenses within each LSA, the geographic market within which cellular carriers compete is the LSA. BellSouth notes that as a result of agreements among cellular carriers in different LSAs, a cellular customer now enjoys uninterrupted service when he travels outside of his "home" LSA. That is beside the point, however. Regardless whether a cellular customer can have uninterrupted service when traveling beyond his home LSA, the market is local because "the purchasers cannot, as a practical matter, turn to suppliers outside their own areas." [Standard Oil v. United States, 337 U.S. 293, 299 n.5, 93 L. Ed. 1371, 69 S. Ct. 1051 \(1949\)](#).

Fifth. BellSouth's argument that the Commission ignored the HSR documents that AT&T and McCaw submitted to it is completely without merit. The Commission stated that it reviewed [**16](#) the documents. *Order*, P 6. The agency is not obliged to summarize in its decision the contents of all of the documents in the record before it. The Commission's failure to refer specifically to those documents or to their contents in the text of the Order is hardly surprising inasmuch as they are under seal. See *Order*, P 155 n.343 (because of *Protective Order*, arguments based upon HSR materials "summarized generally"). While the Commission may have had the option of publishing portions of the *Order* under seal in order to address the HSR materials expressly, as BellSouth suggested at oral argument of this appeal and upon which we express no opinion, there is apparently no precedent for such a practice and the Commission certainly was not required to do that.

Sixth. Finally, the Commission's decision not to condition the merger as urged by BellSouth is reasonable. The conditions proposed by BellSouth, like BellSouth's arguments generally, seem to be rooted in the mistaken belief that the Commission should protect competitors at the expense of consumers. See *Hawaiian Telephone*, 498 F.2d at 776 ([HN4](#)) "relative competitive positions of ... carriers ... is of little relevance [**17] in determining whether the public interest test is satisfied"). We have already explained why we find no error in the Commission's refusal to impose upon McCaw the restrictions that the MFJ places upon the BOCs, and why it was reasonable for the Commission to decline to launch a collateral attack upon the MFJ.

We also find reasonable the Commission's decision that McCaw's ability to bundle IX and cellular services is in the public interest. [*1493] BellSouth's only argument against the practice is that because the MFJ prohibits it from bundling IX and cellular service, McCaw should also be so limited. Again, BellSouth would have the Commission serve that company's own narrow interest rather than the broader public interest. Moreover, as a reseller of AT&T's IX service, McCaw has always "bundled" IX and cellular service--a McCaw cellular customer automatically gets AT&T as his long distance company. Finally, we have no reason to doubt the Commission's conclusion that bundling will lead to innovative rate structures and lower prices, both of which will benefit consumers. *Order*, WW 73-78.

2. SBC's Appeal

SBC disputes the Commission's decision that the national market for [**18] IX service is the relevant market in which to measure the horizontal impact of the merger. SBC contends that the relevant market is instead that for IX service provided to cellular customers in "cellular service areas in which McCaw offers [IX] services." SBC argues that the Commission would have recognized the anti-competitive effect of the merger if only it had focused upon "the characteristics of consumer demand for cellular long distance"--as did the DOJ in its suit to block the merger, see *United States v. AT&T Corp., and McCaw Cellular Com. Inc., Competitive Impact Statement*, 59 Fed. Reg. 44166, 44168-169 (Aug. 26, 1994)--rather than upon the market as defined by "the characteristics of retail supply." SBC points out that as it defines the market, McCaw, in its capacity as a reseller to cellular customers of IX service purchased from AT&T, has the second largest market share after its merger partner, AT&T.

The Commission's focus upon the market for all IX service rather than the market for IX service provided to cellular customers is perfectly reasonable. We accept as true, for the sake of the argument, SBC's contention that a "small but significant and nontransitory price [**19] increase in the cost of cellular originated interexchange service ... would not cause [a] wireless customer ... to switch to a landline phone," and that "cellular long distance callers generally do not view wired telephones as a viable substitute." [HN5](#) A market need not be defined solely by reference to consumer demand, however. The substitutability of supply is also relevant, as the Commission noted: "there is no significant difference between the interexchange facilities made available to a customer making an interexchange call from a 'wireline' telephone and the facilities made available to a customer making an interexchange call from a cellular phone." *Order*, P 14.

Supply substitutability is a well-accepted consideration in market definition. See Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, IIA *Antitrust Law* 252 (1995) ([HN6](#)) "Although not close substitutes for each other on the demand side, two products produced interchangeably from the same production facilities are in the same market"); *id. at 255* ("It is of little consequence that consumers have no good substitutes if *producers* can immediately respond to a firm's price increase by switching production [**20] to that firm's products") (emphasis in original); *id. at 257* ("Of course, whatever market definition is employed, relative ease of entry by other firms should always be taken into account. The one course that would be clearly wrong would be to define the market as A alone while ignoring the ease of entry from B producers"); Richard A. Posner, *Antitrust Law: An Economic Perspective* 125-134 (1976). This principle has been endorsed by the Supreme Court, see, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 n.42, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) ([HN7](#)) "cross-elasticity of production facilities may ... be an important factor in defining a product market"); and applied by this court and others, see *Rothery Storage Van Co. v. Atlas Van Lines, Inc.*, 253 U.S. App. D.C. 142, 792 F.2d 210, 218 (D.C. Cir. 1986) ("... the capability of other production facilities to be converted to produce a substitute product is referred to as cross-elasticity of supply. The higher [this] cross-elasticity, the more likely it is that similar products ... are to be counted in the relevant market"); *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674, 691 (9th Cir. 1976) ("production

cross-elasticity must be considered" when defining product [**21] market); see also *Department of Justice/Federal [*1494] Trade Commission Horizontal Merger Guidelines*, 4Trade Reg. Rep. (CCH) P 13,104 at 20,573-4 n.14 ("if production substitution among a group of products is nearly universal among the firms selling one or more of those products ... the Agency may use an aggregate description of those markets as a matter of convenience").

In its reply brief, SBC contends that the Commission did not really rest upon supply substitution in defining the relevant market. That is clearly wrong. The Commission based its market definition upon both its own finding that an IX carrier can readily make available to cellular customers the facilities it uses to serve wireline customers, *Order*, P 14, and upon the related finding of the Attorney General of California that "arbitrage activities would defeat any attempt by AT&T/McCaw to raise cellular interexchange rates above existing levels," *Order*, P 13.

SBC also argues that the Commission failed adequately to consider the possibility that McCaw could develop a national wireless IX network to compete with AT&T, and therefore failed to recognize that the merger would diminish potential competition in the [**22] IX market. The Commission did, however, consider that possibility--and dismiss it as extremely speculative in view of the tremendous capital investment that would be required in order to build a national wireless IX network and of McCaw's fragile financial status. *Order*, P 30 n.73. The Commission's treatment of that subject was reasonable; the agency's responsibility is to deal with "probabilities" not "ephemeral possibilities." [United States v. FCC, 652 F.2d 72 at 99.](#)

B. Proposed Conditions

As the Commission reviewed the competitive impact of the merger, it considered whether there was any need to condition its approval of the license transfers in any way. SBC now argues that the Commission erred in refusing to adopt two of the conditions that SBC proposed in order to protect against specific anti-competitive practices by AT&T.

1. Use of Information Gained Through Provision of IX Service

AT&T provides IX service directly to any customer of a BOC-owned cellular carrier who selects AT&T as his IX carrier. As a result, AT&T has access to so-called customer proprietary network information (CPNI), i.e., each customer's name, address, cellular telephone [**23] number, and pattern of cellular telephone usage. Before the Commission, SBC noted that this information could be used by McCaw both to monitor its cellular competitors' activities and to market its cellular service directly to their customers. SBC argued that the Commission should prohibit AT&T from disclosing CPNI to McCaw.

The Commission refused to impose that limitation because it regards AT&T/McCaw's ability to offer one-stop shopping for all of a customer's telecommunications needs as one of the benefits to the public resulting from the merger. *Order*, P 83. Instead, the Commission imposed upon AT&T's use of CPNI the same restrictions that it had earlier imposed upon AT&T's use of CPNI for the marketing of enhanced services and customer premises equipment (CPE). See *id.*; see also [Rules Governing Telephone Companies' Use of CPNI, Public Notice, 9 F.C.C.R. 1685 \(1994\)](#). In short, unless a customer requests that AT&T not use his CPNI, the Commission left AT&T free to use that information in its marketing of McCaw's cellular service. See *Order*, P 83.

SBC contends that the Commission misstated the benefit to consumers of letting AT&T use their CPNI: The typical cellular [**24] customer solicited by McCaw, unlike a typical customer for enhanced services or CPE, will be unable to bargain for a lower price from his current provider. SBC argues also that the market for cellular service, unlike the market for enhanced services, will not be spurred to grow as a result of AT&T's using CPNI for direct marketing. Thus, according to SBC, "there can be no public interest justification for allowing use of ... CPNI to raid competitors' customers."

SBC's argument, like many of those reviewed above, seems to be not that the Commission's decision--here, its refusal to impose [*1495] the condition--will hurt competition or otherwise adversely affect the public interest, but instead that it will hurt SBC by increasing the sting of the competition it will face from the merged company. We

agree with the Commission (and so apparently does SBC) that AT&T/McCaw's ability to market its service directly to the customers of other cellular carriers should lead to lower prices and improved service offerings designed to lure those customers away. We part company with SBC only in that we do not see why that is contrary to the public interest. Even assuming that a targeted customer is unable [**25] individually to negotiate a lower price directly with his BOC-owned cellular carrier, there is no reason to think that the BOC-owned carrier will not respond to the competitive spur by providing price and service levels, if it can, comparable to those offered by McCaw. While the number of cellular customers may not be directly increased by McCaw's marketing to the BOCs' existing cellular customers, the intensified price and service competition that follows is likely to draw more customers into the cellular market--a clear public benefit. Therefore, nothing in SBC's argument gives us reason to doubt the Commission's conclusion that the proposed condition would be contrary to the public interest.

2. Transfer of Information from AT&T Network Equipment Personnel to AT&T IX Service Personnel

In its role as a manufacturer and supplier of cellular network equipment, AT&T provides repair service and equipment upgrades to cellular carriers that use AT&T equipment. As a result, AT&T may obtain sensitive information about cellular carriers that compete with McCaw. SBC argues that the Commission erred in refusing to prohibit AT&T from using such information for the benefit of McCaw. [**26] See *Order*, P 110.

First, the Commission noted that there had been no significant problem in the past with AT&T misusing information obtained by its network equipment personnel. *Id.*, P 112. Standing alone, that finding might be insufficient to support the Commission's decision; in the past, after all, AT&T had little incentive to use the information to the advantage of another cellular company, whereas its affiliation with McCaw will create such an incentive. The Commission also concluded, however, that existing market incentives and legal safeguards against the sharing of proprietary and confidential information appear to be sufficient to protect McCaw's cellular competitors from the type of conduct that SBC claims to fear. Thus, the Commission found both that AT&T's manufacturing business would not last long if potential customers are given reason to fear that AT&T will misuse their confidential information, and that the threat of legal proceedings would further deter the misuse of such information. *Id. at P 112*. These are reasonable observations and they support the conclusions drawn by the FCC. If AT&T is unable to persuade purchasers of its cellular network equipment [**27] that their sensitive business information will not be shared with McCaw, then AT&T's \$ 500 million-per-year network equipment business will not long endure. Moreover, AT&T's contracts with its network equipment customers already prohibit AT&T from using confidential information and those customers can, in the future, seek even greater restrictions upon AT&T's use of this information. See *id. at P 113*.

SBC points to the Commission's decision to impose conditions designed to limit AT&T's ability to discriminate against "locked-in" purchasers of network equipment, see *id. at P 99*, and suggests that it was arbitrary for the Commission not to impose similar conditions in this context. The Commission, however, reasonably found that cellular carriers generally had not contracted against the problem of discrimination, while they had contracted against the misuse of confidential business information.

Finally, we note that the Commission offered its complaint process to any cellular carrier that believes it is being victimized by any specific behavior on the part of AT&T. *Id. at P 83*. We are therefore confident that the Commission stands ready, in the event that its reliance upon [**28] market forces and existing legal norms proves inadequate, to revisit the claimed need for regulatory control [*1496] over AT&T's use of its equipment customers' confidential business information.

C. Procedural Challenges

Both BellSouth and SBC challenge the procedures that the Commission followed in this matter. SBC argues that the Commission should have granted its request that the HSR documents be released to the court that administers the MFJ. BellSouth argues both that the HSR document production process was irrational and that the Commission should have held an evidentiary hearing.

1. Waiver of the Protective Order

The four BOCs that commented jointly upon the HSR material also asked for the Commission's permission to submit those comments and 84 HSR documents, under seal, to the district court that administers the MFJ. The Commission refused to grant that limited waiver of the Protective Order, however, holding that the BOCs had failed to show "extraordinary circumstances" involving "a compelling public interest" in submitting the documents to the court. See *Order*, P 167.

SBC advances no compelling reason why the Commission should have waived the Protective Order. Although **[**29]** SBC points out that § 3 of the Protective Order allows the Commission to disclose the information to "any person ... in the interest of justice," and argues that in denying its request the Commission deviated from this standard, there is no reason to believe that the Commission's restatement of its standard is in any way material. The MFJ court can, either on its own motion or at the request of a BOC, itself order the production of the HSR documents. Moreover, the MFJ court has now passed upon the issue to which BellSouth contends the HSR materials are relevant, *viz.*, whether a BOC should be permitted to offer IX service directly to its cellular customers.

2. Review of the HSR Documents

BellSouth argues that the Commission erred by asking AT&T and McCaw to submit to it only a portion of their voluminous HSR submissions to the DOJ. In particular, BellSouth claims that the Commission acted arbitrarily in failing to review certain documents deemed relevant by both AT&T and BellSouth.

The Commission's manner of proceeding was well within its procedural discretion in implementing the Communications Act. The HSR documents contained millions of pages; for the Commission to have **[**30]** sorted through all of them would have delayed a decision on the transfer indefinitely. **HN8** [↑] The Commission is fully capable of determining which documents are relevant to its decision-making; for us to hold that the Commission is bound to review every document deemed relevant by the parties would be an unwarranted intrusion into the agency's ability to conduct its own business, see *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978) ("court should ... not stray beyond the judicial province ... to impose upon the agency its own notion of which procedures are "best" "), and would "arm interested parties with a potent instrument for delay." *U.S. v. FCC*, 652 F.2d at 91.

3. Need for an Evidentiary Hearing

BellSouth argues that the Commission erred in refusing to hold a full evidentiary hearing upon the license transfer. It contends that a hearing is necessary in order to resolve "disputed factual issues," including definition of the relevant market(s), the effect of the merger upon competition in those markets, and AT&T's purpose in pursuing the merger.

HN9 [↑] "The decision of whether or not hearings are necessary or desirable is a matter in which the Commission's discretion **[**31]** is paramount." *Gencom Inc. v. FCC*, 265 U.S. App. D.C. 403, 832 F.2d 171, 181 (D.C. Cir. 1987). **HN10** [↑] A party seeking to compel the Commission to hold an evidentiary hearing must: (1) file a petition to deny containing "specific allegations of fact sufficient to show that ... a grant of the application would be *prima facie* inconsistent with the public interest," *id. at 180*; and (2) present to the Commission "a substantial and material question of fact." *Id.* BellSouth has done neither. BellSouth's "disputed factual issues" are about just the sort of "legal **[*1497]** and economic conclusions concerning market structure, competitive effect, and the public interest" that "manifestly do not" require a live hearing. *U.S. v. FCC*, 652 F.2d at 89-90. The Commission here developed an extensive record; by its own later account, it held a "thorough hearing--the most extensive ever held ... about the transfer of mobile radio licenses." *FCC Response to Emergency Motion for Interim Relief*, No. 94-1639, at 10 (D.C. Cir. Oct. 6, 1994). Our reading of the record suggests that an "evidentiary hearing would less promote reasoned decisionmaking in this case than it would delay and impede" the Commission's decision. *U.S. **[**32]** v. FCC*, 652 F.2d at 96).

III. CONCLUSION

The appellants do little more than complain that the merger of AT&T and McCaw will lead to greater competition in both the market for IX service and the market for cellular service. They have failed to show in any way why the

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merger would not be in the public interest--indeed, they have more nearly shown the opposite--or why the Commission's conclusions are in error. Therefore, the order under review is

Affirmed.

End of Document

Anti-Monopoly, Inc. v. Hasbro, Inc.

United States District Court for the Southern District of New York

June 26, 1995, Decided ; June 27, 1995, FILED

94 Civ. 2120 (LMM)

Reporter

1995 U.S. Dist. LEXIS 8822 *; 1995-2 Trade Cas. (CCH) P71,095

ANTI-MONOPOLY, INC., Plaintiff, -against- HASBRO, INC., TOYS "R" US, INC. and K MART CORPORATION, Defendants.

Core Terms

Toys, board game, allegations, motion to dismiss, antitrust, competitor, conspiracy, commerce, retailer, Clayton Act, monopoly, relevant market, anti trust law, Sherman Act, monopolize, prices, cases, Defendants', unfair competition, discovery, business relationship, manufacturer, conspired, products, denies, amend, costs, market share, misappropriated, purchasers

LexisNexis® Headnotes

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

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

HN1[] Amendment of Pleadings, Leave of Court

Leave to amend a complaint shall be freely given when justice so requires. [Fed. R. Civ. P. 15\(a\)](#). The rule in the U.S. Court of Appeals for the Second Circuit is to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith. In determining what constitutes "prejudice," a court considers whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

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

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

HN2[] Relevant Market, Product Market Definition

Definition of the relevant market is the first step in a court's analysis of an alleged antitrust violation. A complaint must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed. The relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand.

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

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

HN3 [↓] **Market Definition, Relevant Market**

The definition of the relevant market lies initially with a plaintiff. Defendants have their opportunity to challenge the plaintiff's definition, but the court must accept a reasonable definition on the face of the complaint. Unless the proposed definition is patently over- or under- inclusive, the court must accept the plaintiff's proposed definition.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4 [↓] **Actual Monopolization, Anticompetitive & Predatory Practices**

See § 3 of the Clayton Act, [15 U.S.C.S. § 14](#).

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN5 [↓] **Regulated Practices, Market Definition**

A short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules. In considering the complaint on a motion under [Fed. R. Civ. P. 12\(b\)\(6\)](#), the Court must accept the pleader's allegations of facts as true together with such reasonable inferences as may be drawn in the pleader's favor. That does not mean that conclusory allegations which merely recite the litany of antitrust will suffice. An antitrust complaint must adequately define the relevant product market, allege antitrust injury, and allege conduct in violation of the antitrust laws.

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

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

HN6 [↓] **Monopolies & Monopolization, Conspiracy to Monopolize**

The conspiracy to monopolize offense consists of three elements: (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) a specific intent to monopolize.

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

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

[HN7](#)[] Regulated Practices, Monopolies & Monopolization

The essential facility doctrine is not a separate violation of antitrust law, but rather is a label that may aid in the analysis of a monopoly claim. In an early formulation, the essential facility doctrine, also called the bottleneck principle, states that where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility. The essential facility doctrine, however, is in tension with another doctrine: Antitrust law does not require one competitor to give another a break just because failing to do so offends notions of fair play. To prove monopolization of an essential facility, a party 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. The first and third elements go to defendant's degree of control while the second and fourth go to determining whether the facility is truly "essential".

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

[HN8](#)[] Regulated Practices, Monopolies & Monopolization

A plaintiff alleging monopolization of an "essential facility" must show more than inconvenience or even some economic loss; he must show that an alternative to the facility is not feasible. The essential facility doctrine cannot be read so broadly as to mean that a plaintiff is entitled to any facility it finds desirable or convenient, or that retailers must stock every product of a given type.

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

[HN9](#)[] Intentional Interference, Elements

Under New York law, to prevail on a claim of tortious interference with prospective business relations, a plaintiff must demonstrate that the defendant interfered with business relations existing between a plaintiff and a third party, either with the purpose of harming the plaintiff or by means that are dishonest, unfair, or improper. If the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct. The tort usually involves a business relationship that is something less than contractual in nature.

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > General Overview

HN10 [blue icon] **Unfair Business Practices, Elements**

The tort of unfair competition is not some amorphous catch-all claim to be appended to any complaint involving claims that a competitor has injured a business rival. It is a specific claim with distinct elements. Plaintiff must allege (1) acts or omissions by defendants that proximately caused a misappropriation; and 2) the property or benefit misappropriated. The tort usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property. Failure to allege with specificity what property has been misappropriated will result in dismissal of the claim.

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > General Overview

HN11 [blue icon] **Unfair Business Practices, Elements**

While the tort of unfair competition may be flexible and expansive, it does not encompass a claim that the only "property" appropriated is plaintiff's market share.

Antitrust & Trade Law > Clayton Act > General Overview

HN12 [blue icon] **Antitrust & Trade Law, Clayton Act**

See § 7 of the Clayton Act, [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Clayton Act > General Overview

HN13 [blue icon] **Antitrust & Trade Law, Clayton Act**

See § 2 of the Clayton Act, [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

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

A claim under § 2 of the Clayton Act is similar to a claim for predatory pricing under § 2 of the Sherman Act: The essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market. Under either claim, plaintiff must prove two elements: (1) that the prices complained of are below an appropriate measure of its rival's costs and (2) there exists a reasonable prospect of recouping its investment in below-cost prices. Although there is no well settled benchmark for determining an appropriate measure of a company's costs, it has been suggested that, in the United States Court of Appeals for the Second Circuit, the appropriate standard may be reasonably anticipated average variable cost.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN15 [+] **Conspiracy to Monopolize, Elements**

The § 1 of the Sherman Act claimant must demonstrate (1) concerted action by two or more persons which (2) unreasonably restrains interstate trade or commerce. Unlike the proof required to establish a conspiracy to monopolize under § 2 of the Sherman Act, a specific intent to create a monopoly is not required under § 1 of the Sherman Act.

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For HASBRO, INC., defendant; Dennis P. Orr, Shearman & Sterling, NY, NY. Gary L. Reback, Susan Abouchar Creighton, Steven A. Maddox, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA.

Judges: LAWRENCE M. McKENNA, U.S.D.J.

Opinion by: LAWRENCE M. McKENNA

Opinion

MEMORANDUM AND ORDER

McKENNA, D.J.

Plaintiff, Anti-Monopoly Inc. ("Anti-Monopoly"), brought this action against defendants Hasbro, Inc. ("Hasbro"), Toys "R" Us, Inc. ("Toys"), and K-Mart Corp. ("K-Mart") (together "Defendants"), alleging a conspiracy to allow Hasbro to monopolize the family board game market. Defendants have moved individually pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) to dismiss some or all of the claims for failure to state claims upon which relief can be granted. Anti-Monopoly has cross-moved pursuant to [Fed. R. Civ. P. 15](#) for leave to amend its Amended Complaint. For the reasons stated below, Defendants' motions are granted in part and denied in part, and Anti-Monopoly's motion is granted.

Facts

Anti-Monopoly developed and markets a family board game called Anti-Monopoly and currently possesses less than 1% of the market for family board games. Hasbro, Anti-Monopoly's competitor, is the leading manufacturer of family board games, with more than 80% of the market. Toys is the largest retailer of family board games with about 35-40% of the retail market. K-Mart is the second largest retailer of board [*2] games with about 15% of the retail market. Anti-Monopoly and Hasbro compete directly for space in retail stores like Toys and Hasbro. (Proposed Second Am. Compl. ("Compl.") PP 4-7, 25.)

Anti-Monopoly's proposed Second Amended Complaint alleges that Hasbro has for more than a decade been gradually increasing its market share through the acquisition of smaller family board game manufacturers such as Ideal Toys and Parker Brothers, as well as by certain practices which violate federal **antitrust law**. Most of those practices are not the subject of this motion, as Hasbro has not moved to dismiss Anti-Monopoly's claim under § 2 of

the Sherman Act. Toys and K-Mart are alleged to be co-conspirators in Hasbro's schemes standing to benefit from helping Hasbro develop monopoly power in the relevant market.

The Amended Complaint includes eight separate counts against all three defendants and Anti-Monopoly has cross-moved for leave to add an additional Count (Count IX) in its proposed Second Amended Complaint. The Court must address the motion to Amend and then each defendant's motion to dismiss each count.

II.

Motion to Amend Amended Complaint

Anti-Monopoly has moved to amend to add certain [*3] supplemental allegations as well as an additional count.

In their motions to dismiss, Defendants have only addressed two substantive changes to Anti-Monopoly's Complaint: a revision in the definition of the relevant market and a new claim (Claim IX) alleging violation of § 3 of the Clayton Act. The Court takes each of these in turn and otherwise grants Anti-Monopoly's request to make all other changes proposed in its Second Amended Complaint.

HN1[] Leave to amend a complaint shall be freely given when justice so requires. *Fed. R. Civ. P. 15(a)*.

The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith. . . . In determining what constitutes "prejudice," we consider whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.

Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993) (citations omitted).

A.

Hasbro's opposition to Anti-Monopoly's [*4] proposal to redefine the relevant market is twofold: first, that the definition is overly narrow, and, second, that Hasbro would be prejudiced in that it has already prepared a defense based on the original definition of the market and would be forced to incur a substantial cost to refine its defense based on the revised definition.

HN2[] Definition of the relevant market is "the first step in a court's analysis" of an alleged antitrust violation. *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979)*. "A complaint must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed. The relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand." *Re-Alco Indus., Inc. v. National Ctr. for Health Educ., Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993)* (citations omitted).

In its Amended Complaint, Anti-Monopoly defined the relevant product market as "board games". (Am. Compl. P 15.) In its proposed Second Amended Complaint, Anti-Monopoly seeks to redefine the relevant market as "family board games" and the relevant submarket as [*5] "monopoly-type family board games". (Compl. P 15.) "Family board games" are defined as "non-strategy board games, in which players move tokens on a board surface, and the games are suitable for players at least 7-8 years old and are targeted for group play which does not exclude the 7 or 8 to 18 year age group." (*Id.* P 12.) "Monopoly-type family board games" means family board games based on some of the monopolistic features of real estate, including the payment of rents. (*Id.*)

HN3[] The definition of the relevant market lies initially with the plaintiff. Defendants will have their opportunity to challenge Anti-Monopoly's definition, but the Court must accept a reasonable definition on the face of the Complaint. *Minpeco, S. A. v. Conticommodity Servs., 552 F. Supp. 327, 331 (S.D.N.Y. 1982)* ("Rule 8 does not require that a plaintiff 'define specifically the boundaries of its purported market.' . . . Questions of market definition

can be narrowed and determined through the discovery process."). Unless the proposed definition is patently over- or under-inclusive, the Court must accept the plaintiff's proposed definition. "Family-board games" is not a patently under-inclusive definition [*6] and the Court will allow Anti-Monopoly to redefine the relevant market in its Second Amended Complaint.¹

Turning to Hasbro's argument that it will be forced to incur a substantial cost in revising its defense, the Court may consider, at a later stage of this litigation, an order requiring Anti-Monopoly to pay Hasbro for specifically identifiable additional costs incurred by Hasbro as a result of having had to defend based on the original definition.² See [Ovitz v. Jefferies & Co., 102 F.R.D. 242, 244 \(N.D. Ill. 1984\)](#).

[*7] B.

Hasbro's only opposition to the addition of Count IX is that the amendment would be futile.³

Section 3 of the Clayton Act provides

HN4 [↑] It shall be unlawful for any person engaged in commerce . . . to make a sale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise . . . 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.

[15 U.S.C. § 14.](#)

In proposed Count IX, Anti-Monopoly alleges Hasbro has violated § 3 of the Clayton Act by "making sales of family board games to K-Mart, Toys and the other alleged co-conspirators on terms which require them not to buy family board games from plaintiff and other small [*8] family board game competitors." (*Id.* P 93.) Having tracked the language of the statute and included a number of factual allegations to support its theory, Anti-Monopoly has adequately pled a claim under § 3 of the Act. Therefore, the Court grants Anti-Monopoly's motion to add Count IX.⁴

III.

[Rule 12\(b\)\(6\) Standards in Antitrust Cases](#)

HN5 [↑] "[A] short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules." [George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 \(2d Cir. 1977\)](#) (citing [Nagler v. Admiral Corp., 248 F.2d 319 \(2d Cir. 1957\)](#), and 5 Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure*, § 1228 (1969)). In considering the complaint on a motion under [Fed. R. Civ. \[*9\] P. 12\(b\)\(6\)](#), "the Court must accept the pleader's allegations of facts as true together with such reasonable inferences as may be drawn in [the pleader's] favor."

¹ The Court also grants Anti-Monopoly's motion to redefine the market to include a submarket of "monopoly-type family board games," but notes, without at this time so holding, that the definition appears too narrow to be relevant for purposes of an antitrust claim.

² Anti-Monopoly would not be responsible for costs incurred in formulating elements of the initial defense that are still valuable to Hasbro for purposes of a new defense. It is not at all clear which costs incurred to date as a result of Anti-Monopoly's original market definition will remain of value throughout this litigation.

³ Anti-Monopoly has withdrawn Count IX as to Toys and K-Mart. (Pl. Reply Br. at 9.)

⁴ Having granted Anti-Monopoly's motion to amend the Complaint, all references to a Complaint are to the Second Amended Complaint unless otherwise noted.

Deep South Pepsi-Cola Bottling Co. v. PepsiCo, Inc., 1989 U.S. Dist. LEXIS 4639, at *12, 1989 WL 48400, at * 5 (S.D.N.Y. May 2, 1989). That does not mean that "conclusory allegations which merely recite the litany of antitrust will . . . suffice." *John's Insulation, Inc. v. Siska Constr. Co.*, 774 F. Supp. 156, 163 (S.D.N.Y. 1991). An antitrust complaint must "adequately . . . define the relevant product market, . . . allege antitrust injury, [and] . . . allege conduct in violation of the antitrust laws." *Re-Alco Indus., Inc. v. National Ctr. for Health Educ., Inc.*, 812 F. Supp. 387, 391 (S.D.N.Y. 1993).

Furthermore, it has been very persuasively argued that an antitrust plaintiff whose complaint is challenged must articulate "a careful statement of his legal theory." Phillip Areeda & Donald F. Turner, *Antitrust Law*, P 317e (1978). It is not clear however, in the Second Circuit, that the theory -- as distinguished from the facts supporting it -- must be set forth in the complaint itself, see *George C. Frey*, 554 F.2d at 554, but it is [*10] nevertheless not too much to ask that the theory -- or "alternative or multiple legal theories," Areeda & Turner, P 317e -- at least be fully argued in response to a dispositive motion. Not only will such argument enable a court to see how the facts alleged, if proved, would constitute a violation of the Sherman Act, but "the recommended specificity focuses discovery and thereby saves both parties' energies and costs." *Id.* "The heavy costs of modern federal litigation, especially antitrust litigation, and the mounting caseload pressures on the federal courts, 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." *Sutliff, Inc. v. Donovan Cos., Inc.*, 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.).

The Court therefore examines the Complaint and Anti-Monopoly's opposition brief to discern whether Anti-Monopoly has stated a basic, but coherent, theory of how the Defendants have violated the antitrust laws.⁵

[*11] IV.

Count I: § 2 of the Sherman Act

In Count I, Anti-Monopoly alleges that Defendants have violated § 2 of the Sherman Act by monopolizing, willfully attempting to monopolize, and combining and conspiring with various co-conspirators to monopolize, the manufacturing and sale of family board games. (Compl. P 29.) Only Toys and K-Mart have moved to dismiss Count I. In its responsive brief Anti-Monopoly concedes that its only claim against Toys and K-Mart under § 2 of the Sherman Act is for conspiracy to monopolize. (Pl. Br. at 28-29.)

HN6 [↑] The conspiracy to monopolize offense consists of three elements: 1) concerted action, 2) overt acts in furtherance of the conspiracy, and 3) a specific intent to monopolize. *Volvo North America Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988).

Anti-Monopoly's allegations that Toys and K-Mart have conspired with Hasbro are highly speculative and come dangerously close to being subject to dismissal for lack of allegations of supporting facts. See *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("Although the Federal Rules permit statement of ultimate [*12] facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal."); *Garshman v. Universal Resources Holding Inc.*, 824 F.2d 223, 230 (3d Cir. 1987) ("The allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act.") Nevertheless, the Court finds that Anti-Monopoly has stated a claim. Clearly, Anti-Monopoly has alleged

⁵ The Court reminds Plaintiff of the warning of Judge McCunn of the Northern District of New York: "[Plaintiff has] made the court's task in deciding these motions particularly arduous due to [its] poorly drafted pleadings and memoranda of law. Counsel [is] forewarned that in the future motion papers such as these will simply be returned. The court is burdened enough without having to do legal research for counsel and speculate as to the exact nature of a given claim or argument." *Repasky v. Orzel*, 1991 U.S. Dist. LEXIS 2668.

concerted action by Defendants to exclude Anti-Monopoly from the market as well as overt acts, the refusals to deal; and all of this with the specific intent to conspire. (Compl. P 29.)

The Court notes, however, that Anti-Monopoly's theory seems, on its face, highly implausible. As customers of Hasbro, now and in the future, it does not make too much economic sense that Toys and K-Mart would help Hasbro gain monopolistic power in the relevant market. As a monopolist, Hasbro would be in a position to dictate higher wholesale prices for its products to Toys and K-Mart. However, the Court will not dismiss the Complaint at this early stage of the proceeding without [*13] allowing Anti-Monopoly a chance to develop its case in discovery.

Toys and K-Mart also rely on caselaw suggesting that activity that "is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). See also [Venture Tech., Inc. v. National Fuel Gas Co., 685 F.2d 41, 48 \(2d Cir. 1982\)](#). Although these cases are closely analogous, they each involved disputes in which discovery had been conducted and had been litigated to or beyond a motion for summary judgment. The Court is hesitant to extend the reasoning of these cases to a motion to dismiss on the face of the Complaint. Anti-Monopoly's allegations, if still unsupported following discovery, may not be sufficient to survive a motion for summary judgment, but they are sufficient to state a claim upon which relief can be granted.

Toys' and K-Mart's motions to dismiss Count I are denied.

Count II: Essential Facility

In Count II, Anti-Monopoly alleges that Hasbro's control of Toys and K-Mart constitutes monopolization of an essential [*14] facility in violation of § 2 of the Sherman Act. (Compl. P 42.)

HN7 [↑] The essential facility doctrine is not a separate violation of [antitrust law](#), but rather is "a label that may aid in the analysis of a monopoly claim." [Viacom Int'l, Inc. v. Time Inc., 785 F. Supp. 371, 376 n.12 \(S.D.N.Y. 1992\)](#). In an early formulation, "the essential facility doctrine, also called the 'bottleneck principle,' states that 'where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.'" [Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992 \(D.C. Cir. 1977\)](#) (quoting A. O. Neale, *The Antitrust Laws of the United States*, at 67 (2d ed. 1970)) (footnote omitted), cert. denied, 436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978). The "essential facility" doctrine, however, is in tension with another doctrine: "[Antitrust law](#) . . . does not require one competitor to give another a break just because failing to do so offends notions of fair play." [Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 \(2d Cir. 1990\)](#). [*15]

To prove monopolization of an essential facility, Anti-Monopoly 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 Comm. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132 \(7th Cir. 1983\)](#). The first and third elements go to defendant's degree of control while the second and fourth go to determining whether the facility is truly "essential".

The Court first addresses the issue of control. In most of the "essential facility" cases, control stemmed from the defendants' ownership, individually or collectively, of the facility. However, in this case, the control of the facility stems not from ownership, but from an alleged system of price incentives and threats designed to force the owner of the facility not to make it available to a competitor. Although it is a novel theory of control, and represents an extension of the "essential facility" doctrine, the Court will not say at this point that Anti-Monopoly has not adequately pled control of Toys and [*16] K-Mart.

Nevertheless, the Court finds as a matter of law that Toys and K-Mart do not constitute an essential facility. The Second Circuit most recently discussed the doctrine in [Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566 \(2d Cir. 1990\)](#):

A leading antitrust commentator would limit the analysis to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." Most of the successful essential facility claims fall within the categories stated by this commentator. In cases finding liability in other categories, however, the facility in question was more than dominant; it was effectively the only one in town.

Id. at 569 (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, § 736.2 (Supp. 1988)) (other citations omitted). [HN8](#) [↑] "A plaintiff must show more than inconvenience or even some economic loss; he must show that an alternative to the facility is not feasible." [Twin Labs., 900 F.2d at 570](#).

There is no suggestion that Toys and K-Mart's stores are "facilities whose duplication is forbidden by law" or that they [*17] are "publicly subsidized and thus could not practicably be built privately." Nor are they a "natural monopoly" -- or the result of a "natural monopoly" -- or the "only [facility] in town." Anti-Monopoly does not allege that there are not many independent stores retailing toys and board games that Anti-Monopoly is free to use to reach the public for the sale of its products. The essential facility doctrine cannot be read so broadly as to mean that a plaintiff is entitled to any facility it finds desirable or convenient, or that retailers must stock every product of a given type.

The Court grants Defendants' motion to dismiss Count II.

Count III: Tortious Interference with Advantageous Business Relationships

[HN9](#) [↑] Under New York law, to prevail on a claim of tortious interference with prospective business relations, a plaintiff must demonstrate that the defendant interfered with business relations existing between a plaintiff and a third party, either with the purpose of harming the plaintiff or by means that are dishonest, unfair, or improper.

[Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 \(2d Cir. 1988\)](#). "If the defendant's interference [*18] is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct." [PPX Enters., Inc. v. Audiofidelity Enters., Inc., 818 F.2d 266, 269 \(2d Cir. 1987\)](#). The tort usually involves a business relationship that is something less than contractual in nature. [Volvo, 857 F.2d at 74](#).

In Count III, Anti-Monopoly makes a series of separate allegations suggesting that the Defendants have interfered, individually and collectively, with certain business relationships. (Compl. PP 48-51.) The Court must take this complicated series of allegations separately.

A.

First, Anti-Monopoly alleges that the Defendants have interfered with Anti-Monopoly's relationships with other major retailers. However, the Second Amended Complaint does not provide any factual basis for this allegation. The essence of the Complaint is that Hasbro has conspired with Toys and K-Mart to exclude Anti-Monopoly from the market. There is no allegation, however, that either Hasbro, Toys or K-Mart has encouraged any other retailer to not deal with Anti-Monopoly. Hasbro has not even named any other major retailer who has refused [*19] to deal with Anti-Monopoly.

B.

Second, Anti-Monopoly alleges that Toys and K-Mart have each conspired with Hasbro to interfere with Anti-Monopoly's relationship with the other. However, Anti-Monopoly has not plead any facts suggesting that either Toys or K-Mart has committed any act that would interfere with Anti-Monopoly's relationship with the other. According to

the Complaint, Toys and K-Mart each entered into agreements with Hasbro that they would not deal with Anti-Monopoly in exchange for favorable prices.

C.

Finally, Anti-Monopoly alleges that Hasbro has interfered with Anti-Monopoly's relationship with Toys and K-Mart by inducing them to not deal with Anti-Monopoly. Hasbro concedes that such action constitutes interference with a business relation, but argues that because the alleged interference is intended, at least in part, to advance its own competing interests, the claim must fail because Anti-Monopoly has not alleged that the conduct is criminal or fraudulent as required by the caselaw.

The Court cannot agree. Although, Anti-Monopoly does not expressly claim that Hasbro's conduct is criminal, the Court notes that almost the entire Complaint is devoted [*20] to allegations that Hasbro has been violating, and continues to violate, the Sherman Antitrust Act, a federal criminal statute. If Anti-Monopoly can prove that Hasbro has violated the antitrust acts, such conduct should be sufficiently criminal to constitute the predicate required for the tort of tortious interference. See [Van Natta Mech. Corp. v. Di Staulo, 277 N.J. Super. 175, 649 A.2d 399, 407-08 \(N.J. Sup. Ct. App. Div. 1994\)](#) ("The grounds for the antitrust violation could nonetheless be used to prove defendants' unlawful, anti-competitive acts.").

The Court grants Toys' and K-Mart's motions to dismiss but denies Hasbro's motion to dismiss Count III insofar as that Count is based on the ground considered in C, above. Count III otherwise dismissed as to all defendants.

Count IV: Unfair Competition

In Count IV, Anti-Monopoly alleges that Defendants have appropriated Anti-Monopoly's market share, i.e. its customers, by means of unfair competition.

[HN10](#) [↑] The tort of unfair competition is not some amorphous catch-all claim to be appended to any complaint involving claims that a competitor has injured a business rival. It is a specific claim with distinct elements. *Saratoga Vichy* [*21] [Spring Co. v. Lehman, 625 F.2d 1037, 1044 \(2d Cir. 1980\)](#). Plaintiff must allege "1) acts or omissions by defendants that proximately caused a misappropriation; and 2) the property or benefit misappropriated." [Volvo, 857 F.2d at 75](#). The tort "usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." [Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting, 672 F.2d 1095, 1105 \(2d Cir. 1982\)](#). See also, [Saratoga Vichy Spring Co. v. Lehman, 625 F.2d 1037, 1044 \(2d Cir. 1980\)](#) ("The essence of an unfair competition claim under New York law is that the defendant has misappropriated the labors and expenditures of another."). Failure to allege with specificity what property has been misappropriated will result in dismissal of the claim. [Volvo, 857 F.2d at 75; Data Broadcasting Corp. v. Tele-Communications, Inc., 1992 U.S. Dist. LEXIS 16881, 1992 WL 350624, *4 n.4](#) (S.D.N.Y. 1992).

Anti-Monopoly has not identified any misappropriated property in the Complaint. In response to Defendants' challenge, Anti-Monopoly suggests in its brief that it was its market share that had been taken and that "appropriation of a competitor's customers [*22] is in the long run what unfair competition is about." (Pl. Br. at 27.) Anti-Monopoly's theory is creative but unpersuasive. Loss of market share may be the ultimate consequence of an act of unfair competition, as it is for any business tort, but, standing alone, it does not state a claim. There is no allegation that the Defendants have used or appropriated any of Anti-Monopoly's products or properties. [HN11](#) [↑] While the tort of unfair competition may be flexible and expansive, [Roy Export, 672 F.2d at 1105](#), it does not encompass a claim that the only "property" appropriated is plaintiff's market share. See [Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., Inc., 614 F.2d 832, 842 \(2d Cir. 1980\)](#).

Defendants' motion to dismiss Count IV is granted.

Count V: Cancellation of Patents and Copyrights

Although Anti-Monopoly characterizes this as a cause of action, it is a statement of a form of relief sought under other claims, more properly considered should Anti-Monopoly prove a violation of the antitrust laws. Accordingly, Count V is dismissed, without prejudice to consideration at an appropriate time of forms of relief to which Anti-Monopoly may be entitled.

*Count VI: § 7 [*23] of the Clayton Act*

In Count VI, Anti-Monopoly alleges that Hasbro has violated § 7 of the Clayton Act by acquiring the stock and the whole and part of the assets of various corporations engaged in competition with Hasbro where the effect has been to substantially lessen competition and to create a monopoly in such markets. (Compl. P 66.)

§ 7 of the Clayton Act provides:

HN12[] 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 and no person . . . shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or 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.

Anti-Monopoly's allegations clearly state a claim upon which relief can be granted. Anti-Monopoly has alleged that Hasbro has dramatically increased its share of the family board game market by purchasing a number of smaller companies and is approaching 90% control [*24] of the market. Such a development could certainly have the effect of substantially lessening competition or creating a monopoly by concentrating virtually all the manufacturing power in one manufacturer. The Court denies Hasbro's motion to dismiss Count VI.⁶

Anti-Monopoly has not shown that § 7 of the Clayton Act imposes liability on any party other than the acquirer, Hasbro. Therefore, the Court grants Toys' and K-Mart's motions to dismiss Count VI.

Count VII: § 2 of the Clayton Act

In Count VII, Anti-Monopoly alleges that Hasbro has violated the Robinson-Patman Act (§ 2 of the Clayton Act) by "providing substantial discounts, terms and services to major family board game retailers [*25] which are not made available on equal terms to competing smaller family board game retailers and wholesalers and which are not either cost justified or otherwise permitted under § 2." (Compl. P 76).

§ 2 of the Clayton Act provides:

HN13[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a).

HN14[] A claim under § 2 of the Clayton Act is similar to a claim for predatory pricing under § 2 of the Sherman Act: "The essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the

⁶ Rather than focusing on the sufficiency of the allegations, Hasbro bases its motion on Anti-Monopoly's requested relief for an order compelling divestiture of the acquisitions. However, the issue for the Court at this time is not what relief is appropriate, but whether Anti-Monopoly has stated a claim under the law.

relevant market." *Brooke Group, Ltd. v. Brown & Williamson* [*26] *Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2587 (1993)*. Under either claim, plaintiff must prove two elements: (1) "that the prices complained of are below an appropriate measure of its rival's costs" and (2) there exists "a reasonable prospect . . . of recouping its investment in below-cost prices." *Id.* at 2487-88. Although there is no well settled benchmark for determining "an appropriate measure of [a company's] costs," it has been suggested that, in the Second Circuit, the appropriate standard may be "reasonably anticipated average variable cost." *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404, 407 (2d Cir. 1988).

Two classes of plaintiffs are recognized to have standing to bring a Robinson-Patman claim. Direct competitors of the predator are said to suffer primary-line injury when they are unable to match the predator's prices and must either sell at a loss or lose market share. Competitors of the favored purchasers are said to suffer secondary-line injuries when they are forced to compete in the same market as the purchasers who are enjoying the benefit of lower overhead for the same product. Anti-Monopoly has argued that it [*27] has suffered both types of injuries.

Defendants' only ground for dismissal of Count VII was the absence of an allegation that Hasbro prices its products below an appropriate measure of its costs. With the filing of its Second Amended Complaint, Anti-Monopoly has now remedied that deficiency in. (Compl. P 31W). Furthermore, it can fairly be inferred that there is a reasonable prospect that Hasbro would recoup its investment if it were able to eliminate the remaining board game manufacturers.

Because the Court agrees that Anti-Monopoly has stated a claim for a primary-line injury, the Court does not address at this time Anti-Monopoly's claim that it has suffered a secondary-line injury. The Court denies Hasbro's motion to dismiss Count VII.

However, the Statute does not impose liability on the beneficiaries of the advantageous pricing. The Court therefore grants Toys' and K-Mart's motions to dismiss Count VII.

Count VIII: Section 1 of the Sherman Act

In Count VIII, Anti-Monopoly alleges that Defendants have violated § 1 of the Sherman Act: The "activities of the defendants . . . constitute an illegal antitrust contract, conspiracy and combination to unreasonably restrain trade [*28] in the" relevant market and involve "concerted action between Hasbro and each of the two co-defendants." (Compl. P 87.)

HN15 [+] "The section 1 claimant must demonstrate (1) concerted action by two or more persons which (2) unreasonably restrains interstate trade or commerce." *Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs.*, 746 F. Supp. 320, 325 (S.D.N.Y. 1990). "Unlike the proof required to establish a conspiracy to monopolize under section 2, a specific intent to create a monopoly is not required under section 1." *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 793 (2d Cir.).

"It is the rare case in which a plaintiff bringing a § 1 claim can establish the existence of an explicit agreement among the defendants; most conspiracies are proven by inferences drawn from behavior of the alleged conspirators." *Caldwell v. American Basketball Ass'n, Inc.*, 825 F. Supp. 558, 566 (S.D.N.Y. 1993).

Once again the Court must infer the exact nature of Anti-Monopoly's allegations from an inartfully pled Complaint. Anti-Monopoly has alleged a scheme, masterminded by Hasbro, and participated in by Toys and K-Mart, to restrain trade by excluding [*29] Anti-Monopoly from the marketplace. The factual basis for the allegation leaves much to be desired, but the Court will not dismiss Count VIII on its face.

As with their motion to dismiss Anti-Monopoly's § 2 claim, Toys and K-Mart rely on cases holding that conduct that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). However, as noted supra pp. 10-11, those decisions involved cases

developed up to or beyond the summary judgment stage, and are therefore not appropriate authority on a motion to dismiss.

Defendants' motion to dismiss Count VIII is denied.

V.

The Court grants Hasbro's motion to dismiss Counts II, IV, and V, grants in part and denies in part Hasbro's motion to dismiss Count III, and denies Hasbro's motion to dismiss Counts VI-IX. The Court grants Toys' and K-Mart's motions to dismiss Counts II-VII and denies their motion to dismiss Counts I and VIII. Anti-Monopoly has withdrawn Count IX as to Toys and K-Mart.

Dated: New York, New York

June [*30] 26, 1995

SO ORDERED

LAWRENCE M. McKENNA

U.S.D.J.

End of Document

Ambrose v. Blue Cross & Blue Shield

United States District Court for the Eastern District of Virginia, Richmond Division

June 27, 1995, Decided

Civil Action No. 3:94cv636

Reporter

891 F. Supp. 1153 *; 1995 U.S. Dist. LEXIS 9070 **

NANCY L. AMBROSE, HABIB GUIRGUIS, and RICHARD GRANT BIRD, Plaintiffs, v. BLUE CROSS & BLUE SHIELD OF VIRGINIA, INC., a/k/a Trigon Blue Cross Blue Shield, and HMO OF VIRGINIA, INC., and HEALTHKEEPERS, INC., a/k/a Healthkeepers of Virginia, Inc., Defendants.

Core Terms

insurance business, insured, regulating, state law, McCarran-Ferguson Act, impair, invalidate, federal law, decisions, discounts, practices, deductible, federal statute, provisions, insurance code, prohibits, provider, unfair trade practice, insurance contract, copayment, exemption, Savings, private cause of action, insurance policy, state statute, advertising, preemption, settlement, sections, courts

LexisNexis® Headnotes

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

HN1[Motions to Dismiss, Failure to State Claim]

When considering a motion under [Fed. R. Civ. P. 12\(b\)\(6\)](#), the court is required to presume that all factual allegations in the complaint are true and to accord the benefit of all reasonable inferences to the non-moving party. The allegations of the complaint are to be liberally construed and the motion should be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN2[Exemptions & Immunities, McCarran-Ferguson Act Exemption]

See [15 U.S.C.S. § 1011](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

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Insurance Law > Industry Practices > Federal Regulations > General Overview

HN3 Exemptions & Immunities, McCarran-Ferguson Act Exemption

See [15 U.S.C.S. § 1012\(b\)](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN4 Exemptions & Immunities, McCarran-Ferguson Act Exemption

The language of [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), necessitates three inquiries: (1) does the federal statute at issue specifically relate to the "business of insurance;" (2) was the state statute at issue enacted for the purpose of regulating the "business of insurance;" and (3) would application of the federal statute invalidate, impair or supersede the state statute.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN5 Exemptions & Immunities, McCarran-Ferguson Act Exemption

The criteria against which "the business of insurance" must be judged are as follows: 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 factors must be considered together because none of these criteria is necessarily determinative in itself.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN6 Exemptions & Immunities, McCarran-Ferguson Act Exemption

The language of [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), is unambiguous: the first clause commits laws enacted for the purpose of regulating "the business of insurance" to the states, while the second clause exempts only "the business of insurance" itself from the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN7 Exemptions & Immunities, McCarran-Ferguson Act Exemption

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The broad category of laws enacted for the purpose of regulating "the business of insurance" pursuant to [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), consists of laws that possess the end, intention or aim of adjusting, managing, or controlling "the business of insurance." This category necessarily encompasses more than just "the business of insurance."

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

[**HN8**](#) [] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The actual performance of an insurance contract falls within "the business of insurance."

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

[**HN9**](#) [] Exemptions & Immunities, McCarran-Ferguson Act Exemption

Under the first clause of [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), a state law controls so long as its purpose, that is, its end, intention, or aim, is adjusting, managing, or controlling "the business of insurance." This category necessarily encompasses more than just "the business of insurance." Under the second clause of [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), the state law is exempt from the antitrust laws to the extent that the practice regulated is itself "the business of insurance."

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Advertising

Insurance Law > Industry Practices > Federal Regulations > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Liability & Performance Standards > Disclosure Obligations by Insureds > General Overview

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

[**HN10**](#) [] Unfair Business Practices, Advertising

Va. Code Ann. § 38.2 establishes rules and procedures to be followed in the issuance and performance of insurance policies. The purpose of [Va. Code Ann. § 38.2-500](#) is to regulate trade practices in "the business of insurance" in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), by defining and prohibiting all practices in the commonwealth that constitute unfair methods of compensation or unfair or deceptive acts or practices. To that end, [Va. Code Ann. § 38.2-502](#) prohibits

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misrepresentation of the benefits, advantages, conditions or terms of any insurance policy. That provision is supplemented by [Va. Code Ann. § 38.2-503](#) which prohibits any advertisement, announcement or statement containing any assertion, representation or statement relating to "the business of insurance" which is untrue, deceptive or misleading.

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Advertising

Insurance Law > Liability & Performance Standards > Disclosure Obligations by Insureds > General Overview

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Payments

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Claims Investigations & Practices

[**HN11**](#) [] **Unfair Business Practices, Advertising**

Va. Code Ann. § 38.2-510A.1 prohibits misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue. Va. Code Ann. § 38.2-510A.4 prohibits arbitrary refusal to pay claims. Va. Code Ann. § 38.2-510A.6 prohibits not attempting in good faith to make prompt, fair and equitable settlements of a claim. Va. Code Ann. § 38.2-510A.8 prohibits attempting to settle claims for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Claims Investigations & Practices

[**HN12**](#) [] **Unfair Business Practices, Claims Investigations & Practices**

The penalty provisions of Va. Code Ann. § 38.2 are not exclusive. Therefore, they are in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose civil penalties for violation of the laws of [Va. Code Ann. § 38.2-221](#).

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Insurance Law > Industry Practices > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Claims Investigations & Practices

[**HN13**](#) [] **Consumer Protection, False Advertising**

The plain meaning of [Va. Code Ann. §§ 38.2-502](#), [38.2-503](#) and [38.2-510](#) shows that the primary purpose of these sections is to regulate the performance of insurance contracts by assuring conformity between representations made by the insurer to the insured and the actual performance of the insurance policies, and between basic principles of fair practices and the actual performance of the policies. In other words, each statute is designed to regulate the representations made to form, and the practices which comprise, the relationship between insurer and insured and the performance of the insurance contract which is the foundation of that relationship.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

Insurance Law > Liability & Performance Standards > Disclosure Obligations by Insureds > General Overview

Insurance Law > Industry Practices > General Overview

HN14 [blue icon] Exemptions & Immunities, McCarran-Ferguson Act Exemption

Laws aimed at protecting or regulating the relationship between insurer and insured satisfy the language of the first clause of [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Liability & Performance Standards > Disclosure Obligations by Insureds > Fraudulent Intent

HN15 [blue icon] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The marketing and performance of insurance policies undoubtedly falls within "the business of insurance."

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Liability & Performance Standards > Disclosure Obligations by Insureds > General Overview

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Advertising

Insurance Law > Industry Practices > General Overview

HN16 [blue icon] Exemptions & Immunities, McCarran-Ferguson Act Exemption

A state law enacted for the purpose of preventing false advertising by insurance companies is a law enacted for the purpose of regulating "the business of insurance." State laws regulating advertising are encompassed within the scope of the first clause of [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#) since advertising clearly appears to affect the relationship between the insurer and insured.

Insurance Law > ... > ERISA > Savings Clause > General Overview

Pensions & Benefits Law > ERISA > Federal Preemption > Savings Clause

Pensions & Benefits Law > ERISA > Federal Preemption > General Overview

HN17 [blue icon] ERISA, Savings Clause

See [29 U.S.C.S. § 1144\(b\)\(2\)\(A\)](#).

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Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > ... > Savings Clause > Business of Insurance Test > General Overview

Pensions & Benefits Law > ERISA > Federal Preemption > Savings Clause

Pensions & Benefits Law > ERISA > Federal Preemption

Pensions & Benefits Law > ERISA > Federal Preemption > General Overview

HN18[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The term "business of insurance" as used in the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), has been adopted as the basis for defining the scope of the Savings Clause of ERISA, [29 U.S.C.S. § 1144\(b\)\(2\)\(A\)](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN19[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

Under the first clause of [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), states have the broadest power to regulate "the business of insurance" where neither the McCarran-Ferguson Act nor another federal statute specifically provides that its power should be less extensive.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Governments > Legislation > Interpretation

HN20[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The words "invalidate, impair and supersede" are not defined in the McCarran-Ferguson Act, 15 U.S.C.S. § 1011-1015. Like all statutory terms, those three words must be given their ordinary meaning unless another meaning is dictated by the context in which they are used or by statutory definition.

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

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

HN21[] Private Actions, Racketeer Influenced & Corrupt Organizations

Application of civil Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. §§ 1961-1968](#), invalidates, impairs, or supersedes state laws enacted for the purpose of regulating "the business of insurance"

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when the state laws do not provide for private causes of action, treble damages, costs, or attorneys fees, all of which are available under RICO.

Constitutional Law > Supremacy Clause > General Overview

[HN22](#) [+] Constitutional Law, Supremacy Clause

Federal statutes do not invalidate, impair or supersede state statutes by permitting private causes of action not available under the state law or by allowing remedies not available under the state law.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

[HN23](#) [+] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The application of a federal statute prohibiting acts which are also prohibited under a state's insurance laws does not invalidate, impair or supersede the state's laws under [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > ... > Savings Clause > Business of Insurance Test > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

[HN24](#) [+] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The language of [15 U.S.C.S. § 1012\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), is inconsistent with a congressional intent to allow states to preempt the field of insurance regulation.

Constitutional Law > Supremacy Clause > Federal Preemption

Constitutional Law > Supremacy Clause > General Overview

Constitutional Law > Supremacy Clause > Supreme Law of the Land

[HN25](#) [+] Supremacy Clause, Federal Preemption

Preemption is the doctrine by which courts enforce Article VI of the Constitution which provides that the laws of the United States shall be the supreme law of the land, any thing in the constitution or laws of any state to the contrary notwithstanding. U.S. Const. art. VI. Preemption occurs when Congress explicitly so provides or when the intent to preempt is implied by the structure and purpose of a federal statute. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Constitutional Law > Supremacy Clause > General Overview

Insurance Law > ... > Savings Clause > Business of Insurance Test > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN26 [+] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The concept of preemption, whether direct or inverse, requires a determination whether there exists a direct conflict between federal and state law or whether state and federal law can co-exist. The McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), does not admit of such an analysis even though in it Congress declared the primacy of state law in the regulation of "the business of insurance." This is because §§ 1011-1015 do not turn on status, i.e., supremacy of a body of law, but on the effect of the law, i.e., whether an act of Congress invalidates, impairs or supersedes certain kinds of state law.

Constitutional Law > Supremacy Clause > General Overview

HN27 [+] Constitutional Law, Supremacy Clause

The existence of a comprehensive regulatory scheme is not, in and of itself, sufficient to show that application of a federal law would invalidate, impair or supersede any particular state law.

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For BLUE CROSS & BLUE SHIELD OF VIRGINIA, INC. aka Trigon Blue Cross Blue Shield, HMO OF VIRGINIA, INC., HEALTHKEEPERS, INC. fka Healthkeepers of Virginia, Inc., defendants: James Crawford Roberts, Mays & Valentine, Richmond, VA. James Brien Comey, Jr., R. Gordon Smith, James Patrick McElligott, Jr., Robert Gordon Smith, McGuire, Woods, Battle & Boothe, Richmond, VA. Jeanette Dian Rogers, Blue Cross & Blue Shield of Virginia, Legal Department, Richmond, VA.

Judges: Robert E. Payne, United States District Judge

Opinion by: Robert E. Payne

Opinion

[*1154] MEMORANDUM OPINION

The Amended Class Action Complaint ("Amended Complaint") contains five counts. In Counts One and Two, Richard G. Bird, and the class he purports to represent, assert claims under the Employee Retirement Income Security Act of 1974, [29 U.S.C. §§ 1001-1461](#) ("ERISA"). These two counts have been voluntarily dismissed. Consequently, Bird is no longer a plaintiff and there are no ERISA claims remaining. Count Three is asserted by Nancy L. Ambrose and Habib Guirguis, and the classes they purport to represent, under the Racketeer Influenced

and Corrupt Organizations Act, [18 U.S.C. §§ 1961-1968](#) ("RICO"). In Count Four, the Ambrose and Guirguis Classes assert Virginia state law claims for breach of contract, failure to account and breach of fiduciary duty. Count Five, for reasons not entirely clear, seeks injunctive relief respecting adjustments of allegedly improperly calculated policy holder lifetime benefit caps.

The defendants are three corporations: Blue Cross & Blue Shield of Virginia, Inc., now known as Trigon Blue Cross Blue Shield, Blue Cross Blue Shield HMO of Virginia, Inc. ("HMO Virginia"), [\[**2\]](#) and Healthkeepers, Inc. ("Healthkeepers"). HMO Virginia and Healthkeepers are wholly owned subsidiaries of Trigon. The defendants, who will be referred to collectively as "defendants" or "Trigon," have moved to dismiss the action pursuant to [Fed. R. Civ. P. 9\(b\)](#), [12\(b\)\(1\)](#), and [12\(b\)\(6\)](#), and they claim entitlement to summary judgment pursuant to [Fed. R. Civ. P. 56\(b\)](#).

With the voluntary dismissal of Counts One and Two, RICO provides the only basis for federal jurisdiction and hence resolution of Count Three has become the focal point of this action. The defendants assert that Count Three fails as a matter of law because the application of RICO is precluded by the McCarran-Ferguson Act, [15 U.S.C. §§ 1011-1015](#). If the defendants' contention is correct, then dismissal is appropriate pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#).

[*1155] STATEMENT OF FACTS

The stated facts will be confined to those that are pertinent to the RICO claims asserted by Ambrose and Guirguis. The statement of facts assumes that the allegations of the Amended Complaint are true even though the defendants deny many of those allegations.

A. The Policies, the Plaintiffs and the Offending Practices

The insurance policies [\[**3\]](#) issued by Trigon and purchased by Ambrose and Guirguis contained, as is standard in the insurance industry, provisions establishing annual deductible thresholds which must be reached before the insurer is obligated to make payments to the health care provider or to reimburse amounts paid by the insured. The "deductible" is that "portion of an insured loss to be borne by the insured before he is entitled to recovery from the insurer." Black's Law Dictionary 413 (6th ed. 1990). The policies also contain copayment provisions which allocate the risk between the insured and the insurer by establishing the percentage of medical charges for which each is responsible after the deductible is exhausted. The plaintiffs entered the insurance contracts as a result, in part, of mail-out marketing and advertising campaigns. Those documents, and other literature delivered with the policy and with correspondence about claims, are said to have misrepresented the truth about the amount of risk borne by the insured and insurer, respectively.

More particularly, the RICO claim charges that the defendants devised and effectuated a discounting scheme under which the respective risks borne by insured and [\[**4\]](#) insurer were different than represented in connection with the sale, purchase and performance of the insurance contract. As the plaintiffs put it:

Plaintiffs allege that the *defendants*, unknown to their customers, had *struck secret deals with preferred health care providers for discounts* generally based upon the annual volume of billings generated by Blue Cross customers and their beneficiaries under their contract documents. These *discounts would arise from the Deductible amounts paid and the copayments made but they would only be applied to the defendants' share of the bills, not the risk retained by the participant* and the bills paid by participants in its health plans.

(Amended Complaint, pp. 3-4) (emphasis added). The effect of these practices on the Ambrose class was somewhat different from the effect on the Guirguis Class.

The Ambrose Class consists of insureds whose contracts provided that the insurers "would pay, after a Deductible, 80% of certain covered medical charges with a copayment of 20% from the insureds." (Amended Complaint, p. 3). The insureds in the Ambrose Class incurred medical expenses in a given year that exceeded their deductible [\[**5\]](#)

and therefore they paid copayments according to the terms of their contracts. Because the negotiated discounts were undisclosed, the insured paid 20% of the providers' stated, undiscounted charge. The insurer then paid only the difference between what the insured had paid and the discounted charge. The net result of that practice was that the insured actually paid more than 20% of the amount owed to the health care provider after exhaustion of the deductible. Consequently, say the Ambrose Class plaintiffs, the advertisements and representations which the defendants made in connection with the sale of the policies and the performance of the policy obligations were fraudulent because they misrepresented the true share of the risk allocated in the copayment.

For example, let us assume that: (1) an insured, whose policy provides for a \$ 200 deductible and a 20%/80% copayment thereafter, undergoes a procedure after having satisfied the deductible; (2) the provider's stated charge for that procedure is \$ 1,000; (3) the insurer and the provider have negotiated a 40% discount for the procedure; and (4) the insured is informed in the statement from the insurer or the provider that the provider's [**6] charge is \$ 1,000, of which the insured is to pay 20%, or \$ 200, leaving the insurer to pay the remaining 80% due the provider. In actuality, however, because the provider charged only \$ 600 (the 40% negotiated discount being \$ 400), the insurer has paid only the remaining \$ 400 of the discounted [*1156] charge of \$ 600. In other words, the insurer has paid 66.67% of the actual charge when it had represented that it would pay 80%; and the insured has paid 33.33%, rather than 20% as was represented.

In general terms, the insured in the example paid 20% of a sum that was higher than the amount actually owed to the provider and, as a consequence, the insured paid more than 20% of the amount actually charged by the provider. The Ambrose Class plaintiffs contend that the representations made by the defendants as to the allocation of risk were therefore fraudulent.

The injury to plaintiffs in the Guirguis Class is somewhat more difficult to discern because their payments for medical treatment were within the deductible amount and thus they made no copayments.¹ [**8] The Guirguis Class plaintiffs allege that:

*the discounts arose from the total dollar volume of Blue Cross customer traffic [**7] at the participating providers and that the customers were given no adjustment to their bills corresponding to the discounts so that such customers were secretly charged an excessive amount for medical services and were injured by implicit price-fixing of medical service charges. The excessive charges occurred even though the Blue Cross' [sic] defendants' contracts documents with this subclass of individual customers did not provide for a copayment beyond a deductible amount, but provided instead that the insurer would pay 100% of charges beyond the annual deductible.*

(Amended Complaint, p. 6) (emphasis added).² In essence, members of the Guirguis Class complain that the price they paid for medical treatment was not discounted and that this resulted in an unnecessarily and artificially high price for medical services, payment of which benefited the insurer by permitting the insurer to negotiate other favorable discounts.

B. This Action and the State Investigation

On August 31, 1994, the Ambrose and Guirguis plaintiffs sought redress of these Practices by filing this action which the defendants moved to dismiss on September 21, 1994 and answered on October 3, 1994. At the time,

¹ In fact, Guirguis' policy did not provide for copayments at any level. "Among the choices of coverages which were offered to Dr. Guirguis, Guirguis chose that level of coverage which provided for Guirguis to pay the first \$ 10,000 of annual medical expenses for himself or for a covered dependent, with the contracting Blue Cross Defendant responsible for the balance of covered charges." (Amended Complaint, p. 3). It is unclear whether the Guirguis Class consists only of insureds with these types of contracts, or whether it includes insureds whose policies provide for copayments, at some level, but who incurred medical expenses that did not exceed the deductible threshold. For purposes of this motion, it is assumed that the Guirguis Class includes both types of insureds.

² The price-fixing alleged in this paragraph is asserted only as part of the fraud under the RICO claim, not as an antitrust claim.

Virginia's State Corporation Commission ("SCC") was concluding its investigation of the discounting practices and, on September 22, 1994, the SCC entered an Order Accepting Offer of Settlement. Under the terms of the settlement, Trigon agreed to pay a fine of \$ 5 million and to implement a Coinsurance Refund Program, pursuant to which it would refund the excessive copayments to Trigon policyholders and to members of its HMO affiliates, including HMO Virginia and Healthkeepers, and to their beneficiaries.

The order entered by the SCC followed a special market report prepared by the SCC's Bureau of Insurance which ensued an extensive study of the discounting practices as to which the plaintiffs now [**9] seek relief under RICO. That investigation was conducted pursuant to, and as a part of, a comprehensive state statutory and administrative scheme by which Virginia regulates all insurance business conducted in the Commonwealth. The report concluded that Trigon's discounting practices, including those of which Ambrose and Guirguis complain, violated several provisions of Virginia's insurance laws including the proscriptions against misrepresenting the terms of insurance Policies and against unfair claims settlement practices which are found in the Uniform Trade Practices chapter of Virginia's insurance code, Title 38.2.

[*1157] The original deadline for filing those refund claims was December 7, 1994, but it was extended to January 7, 1995. As of February 1, 1995, Trigon had approved and paid approximately 128,000 claims totaling \$ 21.9 million.³

[**10] Because of the settlement between the SCC and Trigon and the resulting Coinsurance Refund Program, the parties jointly requested that this action be stayed until March 15, 1995. The stay was entered by Order dated October 6, 1994. As directed in that Order, the plaintiffs filed the Amended Complaint on November 3, 1994 and, on February 1, 1995, the defendants filed their Answer and their Second Motion to Dismiss.

DISCUSSION

HN1 When considering a motion under *Fed. R. Civ. P. 12(b)(6)*, the court is required to presume that all factual allegations in the complaint are true and to accord the benefit of all reasonable inferences to the non-moving party. 2A Moore's Federal Practice P 12.07[2.5](2d ed. 1994). The allegations of the complaint are to be liberally construed and the motion should be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] 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).

A. The McCarran-Ferguson Act: An Historical Perspective

Because the McCarran-Ferguson Act is the focal point of this motion, it is helpful to place the [**11] Act in historical perspective. Beginning with the Supreme Court's decision in *Paul v. Virginia*, 75 U.S. 168, 19 L. Ed. 357 (1868), the courts took the position that "'issuing a policy of insurance is not a transaction of Commerce' . . . subject to federal regulation." *United States Dep't of Treasury v. Fabe*, 124 L. Ed. 2d 449, 113 S. Ct. 2202, 2207 (1993) (citing *Paul*, 75 U.S. at 183). Consequently, there existed "an accepted and longstanding understanding as a matter of federalism that *Commerce Clause* statutes as passed by Congress did not apply to the 'business of insurance' and that the states had primacy, indeed exclusivity, in the regulation of that business." *Davis, Preclusion of RICO Claims by the McCarran-Ferguson Act*, 14 RICO L. Rpt. 1093 (Dec. 1991).

"The emergence of an interconnected and interdependent national economy, however, prompted a more expansive jurisprudential image of interstate commerce." *Fabe*, 113 S. Ct. at 2207. The culmination of this jurisprudential evolution occurred in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944), in which the Supreme Court displaced the longstanding rule [**12] of law articulated in *Paul*, when it

³ The Treasurer of Virginia filed a claim on behalf of persons who were entitled to, but did not, file claims. The record does not reflect the resolution of this effort to have those funds escheat to the Commonwealth under state law.

held that "no commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance." *South-Eastern Underwriters, 322 U.S. at 553.*

The Supreme Court's decision in *South-Eastern Underwriters* "was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe, 113 S. Ct. at 2207.* In response to that decision, "Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation. It enacted the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters.*" *Fabe, 113 S. Ct. at 2207.*

The first section of the McCarran-Ferguson Act clearly states the Congressional purpose which prompted enactment of the statute:

HN2 [↑] Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by [**13] the several States.

[*1158] *15 U.S.C. § 1011.* As the Supreme Court later explained, "Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429, 90 L. Ed. 1342, 66 S. Ct. 1142 (1946).* Congress sought to achieve its purpose "by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Id. at 429-30.*

B. The Application of the McCarran-Ferguson Act in This Action

Bearing in mind the origins and purposes of the McCarran-Ferguson Act, it is important to focus now on the specific statutory provision at issue in this action, **HN3** [↑] *15 U.S.C. § 1012(b)* ("Section 2(b)"), which provides:

*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 [**14] 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. § 1012 (emphasis added and omitted). Section 2(b) contains two clauses, each of which serves a different purpose. In *Fabe*, the Supreme Court explained this distinction as follows:

As was stated in *Royal Drug*, the first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for "the business of insurance" from the federal antitrust laws.

Fabe, 113 S. Ct. at 2210.

This action does not present an antitrust claim and therefore the second clause of Section 2(b) is not implicated here. Rather, this action turns on the application of the first clause of Section 2(b). More particularly, the issue is whether the first clause of Section [**15] 2(b) of the McCarran-Ferguson Act precludes assertion of RICO claims founded on conduct which Virginia has sought to regulate in three sections of the Unfair Trade Practices chapter of her insurance code, specifically: *Va. Code §§ 8.2-502*, 503 and 510A.

"The starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." [Fabe, 113 S. Ct. at 2207-08](#) (quoting [Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 210, 59 L. Ed. 2d 261, 99 S. Ct. 1067 \(1979\)](#)). According to the Supreme Court, [HN4](#)⁴ Section 2(b)'s language necessitates three inquiries: (1) does the federal statute at issue "specifically relate to the business of insurance;" (2) was the state statute at issue "enacted for the purpose of regulating the business of insurance;" and (3) would application of the federal statute "invalidate, impair or supersede" the state statute. [Fabe, 113 S. Ct. at 2208](#).⁴ The court now addresses each of these inquiries.

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[*1159] 1. RICO Does Not Specifically Relate to the Business of Insurance

The parties agree that RICO does not specifically relate to the business of insurance. Accordingly, there is no further analysis to be made respecting this facet of the test.

2. Virginia's Unfair Trade Practices Act is a Law "Enacted . . . for the Purpose of Regulating the Business of Insurance" within the Meaning of Section 2(b) of the McCarran-Ferguson Act

(a) The Requisite Analysis

The Supreme Court has had only two occasions to examine the meaning of the statutory language "any law enacted by any State for the purpose of regulating the business of insurance" in Section 2(b) of the McCarran-Ferguson Act. The Court first addressed this statutory language in [Securities & Exchange Commission v. National Securities, Inc., 393 U.S. 453, 21 L. Ed. 2d 668, 89 S. Ct. 564 \(1969\)](#), where it held:

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement -- these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their [\[*17\]](#) status as reliable insurers that they too must be placed in the same class. But *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. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."*

Id. at 460 (emphasis added).

Almost a quarter of a century later, the Court addressed the first clause of Section 2(b) for the second time in [United States Dep't of Treasury v. Fabe, 124 L. Ed. 2d 449, 113 S. Ct. 2202 \(1993\)](#). The issue there was whether an "Ohio law designating the priority of creditors' claims in insurance-liquidation proceedings," [Fabe, 113 S. Ct. at 2205](#), "is one 'enacted by the State for the purpose of regulating the business of insurance.'" [Id. at 2209](#). The petitioner in *Fabe* minimized the significance of the decision in *National Securities*, instead asserting that the more recent Supreme Court decisions in [Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 \(1979\)](#) and [Union Labor Life Ins. Co. v. Pireno, \[**18\] 458 U.S. 119, 73 L. Ed. 2d 647, 102 S. Ct. 3002](#)

⁴ Other courts have employed a four-part test to determine whether the McCarran-Ferguson Act precludes application of a federal statute. Under that approach, the inquiry is whether: (1) the federal statute relates specifically to the business of insurance; (2) the acts challenged under that statute constitute the business of insurance; (3) the state has enacted a law regulating the challenged acts; and (4) the state law would be invalidated, impaired or superseded by application of the federal statute. See [Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., Inc., 50 F.3d 1486, 1489 \(9th Cir. 1995\)](#); [Cochran v. Paco, Inc., 606 F.2d 460, 464 \(5th Cir. 1979\)](#); [Everson v. Blue Cross & Blue Shield of Ohio, No. 93cv7534, 1994 WL 6752000, at *10 \(N.D. Ohio June 15, 1994\)](#); [Forsyth v. Humana, Inc., 827 F. Supp. 1498, 1520 \(D. Nev. 1993\)](#); [First Nat'l Bank of Pa. v. Sedgwick James of Minnesota, Inc., 792 F. Supp. 409, 417 \(W.D. Pa. 1992\)](#); [Senich v. Transamerica Premier Ins. Co., 766 F. Supp. 339, 340-41 \(W.D. Pa. 1990\)](#). However, because the United States Court of Appeals for the Fourth Circuit has never adopted this four-part test, and because the Supreme Court did not subscribe to it in *Fabe*, the analytical framework to be used here will be the one used by the Supreme Court in *Fabe*. See *infra* note 5.

[\(1982\)](#) provided the criteria against which the "business of insurance" must be judged. [*Fabe, 113 S. Ct. at 2208.*](#) [HN5](#) Those criteria are as follows:

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.

[*Pireno, 458 U.S. at 129.*](#) As the Court explained in *Pireno*, all three factors must be considered together because "none of these criteria is necessarily determinative in itself." *Id.*

The petitioner in *Fabe* contended that the Ohio priority statute was not "enacted . . . for the purpose of regulating the business of insurance" because it addressed only the relationship between policyholders and other creditors of the insurance company and satisfied none of the *Pireno* criteria because a law fixing the priority of claims in a bankruptcy proceeding did not transfer risk, was not an integral part of the policy relationship, and was not limited to the insurance [\[**19\]](#) industry. [*Fabe, 113 S. Ct. at 2208-09.*](#) Rejecting that argument, the Court held that the Ohio priority statute was a law "enacted . . . for the purpose of regulating the business of insurance," [*Fabe, 113 S. Ct. at 2210,*](#) to the extent that it was designed to protect the interests of insured in their contractual relationship with their insurers. [*Id. at 2212.*](#) In so doing, the Court distinguished [\[*1160\] Royal Drug](#) and *Pireno* on the basis that they "involved the scope of the antitrust immunity located in the second clause of § 2(b). We deal here with the *first* clause, which is not so narrowly circumscribed." [*Fabe, 113 S. Ct. at 2209.*](#) The Court explained the difference between the two clauses of Section 2(b) as follows:

[HN6](#) The language of § 2(b) is unambiguous: the first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioner urges us to do, would be to read words out of the [\[**20\]](#) statute. This we refuse to do.

[*Fabe, 113 S. Ct. at 2209-10.*](#) Then, the Court articulated the standard by which to interpret the phrase "enacted . . . for the purpose of regulating the business of insurance" in the first clause of Section 2(b).

[HN7](#) The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention or aim" of adjusting, managing, or controlling the business of insurance. Black's Law Dictionary 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the "business of insurance."

[*Fabe, 113 S. Ct. at 2210*](#) (emphasis added).

Decisions of lower courts after *Fabe* have evinced some uncertainty whether the *Pireno* test is entirely inapplicable to the analysis required under the first clause of Section 2(b) or whether that analysis must still be applied, albeit more broadly than in *Pireno* and *Royal Drug*. Compare [*Colonial Life & Accident Ins. Co. v. American Family Life Assurance Co. of Columbus, 846 F. Supp. 454, 459 \(D.S.C. 1994\)*](#) (*Pireno* criteria are not controlling where only the first clause of Section 2(b) is at issue) [\[**21\]](#) with [*Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., Inc., 50 F.3d 1486, 1490 n.2 \(9th Cir. 1995\)*](#) (*Fabe* held that the business of insurance is to be defined more broadly outside the antitrust area, but that the distinction "is a matter of degree, however, rather than a wholesale change in the inquiry"). This uncertainty apparently stems from the fact that, in *Fabe*, the Court distinguished *Royal Drug* and *Pireno* on the basis that they involved the second clause of Section 2(b) as opposed to the first, while at the same time the Court concluded that [HN8](#) "the actual performance of an insurance contract falls within the 'business of insurance,' as we understood that phrase in *Pireno* and *Royal Drug*." *Fabe, 113 S. Ct. at 2009.*

These two facets of the *Fabe* decision can be reconciled by looking at the basis on which the Court distinguished between the first and second clauses of Section 2(b). The *Fabe* majority recognized that the exemption provided in the first clause includes language that is "significantly missing from the second clause." *Fabe, 113 S. Ct. at 2210 n. 6*. The presence of the word "purpose" in the first clause reflects Congress' [**22] intention to grant "the states broad regulatory authority over the business of insurance." *Id. at 2210*. In contrast, the second clause omits the word "purpose" and, in so doing, carved out "only a narrow exemption for the 'business of insurance' from the federal antitrust laws." *Id. at 2210*.

Although the *Pireno* analysis was developed in cases addressing the second clause of Section 2(b), it is relevant to the first clause for the limited purpose of defining the business of insurance. However, *HN9*[ under the first clause, a state law controls so long as its *purpose*, that is, its "end, intention, or aim," is "adjusting, managing, or controlling the business of insurance." *Fabe, 113 S. Ct. at 2210*. "This category necessarily encompasses more than just the 'business of insurance.'" *Id.* Under the second clause, the state law is exempt from the antitrust laws to the extent that the practice regulated is itself the business of insurance. Thus, to the extent that *Pireno* and *Royal Drug* consider whether the *practice* being regulated is itself the business of insurance, their analysis is inapplicable in a [*1161] case controlled by the broader first clause of Section 2(b). [**23]⁵

[**24]

(b) Application of the Requisite Analysis

The calculus required by *Fabe* necessitates examination of the applicable state statute to determine whether it was enacted for the purpose of regulating the business of insurance. Thus, it is necessary now to review the pertinent sections of Title 38.2 of the Virginia Code, the 53 chapter statute by which Virginia regulates the business of insurance within its borders.

HN10[

The statute establishes rules and procedures to be followed in the issuance and performance of insurance policies. Chapter 5 of Virginia's insurance code is entitled "Unfair Trade Practices." Its stated purpose is to "regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act . . . by defining and prohibiting all practices in this Commonwealth that constitute unfair methods of compensation or unfair or deceptive acts or practices." *Va. Code § 38.2-500*. To that end, *Va. Code § 38.2-502* prohibits misrepresentation of the "benefits, advantages, conditions or terms of any insurance policy." That provision is supplemented by *§ 38.2-503* which prohibits any "advertisement, announcement [**25] or statement containing any assertion, representation or statement relating to (i) the business of insurance . . . which is untrue, deceptive or misleading."

HN11[

Section 38.2-510 is entitled "Unfair claim settlement practices." Subsection 510A.1 prohibits "misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue." Subsection A.4 prohibits arbitrary refusal to pay claims. Subsection A.6 prohibits "not attempting in good faith" to make prompt, fair and equitable settlements of a claim. Subsection A.8 prohibits "attempting to settle claims for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application."

⁵ Some post-*Fabe* decisions considering the first clause of Section 2(b) have continued to analyze whether the *practice* that is the subject of the federal law constitutes the "business of insurance." See *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., Inc.*, 50 F.3d 1486 (9th Cir. 1995); *Everson v. Blue Cross & Blue Shield of Ohio*, 1994 WL 675200 (N.D. Ohio, June 15, 1994). This seems somewhat at odds with the standard clearly articulated in *Fabe*, which requires a court to focus on the *purpose* of the state statute at issue. *Fabe, 113 S. Ct. at 2210*. The courts which have followed that approach have used the four-part test developed before *Fabe* to determine whether the McCarran-Ferguson Act precludes application of a federal statute. See *supra* note 4. The second prong of that test requires the court to ask whether the *practices* challenged under the federal statute themselves constitute the business of insurance. However, *Fabe* seems to require a broader analysis where the first clause of Section 2(b) is at issue because the Court expressly held that the category of laws enacted "for the purpose of regulating the business of insurance . . . necessarily encompasses more than just the business of insurance." *Fabe, 113 S. Ct. at 2210*. It is for this reason that here the court adheres to the analysis articulated in *Fabe*.

The SCC report charged Trigon with violations of those sections and with violations of § 38.2-316.B which prohibits the use of applications, riders and certificates of insurance unless the forms thereof previously have been filed with the SCC. All of those violations are punishable under § 38.2-218 (\$ 5,000 per knowing violation; \$ 1,000 per inadvertent violation) and are made subject to the SCC's vast adjudicative and injunctive [**26] powers by virtue of §§ 38.2-219 and 220.

The provisions of Chapter 5 which Trigon is alleged to have offended do not give rise to a private cause of action. *A&E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 674 (4th Cir. 1986); cert. denied, 479 U.S. 1091, 94 L. Ed. 2d 158, 107 S. Ct. 1302 (1987). However, [HN12](#)[[↑]] the penalty provisions of Title 38.2 are not exclusive; and, therefore, they are "in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose civil penalties for violation of the laws" of Virginia. [Va. Code § 38.2-221](#).

Under *Fabe*, [Va. Code §§ 38.2-502](#), 503 and 510A, and the related enforcement provisions in [Va. Code §§ 38.2-218-220](#), are laws "enacted . . . for the purpose of regulating the business of insurance" if they "possess the 'end, intention, or aim' of adjusting, managing [[*1162](#)] or controlling the business of insurance." [Fabe](#), 113 S. Ct. at 2210 (citation omitted).

First, the provisions at issue are part of a statute - Chapter 5 - the clearly articulated purpose of which is "to regulate trade practices in the business of insurance." [Va. Code § 38.2-500](#). The stated purpose, of course, is not [**27] controlling. It is persuasive, however, for it indicates a legislative intention that the remaining sections of the chapter should serve that purpose.

Second, it is also persuasive that Chapter 5 of Virginia's insurance code is enforceable only by the Commissioner of Insurance and does not create a private cause of action. [A&E Supply Co., 798 F.2d at 674. This points emphatically to the construction of Chapter 5 as a law enacted for no purpose other than regulating the business of insurance.](#)

Third, [HN13](#)[[↑]] the plain meaning of [Va. Code §§ 38.2-502](#), 503 and 510 shows that the "primary purpose," [Fabe](#), 113 S. Ct. at 2210, of these sections is to regulate the performance of insurance contracts by assuring conformity between representations made by the insurer to the insured and the actual performance of the insurance policies, and between basic principles of fair practices and the actual performance of the policies. In other words, each statute "is designed," [id. at 2209](#), to regulate the representations made to form, and the practices which comprise, the relationship between insurer and insured and the performance of the insurance contract which is the foundation of that relationship. [**28]

Under *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969), [HN14](#)[[↑]] laws aimed at "protecting or regulating" the relationship between insurer and insured satisfy the language of the first clause of Section 2(b). [Id. at 460](#). It is clear that those provisions of Virginia's insurance code that prohibit an insurer from misrepresenting the terms of a policy and require adherence to fundamental fair business practices when soliciting and performing the insurance contract are aimed at regulating the relationship between the insurer and insured and protecting the insured in that relationship.⁶ It is equally clear that state laws, the purpose of which is to regulate the marketing and performance of insurance policies by prohibiting fraudulent representations and certain unfair trade practices, are laws "enacted . . . for the purpose of regulating the business of insurance" as defined in *Fabe*. [HN15](#)[[↑]] The marketing and performance of insurance policies undoubtedly falls within the "business of insurance" as that phrase was understood in *Pireno* and *Royal Drug*. How the terms of a policy are represented, and how they are ultimately [**29] performed, affects the spreading of risk, is integral to the policy relationship between insurer and insured, and is unique to the insurance industry. Furthermore, because the Supreme Court expressly held in *Fabe* that "the actual performance of an insurance contract falls within the 'business of insurance,'" it would defy all reason to hold that statutes aimed at ensuring that such performance is fair and conforms to the represented terms of the policy are not laws "enacted . . . for the purpose of regulating the business of insurance."

⁶ In fact, *National Securities* expressly states that "the selling and advertising of policies" constitutes the business of insurance. [National Securities](#), 393 U.S. at 460.

Construing a similar statute, the district court in *Colonial Life & Accident Ins. Co. v. American Family Life Assurance Co. of Columbus*, 846 F. Supp. 454 (D.S.C. 1994), reached the conclusion that HN16[↑] "a state law enacted for the purpose of preventing false advertising by insurance companies is [**30] a law enacted 'for the purpose of regulating the business of insurance.'" *Id. at 458*. Applying *Fabe*, the court held that "state laws regulating advertising are encompassed within the scope of the first clause of Section 2(b) since advertising clearly appears to the Court to affect the relationship between the insurer and insured." *Id. at 460*. That conclusion applies with equal force in this action because the alleged misrepresentations here were made both in actual correspondence concerning the policy and in advertising.

[*1163] Consideration of these Virginia statutes in perspective of the instructions given by *National Securities* and *Fabe* makes manifest that they were enacted by Virginia for the purpose of regulating the business of insurance. These statutes, by their terms, are aimed at protecting and regulating the relationship between insurer and insured. They, together with § 38.2-316B, go directly to control the type of policy issued, as well as to the reliability, interpretation and enforcement of the insurance contract. And, they focus on requiring that performance of the insurance contract be consistent with the representations that induced the relationship. [**31] Therefore, in the most fundamental ways, these sections and the related enforcement mechanisms "possess the 'end, intention or aim' of adjusting, managing or controlling the business of insurance." *Fabe*, 113 S. Ct. at 2210 (citation omitted). Hence, those state laws fall within the reach of the first clause of Section 2(b).⁷

(c) The Decisions in *Tri-State* and *Custer*

At oral argument on the motion to dismiss, the court asked the parties to file supplemental briefs respecting the impact on the McCarran-Ferguson analysis of the decisions of the United States [**32] Court of Appeals for the Fourth Circuit in *Tri-State Mach. Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309 (4th Cir. 1994), cert. denied, 130 L. Ed. 2d 1128, 115 S. Ct. 1175 (1995) and *Custer v. Pan Am Life Ins. Co.*, 12 F.3d 410 (4th Cir. 1993). The plaintiffs responded by arguing that, in those decisions, the Fourth Circuit already has held that state statutes such as the one at issue in this action are not statutes "enacted . . . for the purpose of regulating the business of insurance." The defendants assert that those decisions are not controlling because they involved ERISA, not RICO, and practices not at issue here.

Upon reflection, it seems clear that *Tri-State* and *Custer*, which involved the scope of the Savings Clause of ERISA, do not alter the McCarran-Ferguson analysis dictated by *National Securities* and *Fabe*. ERISA's Savings Clause, which is an exception to the otherwise broad preemptive effect of ERISA, provides in pertinent part that HN17[↑] "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance." 29 U.S.C. § 1144(b)(2)(A) (emphasis added). As the Fourth Circuit explained [**33] in *Tri-State*, HN18[↑] "the term 'business of insurance' as used in the McCarran-Ferguson Act has been adopted as the basis for defining the scope of the Savings Clause of ERISA." *Tri-State*, 33 F.3d at 314; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-49, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-43, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985).

In *Tri-State*, the Fourth Circuit held that, at least as to the practices there involved (abusive claims processing), the West Virginia Unfair Trade Practices Act did not regulate the "business of insurance;" and, therefore, was not saved from preemption by ERISA's Savings Clause. *Tri-State*, 33 F.3d at 314-15; see *Custer*, 12 F.3d at 419-20. The West Virginia Unfair Trade Practices Act is, in most substantive respects, the same statute as Chapter 5 (Unfair Trade Practices Act) of Virginia's insurance code. Consequently, say the plaintiffs, *Tri-State* and *Custer* require a

⁷ The same result would obtain upon application of the second facet of the four-part test applied in *Merchants Home Delivery* and *Everson* because the practice at issue in this action is the business of insurance and is not an "auxiliary activity" that does not affect performance of the insurance contract or enforcement of contractual obligations." *Fabe*, 113 S. Ct. at 2209 (quoting *Pireno*, 458 U.S. at 134 n. 8.).

holding that Chapter 5 of Title 38.2, Virginia's version of the same statute, was not "enacted . . . for the purpose of regulating the business of insurance."

The plaintiff's argument erroneously [**34] equates the phrase "business of insurance," which appears in the second clause of Section 2(b) of the McCarran-Ferguson Act and which the Fourth Circuit interpreted in *Tri-State* and *Custer*, with the language "enacted . . . for the purpose of regulating the business of insurance" which is in the first clause of Section 2(b) and which was not before the Fourth Circuit, but which is dispositive here. This is significant because, under *Fabe*, the [*1164] "broad category of laws enacted 'for the purpose of regulating the business of insurance' . . . necessarily encompasses more than just the 'business of insurance.'" [*Fabe, 113 S. Ct. at 2210.*](#)

When courts have applied the term "business of insurance" in the McCarran-Ferguson Act as the basis for defining the scope of ERISA's Savings Clause, they have used the three part test for the business of insurance that was articulated in *Pireno* and *Royal Drug*. See [*Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48-49, 95 L. Ed. 2d 39, 107 S. Ct. 1549 \(1987\); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743, 85 L. Ed. 2d 728, 105 S. Ct. 2380 \(1985\).*](#) However, the three part test developed in *Pireno* and *Royal Drug*, [**35] and consequently applied to ERISA's Savings Clause in *Metropolitan Life* and *Pilot Life*, "involved the scope of the antitrust immunity located in the second clause of § 2(b)." [*Fabe, 113 S. Ct. at 2209.*](#) Simply put, the *Pireno* test defines only the "business of insurance," which, by definition, is not as broad as the scope of the language at issue here ("laws enacted by any State for the purpose of regulating the business of insurance.") Therefore, the Fourth Circuit's decisions in *Tri-State* and *Pireno* to the effect that the West Virginia Unfair Trade Practice Act does not constitute the "business of insurance" do not require a decision in this action that the sections of Virginia's Unfair Trade Practices Act at issue here were not "enacted . . . for the purpose of regulating the business of insurance."

At first glance, it may seem peculiar that the phrase "regulates insurance," as used in ERISA's Savings Clause is different in scope from the phrase "enacted . . . for the purpose of regulating the business of insurance," as used in the first clause of Section 2(b) of the McCarran-Ferguson Act. For several reasons, however, the distinction is both logical [**36] and necessary. First, the first clause of Section 2(b) contains the word "purpose" which is missing from ERISA's Savings Clause. As the Supreme Court held in *Fabe*, inclusion of this word effectuates a broader scope than where that word is omitted and the reference is only to the "business of insurance" itself. [*Fabe, 113 S. Ct. at 2210.*](#)

Second, the distinction is entirely consistent with the purpose of the McCarran-Ferguson Act through which Congress intended to remove "obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Fabe* 133 S. Ct. at 2207 (quoting [*Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30, 90 L. Ed. 1342, 66 S. Ct. 1142 \(1946\)*](#)) (emphasis added). The first clause of Section 2(b), therefore, imposes "what is, in effect, a clear-statement rule, a rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." [*Fabe, 113 S. Ct. at 2211.*](#) Accordingly, [*HN19*](#) under the first clause of Section 2(b) states [**37] have the broadest power to regulate the business of insurance where neither the McCarran-Ferguson Act nor another federal statute specifically provides that its power should be less extensive.

The *Pireno* test for the "business of insurance" developed in the context of the antitrust exemption contained in the second clause of Section 2(b). There Congress intended to carve out an exemption from federal **antitrust law** that was more "narrow" than the exemption described in the first clause of Section 2(b). [*Fabe, 113 S. Ct. at 2210.*](#) Congress therefore used language less broad than it used in the first clause.

For the reasons set forth above, the court concludes that those provisions of Chapter 5 of Title 38.2 that are at issue in this case are laws "enacted . . . for the purpose of regulating the business of insurance," and that the Fourth Circuit's decisions in *Tri-State* and *Custer* do not require a different result.

3. Whether the State Law Would be Superseded, Impaired or Invalidated by the Application of RICO

Even if a state law was enacted for the purpose of regulating the business of insurance and the federal law at issue does not specifically relate [**38] to the business of insurance, [*1165] the McCarran-Ferguson Act will operate to bar application of the federal law only where its application would "invalidate, impair, or supersede" the state law.

The provisions of Chapter 5 of Title 38.2 that apply to the defendants' conduct in this case, and that this court has already held were "enacted . . . for the purpose of regulating the business of insurance," are directed to the prohibition, remediation and punishment of acts such as those on which the plaintiffs fasten their RICO claim. These provisions can be enforced only by the SCC because Chapter 5 does not create a private cause of action.⁸ The issue is whether application of RICO would "invalidate, impair or supersede" Chapter 5 of Title 38.2. [HN20](#)

The words "invalidate, impair and supersede" are not defined in the McCarran-Ferguson Act. Like all statutory terms, those three words must be given their ordinary meaning unless another meaning is dictated by the context in which they are used or by statutory definition. See [Asgrow Seed Co. v. Winterboer, 130 L. Ed. 2d 682, 115 S. Ct. 788, 793 \(1995\)](#); [Federal Deposit Ins. Corp. v. Meyer, 114 S. Ct. 996, 1001 \(1994\)](#); [Watt v. Alaska, 451 U.S. 259, 265-66, 68 L. Ed. 2d 80, 101 S. Ct. 1673 \(1981\)](#).

"Invalidate" means to "weaken or make valueless" or to discredit. It is a synonym for nullify. Webster's Third New International Dictionary 1188 (1986). "Impair" means to "make [**40] worse . . . diminish in quantity, value, excellence or strength . . . do harm to." *Id. at 1131*. "Supersede" means to "make obsolete, inferior, or outmoded . . . to make void . . . to make superfluous or unnecessary." [Id. at 2295](#).

RICO, which authorizes private causes of action, treble damages and attorneys fees is a powerful weapon in the arsenal of any litigant. Application of RICO to afford redress for violations of Chapter 5, would invalidate and impair the regulation sought to be accomplished by Chapter 5 and the enforcement mechanisms of [Va. Code §§ 38.2-218-220](#). Most aggrieved insureds would opt for the prospect of treble damages rather than participate in remedial measures structured by the SCC. This would make insurers less willing to agree with the SCC to settle disputes over alleged violations for fear of compromising their positions in pending or threatened RICO litigation. The ability to act promptly and to secure for insureds settlements is central to the state's ability to protect insureds and to regulate the insured-insurer relationship. The prospect of treble damages and attorneys fees would weaken, diminish and do serious injury to, if not nullify, the sections [**41] of Chapter 5, and the enforcement mechanisms which protect and regulate that relationship.

Application of RICO would also supersede the state laws at issue. Because RICO provides for a private cause of action and treble damages, and because these provisions of RICO differ dramatically from the way in which Virginia's insurance code addresses the same conduct, RICO would in effect replace Chapter 5 as the principal means by which to remedy such conduct. It would convert a system of public redress into a system of private redress. The forum for redress would shift from the SCC to the federal courts. The result of these effects would be that RICO would supersede Virginia's laws.

Driven by concerns such as these, several district courts confronted with similar facts have held that [HN21](#) application of civil RICO "invalidate[s], impair[s], or supersede[s]" state laws "enacted . . . for the purpose of regulating the business of insurance" when the state laws did not provide for private causes of action, treble damages, costs, or attorneys [*1166] fees, all of which are available under RICO. See [Wexco Inc. v. IMC, Inc., 820 F. Supp. 194, 202-04 \(M.D. Pa. 1993\)](#); [Everson v. Blue Cross & Blue](#) [**42] *Shield of Ohio*, No. 93cv7534, 1994 WL 675200, at *12 (N.D. Ohio June 15, 1994); [LeDuc v. Kentucky Central Life Ins. Co., 814 F. Supp. 820, 829 \(N.D. Cal. 1992\)](#); [Forsyth v. Humana, 827 F. Supp. 1498, 1521-22 \(D. Nev. 1993\)](#).

⁸The SCC has acted under these, and other, provisions of the state insurance law to stop the discounting practices, to impose a \$ 5 million civil penalty and to secure the insurers' agreement to a consent order by which they are required to implement, under the supervision of the SCC, a comprehensive refund program which has produced more than 128,000 refunds amounting to a total payment of \$ 21.9 million. Those punitive and corrective measures were the product of a comprehensive investigation which considered the offending practices, the interests of the insurers, the need for remedial action, the need for punishment and the public interest. With those factors in mind, the SCC effectuated the remedial program and imposed the punishment it thought best satisfied all interests.

However, several recent decisions by courts of appeals outside of the Fourth Circuit have held that [HN22](#)[↑] federal statutes do not "invalidate, impair or supersede" state statutes by permitting private causes of action not available under the state law or by allowing remedies not available under the state law. See [*Nationwide Mut. Insurance Co. v. Cisneros*, 52 F.3d 1351, 1363 \(6th Cir. 1995\)](#); [*Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., Inc.*, 50 F.3d 1486, 1491-92 \(9th Cir. 1995\)](#); [*National Association for the Advancement of Colored People v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 \(7th Cir. 1992\)](#), cert. denied, 124 L. Ed. 2d 247, 113 S. Ct. 2335 (1993).⁹ Of these decisions, only *Merchants Home Delivery* involved application of the RICO statute.

[**43] In *Merchants Home Delivery*, the Ninth Circuit held that [HN23](#)[↑] "the application of a federal statute prohibiting acts which are also prohibited under a state's insurance laws does not 'invalidate, impair or supersede' the state's laws under § 2(b) of the McCarran-Ferguson Act." [*Merchants Home Delivery*, 50 F.3d at 1492](#). Significantly, however, the Ninth Circuit framed the issue as whether "the term 'impair' is intended to be a very broad proscription against applying federal law where a state has regulated, or chosen not to regulate, in the insurance industry. *Id. at 1491* (emphasis omitted). The court held that [HN24](#)[↑] "the language of § 2(b) is inconsistent with a congressional intent to allow states to preempt the field of insurance regulation." *Id. at 1492*. The defendants in this case do not make the argument that the Ninth Circuit considered and rejected. Rather, they argue that the specific federal statute at issue in this case, civil RICO, would have the effect of impairing and superseding specific state laws regulating the business of insurance. To that extent, *Merchants Home Delivery* is distinguishable.

The decisions of the Sixth and Seventh Circuits in [Nationwide](#) [**44] and [*American Family*](#), respectively, also reached the broad holding that federal civil rights laws that prohibit the same conduct as state insurance laws cannot be said to "invalidate, impair or supersede" the state laws, even if they differ in the remedies and enforcement mechanisms that they make available. [*Nationwide*, 52 F.3d at 1363](#); [*American Family*, 978 F.2d at 295-97](#). However, those decisions did not consider the application of RICO. They involved the application of the federal Fair Housing Act, [42 U.S.C. §§ 3601-19](#). Because the remedies available under RICO are among the most severe ever enacted in a federal civil statute, and because RICO is uniquely applicable to a broad range of activities, these decisions addressing a wholly different federal law are not controlling here.

To the extent that the decisions of the Sixth, Seventh and Ninth Circuits must be read to hold that any federal statute which proscribes the same conduct as a state statute will never "invalidate, impair or supersede" the state statute, those holdings would be both overly broad and inconsistent with the plain meaning of the language of Section 2(b). First, the inquiry that the McCarran-Ferguson [**45] Act requires, whether federal law "invalidate[s], impair[s], or supersede[s]" state law, does not lend itself to a blanket rule that certain types of inconsistencies can never satisfy that language. Rather, the language of Section 2(b) requires that a court look at the actual effect of the federal law on the specific state law. In this case, the court is persuaded that allowing claims under RICO will greatly impair the SCC's ability to enforce Virginia's insurance code and, specifically, to secure from insurers settlements that are in the interest of all insureds and in the public interest as well. The court also finds the disparity between the cause of action [*1167] and remedy permitted by RICO and the enforcement mechanism and remedy permitted by Virginia's insurance code to be so great that the federal law would in fact supersede the state law. To ignore these conclusions in favor of a bright line rule that no federal law can "invalidate, impair, or supersede" a state law so long as they prohibit the same acts is contrary to the purposes of the McCarran-Ferguson Act as well as to its plain language.

Second, the premise that federal and state laws that prohibit the same conduct "but [**46] differ in penalty do not conflict with or displace each other," [*American Family*, 978 F.2d at 297](#), seems to be based on a very narrow reading of the purpose and function of the state laws at issue. Virtually any state statute includes more than a simple proscription of conduct. It includes the appropriate penalty for that conduct and the appropriate mechanism for enforcing the proscription. A state law that prohibits an act, punishes it with a specific range of fines, makes it the subject of remedial action, and vests enforcement in a state quasi-judicial entity cannot be said to be consistent

⁹ The court also recognizes that some of the district courts whose decisions are cited above might be required to reach different results in light of the decisions issued by their respective courts of appeals.

with a federal law that prohibits the same act, permits treble damages, fees, and costs, and expressly creates a personal cause of action. If *Nationwide*, *Merchants Home Delivery* and *American Family* are construed to hold otherwise, their lead cannot be followed here.

Moreover, all three decisions proceed upon a common, but flawed, analytical model by assessing the "invalidate, impair or supersede" facet of the McCarran-Ferguson analysis as an issue of "inverse preemption." *Nationwide*, 52 F.3d at 1363; *Merchants Home Delivery*, 50 F.3d at 1492; *American Family*, 978 F.2d at **471 296. As a result, all three decisions assess the effect of Section 2(b) of the McCarran-Ferguson Act through the prism of jurisprudence developed to determine when, under the *Supremacy Clause*, a federal statute preempts state law. This accounts for the fact that *American Family*, *Nationwide* and *Merchants Home Delivery* interpreted the McCarran-Ferguson Act to require a showing of direct conflict between the state and federal law to preclude application of the state law and then augmented that determination by concluding that state and federal law could co-exist even though the federal law provided a cause of action not provided under state law and remedies greater than those provided by state law. *Nationwide*, 52 F.3d at 1363, *Merchants Home Delivery*, 50 F.3d at 1492; *American Family*, 978 F.2d at 295-97.

HN25[] Preemption is the doctrine by which courts enforce Article VI of the Constitution which provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI. Preemption occurs when Congress explicitly so provides or when the intent to preempt [**48] is implied by the structure and purpose of a federal statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). More particularly:

In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law [citations omitted] or if federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." [citations omitted].

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992). Thus, **HN26**[] the concept of preemption (whether "direct" or "inverse") requires a determination whether there exists a direct conflict between federal and state law or whether state and federal law can co-exist.

The McCarran-Ferguson Act does not admit of such an analysis even though in it Congress declared the primacy of state law in the regulation of the business of insurance. This is because the McCarran-Ferguson Act does not turn on status, i.e., supremacy of a body of law, but on the effect of the law, i.e., whether an act of Congress "invalidates, impairs or supersedes" [**49] certain kinds of state law.

Forcing the McCarran-Ferguson Act analysis into the preemption model distorts the analysis required by the statutory test fixed by the McCarran-Ferguson Act. Although direct conflict and co-existence - as used in the jurisprudence of federal preemption - no [***1168**] doubt have a bearing on whether a federal law invalidates, impairs or supersedes a state law, the analytical model required by preemption does not always provide a proper basis for applying the McCarran-Ferguson standard. As explained above, that certainly is the case here. For this additional reason then, the court concludes that *Nationwide*, *Merchants Home Delivery* and *American Family* cannot control the McCarran-Ferguson analysis here.

Finally, two of those decisions find support in *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984) where the Fourth Circuit held that "the presence of a general regulatory scheme does not show that any particular state law would be invalidated, impaired or superseded by the application of the Fair Housing Act or the Civil Rights Acts." *Id. at 421*. Some decisions have cited to *Mackey* as support for the proposition that the availability of [**50] a private cause of action and additional remedies under federal law does not make that law inconsistent with state law. See *Nationwide*, 52 F.3d at 1363; *American Family*, 978 F.2d at 296.

The Fourth Circuit's decision in *Mackey* did not go so far as the Sixth and Seventh Circuits suggest. What the Fourth Circuit held was that **HN27**[] the existence of a comprehensive regulatory scheme was not, in and of itself, sufficient to show that application of a federal law would "invalidate, impair or supersede" any particular state law. The Fourth Circuit did not hold that only a direct conflict between the prohibitions of federal and state law would trigger the McCarran-Ferguson Act. In fact, the McCarran-Ferguson Act argument failed because "we are not pointed to any law enacted by North Carolina which would be 'impaired' by application of the Fair Housing Act or

the Civil Rights Acts." *Mackey, 724 F.2d at 421* (emphasis added). The Fourth Circuit therefore concluded that "in these circumstances, barring these claims is unnecessary to the effectuation of the congressional goals in enacting McCarran-Ferguson, insuring that states retain the power to regulate the business of insurance." **[**51]** *Id.*

In this action, the record demonstrates how application of RICO would impair and supersede the SCC's ability to enforce several specific provisions of Virginia's insurance code. The fact that the same conduct which the state attempted to prohibit would be the basis of a RICO claim does not insure "that states retain the power to regulate the business of insurance." *Id.* Therefore, the court concludes that the decision in *Mackey* does alter the determination that application of RICO would impair and supersede state laws "enacted . . . for the purpose of regulating the business of insurance."

CONCLUSION

For the foregoing reasons, the plaintiffs' RICO claims are precluded as a matter of federal law and the defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) will be granted. With the dismissal of the RICO claim and the previous dismissal of the ERISA claims (Counts One and Two), this court lacks original jurisdiction over the remaining claims and, under 28 U.S.C. § 1337(c)(3), the court declines to exercise jurisdiction over the state law claims. Accordingly, Count Three is dismissed with prejudice and Count Four is dismissed without prejudice. Count Five, **[**52]** to the extent that it seeks relief flowing from Count Three, is dismissed with prejudice. To the extent that Count Five seeks relief on the basis of the state law claims, Count Five is dismissed without prejudice.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

Robert E. Payne

United States District Judge

Richmond, Virginia

Date: 6/27/95

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In re Aluminum Phosphide Antitrust Litig.

United States District Court for the District of Kansas

June 27, 1995, Decided ; July 5, 1995, FILED, ENTERED

CIVIL ACTIONS MASTER FILE NO. 93-2452-KHV AND RELATED CASES

Reporter

893 F. Supp. 1497 *; 1995 U.S. Dist. LEXIS 11026 **; 1995-2 Trade Cas. (CCH) P71,077

IN RE ALUMINUM PHOSPHIDE ANTITRUST LITIGATION, THIS DOCUMENT RELATES TO: ALL ACTIONS

Core Terms

prices, conspiracy, scientific, phosphide, aluminum, factors, defendants', estimated, economist, prevailed, damages, expert testimony, levels, curve, alleged conspiracy, calculations, constant, pellets, tablets, plaintiffs', cases, costs, competitive price, expert report, price-fixing, reliability, patent, lag, evidentiary, methodology

LexisNexis® Headnotes

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

[HN1](#) [down] **Private Actions, Remedies**

In order to prevail on their antitrust claim, plaintiffs must prove that they sustained injury by reason of defendants' unlawful conduct. In doing so, plaintiffs must establish that defendants' unlawful activities caused at least some of their injury, rather than the injury being wholly attributable to other factors. In the absence of more precise proof, causation of injury may be found as a matter of just and reasonable inference from proof of defendants' wrongful acts and their tendency to injure plaintiffs, and from evidence of change in prices not shown to be attributable to other causes. Once causation of damages has been established, the amount of damages may be determined by a just and reasonable estimate, as long as the jury verdict is not the product of speculation or guesswork.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

[HN2](#) [down] **Admissibility, Expert Witnesses**

Fed. R. Evid. 702 governs the admissibility of expert testimony. Rule 702 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

893 F. Supp. 1497, *1497 1995 U.S. Dist. LEXIS 11026, **11026

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 > ... > Procedural Matters > Preliminary Questions > General Overview

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN3 Expert Witnesses, Daubert Standard

Daubert holds that [Fed. R. Evid. 702](#), in conjunction with [Fed. R. Evid. 104\(a\)](#), requires the trial judge to act as gatekeeper to ensure that scientific expert testimony is both reliable and relevant. The term "scientific knowledge" establishes a standard of evidentiary reliability. The adjective "scientific" implies a grounding in the methods and procedures of science, and the word "knowledge" means more than subjective belief or unsupported speculation and applies to any body of known facts or ideas inferred from such facts or accepted as truths on good grounds. In order to qualify as scientific knowledge, proposed expert testimony must be supported by appropriate validation, i.e., good grounds based on what is known.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

HN4 Expert Witnesses, Daubert Standard

The Daubert court specifically limits its discussion to expert testimony based on scientific knowledge, but notes that [Fed. R. Evid. 702](#) also applies to expert testimony on technical or other specialized knowledge.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN5 Expert Witnesses, Daubert Standard

Daubert enumerates four non-exclusive non-dispositive factors which the court may consider: (1) whether the scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) known or potential rate of error; and (4) general acceptance in the scientific community. While each of these factors may not be relevant in determining the reliability of expert testimony on non-scientific or social science subjects, Daubert requires the court to act as a gatekeeper, to determine whether

the expert's testimony and report are reliable and relevant under [Fed. R. Evid. 702](#). To the extent that Daubert factors are relevant to its determination, the court considers them along with any other relevant factors.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Kelly Frye Standard

[HN6](#) [blue icon] Expert Witnesses, Daubert Standard

Under [Fed. R. Evid. 702](#), the inquiry whether expert testimony will assist the trier of fact is essentially a question of relevance. Like all evidentiary issues, the trial court has wide discretion in making these determinations.

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Judges: Kathryn H. Vratil, United States District Judge

Opinion by: Kathryn H. Vratil

Opinion

[\[*1498\] REVISED MEMORANDUM AND ORDER](#)

This price-fixing case comes before the Court on Defendants' Joint Motion in Limine to Exclude Dr. Richard C. Hoyt's Testimony and Expert Report From this Case (Doc. # 443), filed May 5, 1995. Class action plaintiffs claim that defendants engaged in an illegal price-fixing conspiracy under the Sherman Act, 15 U.S.C. § 1, and -- more specifically -- that defendants **[**3]** conspired to fix the case price of aluminum phosphide pellets and tablets in the United States from January 1, 1988, through December 31, 1992. Plaintiffs seek damages on behalf of all entities (except those owned by defendants) which purchased such products during that period. Movants seek to preclude certain portions of the testimony and report of plaintiffs' economic expert, Dr. Richard C. Hoyt, under Federal Rules of Evidence 104(a), 403, 702, and 703.

On May 16, 1995, the Court held an evidentiary hearing on defendants' motion and heard the testimony of both Dr. Hoyt and defendants' economic expert, Dr. John J. Siegfried. Having considered the evidence adduced at that hearing, along with the expert reports of both Dr. Hoyt and Dr. Siegfried, the Court finds that defendants' motion should be and hereby is sustained in the respects and for the reasons set forth below.

A. Factual Background ¹

[4]** Aluminum phosphide is a fumigant used to control insects in the storage of raw agricultural commodities and other food and non-food products. Aluminum phosphide reacts with moisture in the air and releases phosphine gas, which is toxic to insects. In the United States, aluminum phosphide is primarily sold in pellets and tablets. Until the early 1980's, the aluminum phosphide industry was dominated by a legal patent on a product called Phostoxin, sold by Degesch America. Around 1980, the patent expired and new manufacturers began to enter the market. Aluminum phosphide prices began to fall steadily over time as the advantage of the original patent monopoly eroded and new **[*1499]** entrants into the market gained market share.

Aluminum phosphide products may be imported and sold in the United States, but only by those companies which are registered with the Environmental Protection Agency. Between 1988 and 1993, those companies were Degesch America, Inc., Inventa Corporation, McShares, Inc., Pestcon Systems, Inc., Bernardo Chemicals, and Midland Fumigant.² During the relevant time period, these defendants -- along with co-defendants United Phosphorus Ltd., Casa Bernardo, Detia Degesch GmbH, **[**5]** and Detia Freyberg GmbH -- manufactured or distributed aluminum phosphide products for sale in the United States.³

In the late summer and early fall of 1991, the United States Department of Justice issued subpoenas with respect to an ongoing investigation of criminal price-fixing in the aluminum phosphide industry. On November 1, 1993, that investigation resulted in criminal indictments against Detia Degesch, Detia Freyberg, Degesch America, Pestcon, Casa Bernardo, Inventa, and United Phosphorus.⁴ In those indictments, the United States alleged that defendants had conspired to raise the price of aluminum phosphide pellets and tablets from January, 1990, to November, 1990. Detia Degesch and Pestcon pleaded guilty to these charges, admitting that they had conspired to **[**6]** fix prices at a meeting in Rio de Janeiro in January, 1990. Casa Bernardo entered a plea of nolo contendere. The United States dismissed the charges against Detia Freyberg and Degesch America. Inventa and United Phosphorus proceeded to trial, but the United States District Court for the District of Kansas ultimately dismissed the charges against them.

B. Findings of Fact

The Court makes the following findings of fact by a preponderance of the evidence based on the evidence and testimony presented at the hearing on May 16, 1995:

¹ Though the factual record remains to be fully developed through trial of these matters, the Court believes that the facts stated herein are generally undisputed, based on the proceedings to date.

² Midland Fumigant is not a defendant in this case.

³ Non-defendants Sinochem (China), Lian Yun Gang (China), and Excel Industries (India) also manufactured aluminum phosphide products for sale and distribution in the United States.

⁴ Of the defendants in this case, McShares and Bernardo Chemicals (a wholly-owned subsidiary of Casa Bernardo) were not charged in the criminal case.

HN1 In order to prevail on their antitrust claim, plaintiffs must prove that they sustained injury by reason of defendants' unlawful conduct. See *Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1348 (9th Cir. 1985). In doing so, plaintiffs must establish that defendants' unlawful activities caused at least [*7] some of their injury, rather than the injury being wholly attributable to other factors. *Id.* at 1349. In the absence of more precise proof, causation of injury may be found as a matter of just and reasonable inference from proof of defendants' wrongful acts and their tendency to injure plaintiffs, and from evidence of change in prices not shown to be attributable to other causes. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946). Once causation of damages has been established, the amount of damages may be determined by a just and reasonable estimate, as long as the jury verdict is not the product of speculation or guesswork. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir.), cert. denied, 464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983).

Plaintiffs propose to supply this evidence through the expert testimony of Richard C. Hoyt, Ph.D., president of Analytics, Inc., an economics and statistical consulting firm in Excelsior, Minnesota. Dr. Hoyt has a doctorate in Agriculture and Applied Economics. He held teaching positions at the William Mitchell College of Law in St. Paul, Minnesota from [*8] 1977 to 1978, and the College of St. Thomas in St. Paul, Minnesota from 1978 to 1979. Since that time, Dr. Hoyt has devoted his full-time attention to forensic ends: a "partial list" of his experience as an expert witness includes 121 cases (42 antitrust cases, 15 contract cases, 21 discrimination cases, 29 injury/death cases, two patent [*1500] cases, 10 stockholder suits, and two toxic waste cases). In addition, in the last 25 years, Dr. Hoyt has published eight articles. Two articles, published in the *Minnesota Law Review* and the *Hamline Law Review* in 1976 and 1988, respectively, deal with comprehensive models for calculating future damage awards. Four articles on similar topics appear in the *Journal of Legal Economics* (1991 and 1993) and *Issues & Methods in Litigation Economics* (1991). Dr. Hoyt is an expert for hire.⁵

[**9] Before and After Model

Dr. Hoyt proposes to testify to the fact and amount of damages caused by defendants' alleged conspiracy.⁶ [**11] Dr. Hoyt's opinion, according to his report dated March 27, 1995, is as follows: (1) from January 1, 1988 through October 31, 1993, defendants had the ability and the economic incentive to maintain prices for aluminum phosphide pellets and tablets at "higher than competitive levels" throughout the United States;⁷ (2) the market structure of the

⁵ Because he has devoted his career to partisan adjudicatory purposes, it is perhaps no surprise that Dr. Hoyt's professional stature is unequal to that of defendants' expert, Dr. John J. Siegfried. Dr. Siegfried is a professor of economics at Vanderbilt University, where he has served with distinction for 22 years. His professional credentials include numerous visiting professorships throughout the world, service as a Fulbright Senior Scholar (1991-92), selection as current president-elect of the Southern Economic Association (the largest regional association of economists in the United States), and service on the senior staff of President Gerald Ford's Council of Economic Advisors. In 1990, the National Association of Economic Educators honored Dr. Siegfried for lifetime contributions to research on economics education. In addition, Dr. Siegfried has authored more than 100 books and articles in prestigious economic journals throughout the United States, and currently serves on the editorial boards of three such journals. In noteworthy contrast with Dr. Hoyt, Dr. Siegfried has testified as an expert in six to nine cases. Dr. Siegfried does not advertise his availability as an expert witness and he devotes only five to eight percent of his time to consulting.

⁶ For purposes of this ruling, the Court notes that Dr. Hoyt's report was intended and required to contain a complete statement of all opinions to be expressed at trial, on direct examination, with the reasons and basis therefor. Plaintiffs have clearly understood and acknowledged their duty under **Rule 26(a)(2) of the Federal Rules of Civil Procedure**. See Letter from Angela K. Green to Hon. Kathryn H. Vratil (May 19, 1995). Out of an abundance of caution, however, and to avoid any arguable unfairness as counsel and the Court chart new paths under the 1993 amendments to **Rule 26** and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), the Court has construed Dr. Hoyt's report of March 27, 1995, as supplemented by his testimony at the hearing on May 16, 1995.

⁷ According to Dr. Hoyt, the following factors provided defendants the ability and economic incentive to maintain prices at higher than competitive levels: four firms (Degesch America, Pestcon, Research and Bernardo) controlled 90% of the market; demand was inelastic and declining during the time period; market entry was limited by relatively high barriers in the form of licensing

aluminum phosphide industry, "in conjunction with an agreement to fix prices . . had the effect of raising, stabilizing and maintaining prices of aluminum phosphide products at supra-competitive levels over an extended period of time"; and (3) the fact and the extent of defendants' supracompetitive pricing can be measured by a "before and after" model which "generally compares defendants' prices in two distinct time periods (conspiratorial and normative) and calculates the degree to which prices were raised and/or maintained at artificially high levels." Expert Report of Richard C. Hoyt, p. 8, P 8. All parties agree that the "before and after" model is well accepted within the field of economics, and that **[**10]** it may be properly applied to determine the fact and the amount of damages in this case. The dispute is whether Dr. Hoyt indeed applied the "before and after" model, or whether his purported application is so fundamentally flawed as to render his conclusions inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469, U.S. , 113 S. Ct. 2786 (1993).

The theoretical basis for the "before and after" model, in Dr. Hoyt's words, is as follows:

This model is based upon the premise that the normative period is a measure of what the competitive price would have **[*1501]** been absent illegal conduct. Under this well accepted approach, the monetary impact to the class is the difference between the actual price and the estimated competitive price, multiplied times the quantities purchased by all class members.

Expert Report of Richard C. Hoyt, p. 8, P 8. As noted, the "before and after" model requires **[**12]** that actual prices during the conspiracy period be compared to estimated competitive prices that would have prevailed during that period, absent the conspiracy. The model therefore required Dr. Hoyt to determine estimated prices that would have prevailed during the conspiracy period, based on prices that prevailed during the normative or non-conspiratorial period. By definition, "estimated competitive prices" are just that: they cannot be ascertained as historical facts but must be calculated through the exercise of expert judgment and opinion. Through application of established scientific procedures within the field of economics, economists are qualified to make such judgments and calculations.

In this case, Dr. Hoyt made the following findings and opinions concerning the estimated competitive prices that would have prevailed in the absence of a conspiracy:

(1) Estimated competitive prices for the conspiracy period (January 1, 1988 through December 31, 1992) are the prices which prevailed during the normative period (the ten consecutive months from January 1 through October 31, 1993); and

(2) The sole cause of the actual price differences between the conspiracy period **[**13]** and the normative period was the conspiracy itself.

The two prongs of Dr. Hoyt's analysis are critical to plaintiffs' case and they are discussed, in detail, below.

Selection of January 1 to October 31, 1993 as the Normative Period

Plaintiffs' price-fixing claim is set against a stage of generally declining prices after 1980. As noted above, prior to 1980, the aluminum phosphide industry was dominated by a legal patent. After the patent expired, new competitors entered the market. Prices fell steadily as the advantage of the original patent monopoly eroded and four new competitors (Pestcon, Bernardo, Inventia and Midland) gained market share. The overall decline in the selling price of aluminum phosphide progressed steadily and continuously from 1980 through October, 1993 -- except for a noticeable spike during roughly two quarters of 1990, coinciding with the admitted price-fixing episode by Detia Degesch, Pestcon, and Casa Bernardo.

The price decline is evidenced by the following figures: In 1988, at the beginning of the alleged conspiracy, the Degesch companies,⁸ Pestcon, and Casa Bernardo almost exclusively dominated the market for aluminum

and/or registration requirements by the United States government; and aluminum phosphide products are fungible. Expert Report of Richard C. Hoyt, at p. 7, P 6.

⁸For purposes of this motion, the Court refers to Degesch Weyers, Degesch Divisions, and Detia Export as the "Degesch companies."

phosphide pellets and tablets. **[**14]** In 1988, prices for those products ranged from approximately \$ 350 to \$ 500 per case. Over the next five years, Inventra and Midland gained increased market shares at the expense of the three formerly dominant companies. By 1993, market shares were somewhat evenly distributed among the five manufacturers, with Inventra having the largest market share and Casa Bernardo the smallest. By late 1993, prices per case had dropped by about \$ 150, to approximately \$ 200 to \$ 350 per case.⁹ See Defendants' Exhibit 4A.

Dr. Hoyt's opinion is that absent a conspiracy, the prices which prevailed during the first ten months of 1993 - the normative period - would have prevailed **[**15]** throughout each of the five preceding years, from January 1, 1988 through December 31, 1992. According to Dr. Hoyt's written report, he selected January 1 through October 31, 1993 as the normative period for three reasons: (1) the grand jury issued subpoenas in late summer or early fall of 1991, thereby signaling to defendants that the price-fixing jig was up and triggering a resumption of competitive **[*1502]** forces; (2) designating January 1 through October 31, 1993 as the normative period allowed "sufficient lag time" for prices to return to normal; and (3) data for January 1 through October 31, 1993 was "the last portion of the most recent calendar year for which transaction data [were] available." Expert Report of Richard C. Hoyt, p. 9, P 9.

Upon analysis, Dr. Hoyt's opinion is flawed in several obvious respects which render his conclusions irrelevant and inadmissible in this case:

First, Dr. Hoyt's opinion ignores the *before* component of the "before and after" model. Dr. Hoyt concedes that if pre-conspiracy data is available, the preferred scientific approach is to consult the data both before and after the conspiracy period. Transcript (Vol. II) at 108, 111. Under that **[**16]** approach, the economist has statistical bookends and may *interpolate* an estimated price line for any given conspiracy period instead of extrapolating an estimated price line from a single point in time. Although Dr. Hoyt had price information for all defendants for 1986 and 1987,¹⁰ his opinion does not address in any way the pre-conspiracy period. Therefore, Dr. Hoyt cannot account for the fact that prices before the alleged conspiracy are so substantially higher than the purportedly normal prices after the conspiracy.¹¹

[17]** Second, Dr. Hoyt's opinion concerning "sufficient lag time" for normalization of post-conspiracy prices is based on neither evidence nor science. At the hearing on May 16, 1995, Dr. Hoyt defined lag time as the period when prices declined, after the indictments were handed down in August and September, 1991.¹² Transcript (Vol. II) at 66-67, 82. According to Dr. Hoyt, the lag time continued "at least" through 1992, because the "generally downward declining price trend" continued through that period. Transcript (Vol. II) at 68-69. In his view, the prices did not start to "decline or disintegrate" until the earlier part of 1992, and did not level off until 1993. Transcript (Vol. II) at 82.

Dr. Hoyt has expressed no opinion concerning what **[**18]** lag time was *necessary* for aluminum phosphide prices to return to normal levels after the alleged conspiracy ended. The evidence is undisputed that the lag time "could be very short," and could start to run (as Dr. Siegfried phrased it) "when anybody involved in the conspiracy got wind

⁹ According to Dr. Hoyt, when differences between the actual prices and the 1993 normative prices are multiplied times the quantities actually purchased, the total overcharge to plaintiffs is \$ 6,263,428.24.

¹⁰ Dr. Hoyt's complaints to the contrary are not credible, and indeed are contradicted by his own testimony at the hearing on May 16, 1995.

¹¹ Dr. Hoyt offers no scientific rationale for his refusal to consider data from the pre-conspiracy period. Whether we accept his premise that a "before or after" model is just as valid as a "before and after" model, we must hold Dr. Hoyt to those conclusions and opinions which are grounded in the methods and procedures of science and not based on subjective belief or unsupported speculation. Dr. Hoyt's method fails to address (let alone account for) an obvious sign of error in his analytical approach -- the elevated pre-conspiracy price structure -- and to this extent it is not grounded in the methods and procedures of the science of economics.

¹² As noted earlier, the grand jury issued subpoenas in the late summer or early fall of 1991. The government did not unseal the indictments until November 1, 1993. Thus it appears that Dr. Hoyt confused the terms "indictment" and "subpoena" in his testimony.

that they may be under investigation" and stopped fixing prices. Transcript (Vol. II) at 4. Dr. Hoyt states that the 15-month period from the issuance of the indictments to the beginning of the normative period was "sufficient" for defendants to return to competitive prices. He expresses no opinion that some shorter period (one hour? ten days? six months?) was not equally sufficient. Absent a scientifically-supported opinion in this regard, the record suggests no reason why an equally plausible normative period could not commence sometime (any time) before January 1, 1993. Nothing in Dr. Hoyt's demonstrated training as an economist or the factual record in this case has equipped Dr. Hoyt to opine with any reasonable degree of economic or scientific certainty that a 15-month lag time was necessary or sufficient for prices to return to normative levels.

In the end, Dr. Hoyt's selection of January **[**19]** 1 through October 31, 1993 as the normative period comes to rest on his belief that 1993 prices are normative because prices were falling during 1992 but leveled off in 1993. Dr. Hoyt does not purport to explain why -- **[*1503]** in an industry characterized by declining demand from January 1, 1988 through October 31, 1993¹³ and generally declining prices from 1980 to date -- stable prices are "normal" prices for purposes of this analysis. Nor does he purport to account for factors other than "normalization" that may have brought post-conspiracy prices to what Dr. Hoyt views as their 1993 resting place. Indeed, other post-indictment time periods demonstrate the same pattern of falling prices, followed by a leveling off. They equally comply with Dr. Hoyt's criteria for what evidences a normative period. Dr. Hoyt's analysis yields no scientific basis for adopting one period as opposed to any other.

Finally, to the extent that Dr. Hoyt **[**20]** has selected the normative period by reference to the availability of data (as opposed to its relevance or reliability), he offers no scientific or theoretical basis for his calculations and opinions.

Dr. Hoyt's methodology in selecting a normative period is not sound. Scientific learning in the field of economics offers no defensible reason why a prudent economist would select January 1 through October 31, 1993 as the normative period in this case. Recognized methodology for distinguishing the alleged violation period from the alleged non-violation period requires analysis of price patterns and statistical tests, including a "dummy variable approach," to determine whether for any proposed violation period the price was systematically higher than it would otherwise have been.¹⁴ Because Dr. Hoyt failed to perform this and other relevant analysis, his choice of a normative period is not consistent with accepted economic practice. To use Dr. Siegfried words, "the way he selected the benchmark is [not] consistent with the way an economist would do it."

[21] Cause of Price Differences between the Conspiracy Period and the Normative Period**

The goal of a prudent economist in performing the "before and after" analysis is to determine the hypothetical or "counter-factual" prices that would have prevailed during the conspiracy period, but for the conspiracy.¹⁵ In applying the "before and after" model of damages, it is fundamentally necessary to explain the pattern of forces outside the violation period using factors that might have changed (i.e., supply, demand, and differences in competition) to predict the prices during the conspiratorial period. In this context, as in most economic problems, failure to keep "other things equal" is one of the known "pitfalls . . . in the path of the serious economist."

¹³ See Expert Report of Richard C. Hoyt (March 27, 1995) at 6- 7, paragraphs 5-6.

¹⁴ Dr. Siegfried applied the dummy variable approach to Dr. Hoyt's purported normative period, with surprising results. For two of the four companies on which Dr. Siegfried performed the dummy variable analysis, the statistical indicator method revealed that defendants' prices were actually *lower* than what would have been expected during the conspiracy period, January, 1988 through December, 1992. As a result, Dr. Siegfried concluded that Dr. Hoyt's benchmark period had "no basis."

¹⁵ The before and after model cannot be properly applied unless an appropriate normative period, however selected, has been identified. In view of the Court's finding with respect to Dr. Hoyt's selection of the normative period in this case, the proposed before and after model cannot be properly applied. Therefore, it is arguably unnecessary to discuss Dr. Hoyt's conclusion that the difference in prices between the conspiracy period and the post-conspiracy period results solely from the alleged conspiracy. In order that the record is complete, however, the Court finds in the alternative that defendants' motion should be sustained for additional reasons as well.

Samuelson, P. and Nordhaus, W.D., Economics (13th ed.) at p. 7. This case presents two potential normative periods, a "before" period and an "after" period that have distinctly different price levels. One therefore must identify the reasons for the disparate price levels.¹⁶ **[**23]** According to Dr. Siegfried, the field of economics supplies a statistical methodology for making this determination on a scientific basis, and the generally **[**22]** accepted means of predicting the prices that would have prevailed absent the conspiracy is regression analysis. At a minimum, regression analysis addresses supply and demand factors by looking at price **[*1504]** trends over time. A prudent economist must account for these differences and would perform a minimum regression analysis if utilizing the "before and after" model.¹⁷

Dr. Hoyt did not perform a regression analysis to address such obvious points as (1) why normative prices before the alleged conspiracy so greatly exceeded allegedly normative prices after the alleged conspiracy; or (2) the effect of supply, demand, competition or other factors that might impact price levels during both normative periods. Instead, Dr. Hoyt opined that any price increase between 1993 and the conspiracy period was caused solely by the alleged conspiracy. He took a simple weighted average of the actual prices for ten months during 1993 and assumed that that price should have prevailed at all prior points in history.¹⁸ In doing so, Dr. Hoyt ignored price trends inside and outside the 1993 period, violating **[**24]** a fundamental rule of application for the "before and after" model. According to Dr. Siegfried, Dr. Hoyt's calculations did not take into account the effect of four factors: (1) a precipitous decline in demand for aluminum phosphide pellets and tablets, with downward pressure on prices, after 1988; (2) increased competition, with downward pressure on prices, because of new entrants into the market; (3) marked realignment in position between 1990 and 1993, as newcomers to the market Midland and Inventra captured the majority of the pellets and tablets market, leaving the existing sellers to defend on the residual market by reducing prices; and (4) the fact that the aluminum phosphide market is an oligopolistic market, characterized by interdependent pricing, in which no independent seller believes that its actions will be ignored by the other sellers. Transcript (Vol. I) at 56-57, 114-116.

[25]** Dr. Hoyt claims that the "before and after" model "traditionally assumes" that "the conspiracy was the sole cause of the price difference between the conspiracy period and normative period." Expert Report of Richard C. Hoyt, p. 8, n. 8. This is not a scientifically valid assumption, and the economic literature on the "before and after" model conclusively refutes it. One of the basic principles of economics, as applied to the "before and after" model, is that changes in supply, demand, and competition affect prices, and one cannot properly assume that the sole cause of any price difference between the conspiracy period and the normative period is the conspiracy itself. All of the literature on the "before and after" model (including that cited by Dr. Hoyt)¹⁹ includes the essential elements of

¹⁶ It is improper to assume that all prices compared to 1993 are non-normative, because if one looks to the period before January, 1988, one sees much higher prices than occur in 1993.

¹⁷ An economist could go farther, by identifying specific demand and supply factors such as the cost of aluminum and phosphorus ingredients, stocks of grains, numbers of competitors, and so forth. Dr. Siegfried explained, however, that under the minimalistic analysis use of time as a variable "folds those into a single variable that's capturing all of those things put together."

¹⁸ Dr. Hoyt determined the amount of damages by using separate benchmark prices for each defendant, based on the individual defendant's average 1993 price, as opposed to a single average 1993 benchmark price for the entire industry. This approach is contrary to Dr. Hoyt's assumption that aluminum phosphide products are fungible. According to Dr. Hoyt, the fungible nature of aluminum phosphide is one of the market factors which allowed defendants the economic incentive and ability to maintain prices at higher than competitive levels. Expert Report of Richard C. Hoyt, p. 7, P 6. Under well-accepted economic theory, however, fungible products -- or products which are the same -- will be sold at the same price in a competitive market. Dr. Hoyt uses multiple benchmark prices, ranging from \$ 190 for Inventra to \$ 400 for Degesch America. As Dr. Siegfried stated, this is an "enormous price difference for a product that is supposedly the same." If aluminum phosphide products are truly fungible, then a prudent economist would use a single benchmark price to calculate the amount of damages. Thus, Dr. Hoyt's selection of individual benchmark prices is inconsistent with the way an economist would do it, and his methodology is clearly calculated to exaggerate the amount of damages, without any basis in economic theory or principle.

¹⁹ See, e.g., Parker, Measuring Damages in Federal Treble Actions, 17 Antitrust Bull. 497, 506 (1972); Hovenkamp, Economics and Federal Antitrust Law, p. 418 (1985) (before-and after model must be adjusted to account for changes in market) (cited in Expert Report of Richard C. Hoyt at p. 8, n.7).

modeling how changes in supply, demand, and competition affect prices -- so that an estimated non-conspiracy price can be predicted for the period of violation.

[**26] Even if the "traditional assumption" is not valid in all cases, Dr. Hoyt claims that it is [*1505] empirically valid in this case because "the inflated prices between 1988 and 1992 were . . . not the result of correspondingly higher costs."²⁰ Under Dr. Hoyt's theory, the aluminum phosphide industry is a constant cost industry and in a constant cost industry, shifts in demand do not affect price and supply is immediately responsive to changes in demand. Dr. Hoyt concluded that industry costs were constant because he found that no statistically significant change in Degesch America production costs during the period of the alleged conspiracy (the first quarter of 1988 through the fourth quarter 1992). Dr. Hoyt's analysis looked only to Degesch America -- the only manufacturer that incurred production costs in the United States. Dr. Hoyt nonetheless assumed that production costs for pellets and tablets were constant across the industry. This assumption is appropriate, according to Dr. Hoyt, since Degesch America sales comprised roughly 60 percent of the total market and the supply curve for the entire industry represented the sum of the marginal cost curves for all firms within the industry. [**27]²¹

The marginal cost curve for Degesch America would represent its supply curve, however, only if Degesch America operated in a perfectly competitive industry. Both experts agree that the aluminum phosphide market is oligopolistic and, thus, the fact that the marginal cost of Degesch America may be constant does not necessarily mean that the supply curve of Degesch America is completely elastic. Moreover, even if Degesch America's cost information supported Dr. Hoyt's conclusion that changes in demand would not affect price, Dr. Hoyt has not demonstrated any scientific validity [**28] to his assumption that the entire aluminum phosphide industry has an elastic supply curve. An analysis of Degesch America's supply curve alone would have productive value in estimating the industry supply curve only if Degesch America's sales represented a very substantial portion of the industry, which stayed the same proportion over time. Here, of course, Degesch America's proportional share of the market was declining over time and thus it is not indicative of the supply curve of the entire industry.

Dr. Hoyt has not scientifically validated his conclusion that constant costs existed in the aluminum phosphide pellets and tablets industry, or that any such constant costs resulted in an elastic supply curve wherein changes in demand did not affect price. Moreover, even if the Court accepted verbatim Dr. Hoyt's explanation of his constant cost conclusion, Dr. Hoyt's application of the "before and after" model still does not account for other undisputed market factors, such as increasing competition from foreign manufacturers with lower production costs, which must be considered before a reliable price may be predicted for the conspiracy period. In short, Dr. Hoyt's assumption that [**29] any change in prices between 1993 and the conspiracy period was caused solely by the conspiracy is not scientifically or economically valid.

D. Conclusions of Law

HN2 [↑] *Rule 702 of the Federal Rules of Evidence* governs the admissibility of expert testimony. That rule 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.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469, U.S. , 113 S. Ct. 2786, 2795 (1993), the United States Supreme Court **HN3** [↑] held that *Rule 702*, in conjunction with *Rule 104(a)*, requires the trial judge to act as gatekeeper to ensure that scientific expert testimony is both reliable and relevant. The court found that the term "scientific knowledge" establishes a [*1506] standard of evidentiary reliability. *Id. at 2795*. The court noted that the adjective "scientific" implies a "grounding in the methods and procedures of science," and the word

²⁰ Dr. Hoyt does not seek to exclude causation factors other than higher costs.

²¹ Dr. Hoyt also relied on SIC 2879, Agricultural Chemicals, which measures the industry costs for miscellaneous agricultural chemicals produced in the United States. Because the scope of this index is not limited to aluminum phosphide products and covers only United States companies, it is less probative than Degesch America's cost information.

"knowledge" means more [**30] than subjective belief or unsupported speculation and applies to any body of known facts or ideas inferred from such facts or accepted as truths on good grounds. *Id. at 2794*. The court concluded that in order to qualify as scientific knowledge, proposed expert testimony must be supported by appropriate validation, i.e., good grounds based on what is known. *Id. at 2795*.

At issue in *Daubert* was the admissibility of expert testimony on the causal connection between plaintiffs' birth defects and a prescription drug, Bendectin. **HN4**[¹] The *Daubert* court specifically limited its discussion to expert testimony based on scientific knowledge, but noted that *Rule 702* also applies to expert testimony on technical or other specialized knowledge. See *Daubert*, 113 S. Ct. at 2795 n.8. Plaintiffs argue that *Daubert* applies only to "hard" physical sciences which may be tested by scientific method, not social sciences such as economics. **HN5**[¹] *Daubert* indeed enumerates four non-exclusive non-dispositive factors which the Court may consider: (1) whether the scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review [**31] and publication; (3) known or potential rate of error; and (4) general acceptance in the scientific community. While each of these factors may not be relevant in determining the reliability of expert testimony on non-scientific or social science subjects, the Court has no doubt that *Daubert* requires it to act as a gatekeeper, to determine whether Dr. Hoyt's testimony and report are reliable and relevant under *Rule 702*. To the extent that *Daubert* factors are relevant to its determination, the Court considers them along with any other relevant factors.

Under *Daubert*, plaintiffs bear the burden of demonstrating by a preponderance of the evidence that Dr. Hoyt is proposing to testify to (1) economic knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. See *Daubert*, 113 S. Ct. at 2796 n. 10 (citing *Bourjaily v. United States*, 483 U.S. 171, 175-176, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)). This inquiry entails preliminary assessment whether his reasoning and methodology are economically valid and can be properly applied to the facts in issue. *Id. at 2796*. The inquiry is a flexible one, with the overarching subject being the [**32] evidentiary relevance and reliability of the principles that underlie a proposed submission. *Id. at 2797*. The court's focus must be solely on principles and methodology, not the conclusions that they generate. *Id. at 2797*.

HN6[¹] Under *Rule 702*, the inquiry whether expert testimony will assist the trier of fact is essentially a question of relevance. *Daubert*, 113 S. Ct. at 2794-95 (addressing the relationship of *Rule 702* and the "general acceptance" test for scientific evidence from *Frye v. United States*, 54 App. D.C. 46, 293 Fed. 1013 (D.C. Cir. 1923)). Like all evidentiary issues, the trial court has wide discretion in making these determinations. *United States v. Rice*, 52 F.3d 843 (10th Cir. 1995). In *Rice*, the trial court refused to let defendant's expert express certain opinions, and the Tenth Circuit affirmed. In doing so, it made the following observation:

[Defendant's expert] was really not called upon to supply specialized knowledge but to speculate and hypothesize. Traditionally, hypothesis may be an appropriate subject for expert testimony when based upon conclusions from established evidentiary facts, but here [defendant's expert's] [**33] testimony was to be based entirely on pure surmise.

Rice, __ F.3d at __. Here, likewise, plaintiffs call upon Dr. Hoyt not to supply specialized knowledge, but to plug evidentiary holes in plaintiffs' case, to speculate, and to surmise. One does not need an expert economist to do what Dr. Hoyt proposes to do. A non-expert, using Dr. Hoyt's criteria, could pick as an equally valid normative period any arbitrary time period, of any length, occurring at any time after the date of the admitted conspiracy. Dr. Hoyt's analysis is driven [*1507] by a desire to enhance the measure of plaintiffs' damages, even at the expense of well-accepted scientific principles and methodology. Nothing in Dr. Hoyt's analysis makes the data for his so-called "normative" period more relevant than the data for any other pre- or post-conspiracy period, and the record yields no factual basis for any hypothesis that will support his calculations and opinion. Similarly, a non-expert could assume that price-fixing accounts for all differences in price between the conspiratorial period and the normative period. To the extent that Dr. Hoyt purports to cast that assumption as an affirmative declaration [**34] based upon scientific reason and analysis, however, the Court must reject it. Dr. Hoyt's conclusions are scientifically unsound and irrelevant under *Daubert*.

Dr. Hoyt has not shown that his "before and after" model, as applied in this case, accounts for undisputed increases in competition between the conspiratorial and normative periods. See [Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 415-16 \(7th Cir. 1992\)](#) (expert should have separated injury due to unlawful conduct from that due to new entry in market). Nor has he justified his constant cost industry assumption or his application of individual benchmark prices for each defendants. See [Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 911](#) (2d Cir.) (economist's damage evidence properly excluded where no basis for assumption established), cert. denied, 369 U.S. 865, 82 S. Ct. 1031, 8 L. Ed. 2d 85 (1962). As such, Dr. Hoyt has not through proper scientific method established that price declines are attributable to the alleged conspiracy, to the exclusion of all other relevant factors.

Because Dr. Hoyt's opinion is based on unjustified assumptions and does not account for changes in other [**35] relevant market conditions, it would not assist a trier of fact to determine the fact or amount of plaintiffs' damages. See, e.g., [Farley Transp., 786 F.2d at 1351](#) (economist's assumption that lost profits were caused solely by defendant's illegal activities did not provide reasonable basis for calculation of damages); [MCI Communications, 708 F.2d at 1162](#) (plaintiff's improper attribution of all losses to defendant's illegal acts, despite presence of significant other factors, not sufficient to permit jury to make reasonable and principled estimate of amount of damage); [Southern Pac. Communications Co. v. American Tel. & Tel., 556 F. Supp. 825, 1075-76 \(D.D.C. 1983\)](#) (damage model based on unreasonable and speculative assumptions not sufficient to support just and reasonable approximation of damages).

On this record, the Court concludes that in the respects outlined above, Dr. Hoyt's opinion is economically unreliable and therefore inadmissible under [Rule 702](#). Moreover, any minimum probative value of Dr. Hoyt's opinion would be substantially outweighed by the danger of unfair prejudice resulting from his unsupported assumptions.

In evaluating the consequences of this ruling, [**36] the Court recognizes the apparent anomaly of its holding: that without Dr. Hoyt's opinion, plaintiffs may be stripped of their ability to recover substantial actual damages from admitted conspirators. In the final analysis, however, the problem is one of plaintiffs' making. Plaintiffs are well represented by competent, knowledgeable, experienced trial counsel. Class counsel and their expert have charted an aggressive course with respect to their damage calculations, one which under [Daubert](#) was not without foreseeable risk. The Court acknowledges that the issue is not free from doubt, however, and indeed pursuant to [28 U.S.C. § 1292\(b\)](#), the Court certifies that this opinion involves a controlling issue of law as to which there exists substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

IT IS THEREFORE ORDERED that [Defendants' Joint Motion in Limine to Exclude Dr. Richard C. Hoyt's Testimony and Expert Report From this Case](#) (Doc. # 443), filed May 5, 1995, should be and hereby is sustained in the respects outlined above, subject to the foregoing certification under [28 U.S.C. \[**37\] § 1292\(b\)](#).

Dated this 27th day of June, 1995, in Kansas City, Kansas.

Kathryn H. Vratil

United States District Judge

Johnson v. Nyack Hosp.

United States District Court for the Southern District of New York

June 27, 1995, Decided ; June 27, 1995, FILED

94 Civ. 7464 (LAK)

Reporter

891 F. Supp. 155 *; 1995 U.S. Dist. LEXIS 8941 **; 69 Fair Empl. Prac. Cas. (BNA) 1207; 1995-2 Trade Cas. (CCH) P71,075

FLETCHER JOHNSON, et ano., Plaintiffs, -against- NYACK HOSPITAL, et al., Defendants.

Core Terms

limitations period, privileges, tolled, discriminatory, statute of limitations, revocation, resort, continuing violation, reinstatement, proceedings, commence, continuing violation doctrine, antitrust claim, rights, primary jurisdiction, civil rights claim, federal court, three year, limitations, diligence, equitable, accrues, charges, expired, revoked, notice, cause of action, anti trust law, circumstances, recourse

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

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 > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN1[] Clayton Act, Claims

Section 4B of the Clayton Act, [15 U.S.C.S. § 15b](#), provides that a private damage action under the antitrust laws shall be forever barred unless commenced within four years after the cause of action accrued. The cause of action accrues when a defendant commits an act that violates the antitrust laws and injures the plaintiff.

Governments > Legislation > Statute of Limitations > Tolling

HN2[] Statute of Limitations, Tolling

891 F. Supp. 155, *155 1995 U.S. Dist. LEXIS 8941, **8941

A federal court ordinarily may not toll the running of a limitations period.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN3 Dismissal, Involuntary Dismissals

The limitations period begins to run upon the dismissal of an action without prejudice.

Governments > Legislation > Statute of Limitations > Tolling

Insurance Law > ... > Coverage > No Fault Coverage > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN4 Statute of Limitations, Tolling

Equitable tolling permits a plaintiff to sue after the statute of limitations has expired if through no fault or lack of diligence on his part he was unable to sue before, even though the defendant took no active steps to prevent him from suing.

Civil Rights Law > Protection of Rights > Procedural Matters > Claim Accrual

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Rights Law > General Overview

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Procedural Matters > General Overview

Civil Rights Law > Protection of Rights > Procedural Matters > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN5 Procedural Matters, Claim Accrual

The statute of limitations for claims brought under [42 U.S.C.S. §§ 1981](#) and [1985](#) of the Civil Rights Act of 1964 is three years. The claim accrues and the limitation period begins to run when the plaintiff has notice of the act that is claimed to have caused the injury.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Procedural Matters > Statute of Limitations

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Governments > Legislation > Statute of Limitations > Tolling

Civil Rights Law > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN6 Governments, Civil Rights Act of 1964

Under Title VII of the Civil Rights Act of 1964, the existence of a continuous practice and policy of discrimination delays the commencement of the limitation period until the last discriminatory act in furtherance thereof.

Governments > Legislation > Statute of Limitations > Tolling

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN7 Statute of Limitations, Tolling

The determination of whether a continuing violation exists depends principally upon a three-pronged analysis. The first factor involves subject matter and whether the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation. The second factor involves frequency and whether the alleged acts are recurring (e.g., a biweekly paycheck) or more in the nature of an isolated employment decision. The third factor, perhaps of most importance, involves the degree of permanence and whether an act has the degree of permanence which should trigger an employee's awareness and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN8 Statute of Limitations, Extensions & Revivals

The Berry standard for determining whether a continuing violation exists presupposes that related acts may come within the continuing violation doctrine even absent a formal discriminatory structural mechanism.

Governments > Legislation > Statute of Limitations > Tolling

Labor & Employment Law > Discrimination > Actionable Discrimination

Governments > Legislation > Statute of Limitations > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN9 Statute of Limitations, Tolling

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The first two factors in the Berry test, subject matter and frequency, bear on whether acts both within and without the limitation period are part of a discriminatory policy or practice chargeable to the employer, as distinguished from unrelated if deplorable manifestations of individual prejudice. They thus reflect the view that a claim involving an employer's discriminatory policy or practice should not always be cabined by the statutory limitation period in recognition of the special difficulties with which an employee may have to deal.

Governments > Legislation > Statute of Limitations > Tolling

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN10 [] **Statute of Limitations, Tolling**

The third factor of the Berry standard, whether the nature of the events outside the limitation period should have triggered awareness of the need to assert one's rights, evokes considerations central to statutes of limitations generally. Moreover, it generally is regarded as the core and most important element of the Berry test.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN11 [] **Statute of Limitations, Time Limitations**

The discovery rule, which holds that certain causes of action, notably fraud, accrue (i.e., the limitation period begins to run) only when the plaintiff knows, or in the exercise of reasonable diligence should know, of the existence of or basis for the claim.

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

HN12 [] **Tolling of Statute of Limitations, Fraud**

The limitation period is tolled during a defendant's fraudulent concealment of facts that would alert the plaintiff to the plaintiff's claim. A defendant may be equitably estopped to assert the statute where the defendant's actions cause the plaintiff to forebear from asserting the plaintiff's rights.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

[HN13](#) [blue document icon] Statute of Limitations, Time Limitations

The statutory period of limitation does not run while the plaintiff fails to bring suit as a result of blameless ignorance, culpable action by the defendant, or the continued existence of a close and important relationship that reasonably may be regarded as making the commencement of litigation inappropriate or unduly costly in human terms.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Labor & Employment Law > Discrimination > Actionable Discrimination

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

[HN14](#) [blue document icon] Statute of Limitations, Extensions & Revivals

If the discriminatory acts within and without the limitation period are sufficiently similar and frequent to justify a conclusion that both are part of a single discriminatory practice chargeable to the employer, the continuing violation doctrine permits assertion of claims based on both in recognition of the special problems inherent in the employment context. But the third of the Berry factors limits the scope of this otherwise boundless exception to the statute of limitations by permitting suit on a continuing violation theory only if the circumstances are such that a reasonable person in the plaintiff's position would not have sued earlier. This proviso gives due regard both to the defendant's interest in being protected against stale claims and to the plaintiff's interest in adopting strategies designed to deal both with employment discrimination and of being certain that matters have reached a point affording a proper basis for resort to the courts.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Begins to Run > Actual Injury

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

[HN15](#) [blue document icon] Statute of Limitations, Time Limitations

A tort interference claim accrues, and the limitation period begins to run, under New York law when the last of the elements of the cause of action, typically injury, exists.

Counsel: [\[**1\]](#) For Plaintiffs: George C. Clark, Annemarie C. Scanlon, REED SMITH SHAW & MCCLAY, STEIN, ZAUDERER, ELLENHORN, FRISCHER & SHARP.

For Defendants: Ronald S. Rauchberg, Francis D. Landrey, Patricia J. Clarke, Mark Monack, PROSKAUER ROSE GOETZ & MENDELSON LLP.

Judges: Lewis A. Kaplan, United States District Judge

Opinion by: Lewis A. Kaplan

Opinion

[*157] OPINION

LEWIS A. KAPLAN, District Judge.

Hospital staff privileges are essential to the practice of most, perhaps all, medical specialties. Those responsible for extending or revoking staff privileges thus stand at a critical point in the provision of medical care. They bear a weighty responsibility for protecting the public against incompetent and negligent practitioners. At the same time, the power they wield may be abused for any of a panoply of reasons that may imbue human relationships, not least of them racial, religious and ethnic bias, anticompetitive motives, and personal animus.

On February 10, 1987, defendant Nyack Hospital revoked the thoracic and vascular surgery privileges of plaintiff Fletcher Johnson, M.D. Dr. Johnson, an African-American, claims that the decision was the product of anticompetitive motives and racial bias. The [*2] defendants contend that Dr. Johnson's privileges were terminated properly on the basis of professional incompetence and negligence and denies Dr. Johnson's charges.

Dr. Johnson, who has continued to enjoy general surgical privileges at Nyack, and his wholly-owned real estate company here seek damages under the federal antitrust and civil rights laws and on State law theories. Defendants move for summary judgment. They contend, in the main, that they are immune from the antitrust claims under the Health Care Quality Improvement Act of 1986, [42 U.S.C. §§ 11111 et seq. \(1988\)](#), and that all of plaintiffs' claims are barred by the statute of limitations.

Facts

This is the third lawsuit, and the second in this Court, in which Dr. Johnson has sought judicial relief with respect to the 1987 revocation of his vascular and thoracic surgery privileges. His 1987 Article 78 proceeding in the New York Supreme Court was dismissed for failure to exhaust administrative remedies. On February 7, 1990, after further proceedings at Nyack Hospital, Dr. Johnson sued the same defendants in this Court, claiming that the defendants' actions violated the antitrust laws. No civil rights claims were [*3] asserted. Judge Sweet granted defendants' motion for summary judgment dismissing the complaint without prejudice for failure to exhaust administrative remedies, and his decision was affirmed by the Second Circuit on the basis that Dr. Johnson's complaint was within the primary jurisdiction of the New York State Public Health Council [*158] ("PHC"). [Johnson v. Nyack Hospital, 773 F. Supp. 625 \(S.D.N.Y. 1991\)](#), aff'd on other grounds, [964 F.2d 116 \(2d Cir. 1992\)](#) ("Johnson I"). Inasmuch as the details of the proceedings that preceded the filing of *Johnson I* are described in Judge Sweet's opinion, familiarity with which is assumed, there is no need to repeat them here. The Court therefore picks up the thread following Judge Sweet's decision in September 1990.

On January 14, 1992, the New York State Office of Professional Medical Conduct ("OPMC"), a body that is distinct from the PHC and that is responsible for bringing charges against physicians and considering revocation or limitation of their licenses,¹ preferred charges against Dr. Johnson and gave notice of a hearing that could have resulted in revocation of his license to practice medicine. The hearing commenced on February [*4] 10, 1992 and continued through November 17, 1992, ultimately covering a total of twenty one hearing days. The OPMC hearings thus were well under weigh when the Second Circuit affirmed Judge Sweet's decision on May 11, 1992.

¹ [N.Y. PUB. HEALTH L. § 230, subd. 11](#) (McKinney 1990 & Supp. 1992).

Notwithstanding the Second Circuit's holding that Dr. Johnson's claim was within the primary jurisdiction of the PHC and that the claim was not cognizable in federal court absent prior resort to that body, Dr. Johnson did not proceed promptly to the PHC. Although his brief in this Court suggested other reasons,² Dr. Johnson's counsel frankly acknowledged at oral argument that plaintiff made a tactical judgment that recourse to the PHC was unlikely to be successful as long as the charges pending against him in the OPMC remained unresolved. He therefore delayed. (May 30, 1995 Tr. at 51)

[**5] The OPMC rendered its decision on May 6, 1993. Each side claims the decision as a victory, as the OPMC rejected most of the charges against Dr. Johnson but found that he had been guilty of negligence on two occasions and incompetence on one.³ Moreover, Dr. Johnson places great weight on a letter from the hearing panel to the OPMC that was highly critical of the Nyack Hospital peer review proceedings. For purposes of this motion, however, it is immaterial who "won." The fundamental point is that Dr. Johnson did not even file a complaint with the PHC -- which the Second Circuit had held on May 11, 1992 had to be his initial step on the road to a federal forum -- until August 9, 1993. Thus, Dr. Johnson waited approximately fifteen months after the Second Circuit decision and three months after the OPMC decision before resorting to the PHC.

[**6] After proceedings the details of which are not material here, the PHC finally ruled on September 7, 1994. While it appears that some members of the Council were concerned about one aspect of the 1987 proceedings at Nyack Hospital, there were not sufficient votes for the Council either to credit or reject Dr. Johnson's complaint. Accordingly, the PHC took no action whatever.

In February 1994, following the OPMC decision but before the PHC ruling, Dr. Johnson applied for reinstatement of his vascular and thoracic surgery privileges. The application was reviewed by Nyack's Director of Surgery, Dr. Simon, who determined that Dr. Johnson had not demonstrated current clinical competence in the field and that the application should be denied. Three hospital committees reviewed Dr. Simon's recommendation and agreed that the application should be denied, and the Board of Trustees so concluded.

Dr. Johnson appealed the decision, as he was entitled to do under the By-Laws. The hospital appointed former United States District Judge Kenneth Conboy as the hearing officer. At a conference prior to the hearing, [*159] Judge Conboy asked Dr. Johnson to identify the information he had submitted with his [**7] application and questioned Dr. Johnson as to why he had failed to present evidence of current clinical competence beyond the assertions of his counsel. (Tr. Nov. 14, 1994, Docket Item No. 28, at 15-17, 20, 22, 24, 68-69, 72-74) Dr. Johnson said that he was prepared to offer such proof at the hearing and identified several witnesses whom he said would testify in his behalf.

The Hospital contended before Judge Conboy that the hearing officer's function was only to determine whether the Hospital had acted properly given the record before it, while Dr. Johnson argued that he was entitled to a *de novo* review. Judge Conboy indicated agreement with the Hospital, stating that the time for Dr. Johnson to have submitted evidence of his clinical competence "was at the application stage." (*Id.* at 75) He nevertheless afforded Dr. Johnson the opportunity to submit affidavits from those doctors so that he could rule as to whether he would permit them to testify. (*Id.* at 77-78) At the subsequent hearing, Johnson offered letters, rather than affidavits, from five physicians. Judge Conboy ruled that they were inadmissible and, in any case, not probative of Dr. Johnson's current competence. [**8] (Tr. Dec. 19, 1994, Docket Item No. 28, at 59-60, 78) Dr. Johnson's counsel then stated that:

"Given the state of the record, given the rulings, I don't think I can get the decision of the hospital changed at this point in time . . .

² Dr. Johnson's brief argued that his delay in seeking a PHC ruling was justified because the PHC lacked jurisdiction and, in any case, because the PHC -- which in Dr. Johnson's view would not itself examine the medical issues relating to his care of patients -- would benefit from the detailed review then being conducted by the OPMC. The first of these arguments was rejected by the Second Circuit in *Johnson I*. 964 F.2d at 121-22.

³ The parties are at loggerheads over the extent to which the charges rejected by the OPMC were bases for the hospital's revocation of Dr. Johnson's privileges. In view of the disposition of this motion, there is no need to address that issue.

"For that reason, it is my intention to withdraw the appeal at this point, to reapply, I'm assuming the hospital will act in an expeditious fashion, and if we need to do anything after that, we will do what we [have] to do after that. (*Id.* at 80-81)

Dr. Johnson has not reapplied.

This action was filed on October 14, 1994, which was after the PHC had declined to act and during the pendency of the proceedings with respect to Dr. Johnson's application for reinstatement of his privileges. The amended complaint contains five causes of action. Counts I and II charge that the 1987 revocation of privileges violated Sections 1 and 2 of the Sherman Act, respectively. Counts III and IV allege that the revocation of Dr. Johnson's privileges and the 1994 denial of reinstatement violated [42 U.S.C. §§ 1981](#) and [1985\(3\)](#). Count V seeks recovery for the same conduct on the theory that the defendants tortiously interfered with Dr. Johnson's economic advantage [\[**9\]](#) and is brought pursuant to the Court's supplemental jurisdiction.

Discussion

The 1987 Revocation of Privileges

Antitrust Claims

HN1  Section 4B of the Clayton Act, [15 U.S.C. § 15b](#), provides that a private damage action under the antitrust laws "shall be forever barred unless commenced within four years after the cause of action accrued." The cause of action accrues when a defendant commits an act that violates the antitrust laws and injures the plaintiff. E.g., [Zenith Radio Corp. v. Hazeltine Research, Inc.](#), [401 U.S. 321, 338-39, 28 L. Ed. 2d 77, 91 S. Ct. 795 \(1971\)](#). As Dr. Johnson's privileges were revoked on February 10, 1987, effective immediately, any cause of action that arose under the antitrust laws by reason of the revocation accrued on that date.

Dr. Johnson did not commence *Johnson I* until February 7, 1990. By that time, approximately three years of the four year period of limitations had expired. The dispositive question therefore is whether the statute began to run again after the Second Circuit affirmed Judge Sweet's dismissal of *Johnson I* and, if so, when.

Dr. Johnson, as nearly as the Court can determine, makes two analytically distinct [\[**10\]](#) arguments in support of the proposition that this action was timely filed. First, he seems to contend that the Second Circuit's affirmation of the District Court's dismissal without prejudice in substance tolled the statute of limitations until the PHC ruled. In any case, he argues, the statute was equitably tolled as long as he diligently pursued his remedy in the PHC which, he asserts, he did.

The first of plaintiff's arguments cannot be reconciled with [Jewell v. County of Nassau](#), [\[*160\] 917 F.2d 738 \(2d Cir. 1990\)](#). That was a Section 1983 action in which the plaintiff alleged that he had been arrested and convicted and his home searched unlawfully. The case was commenced one day before the expiration of the statute of limitations. The magistrate judge recommended dismissal without prejudice pending the outcome of the State court appeal of Jewell's conviction. Jewell objected on the ground that dismissal would result in the recommencement of the running of time and therefore in the bar of his action. The District Court dismissed, although it purported to toll the statute of limitations. But the Second Circuit reversed, holding that the District Court lacked the power to toll the statute [\[**11\]](#) and that:

"where a plaintiff wishes or is required to pursue his claims in succession, rather than concurrently, in the absence of the parties' agreement made to waive the limitary period before it had expired, a judicial stay of the pending suit, rather than dismissal, albeit expressed to be without prejudice, is the only means by which the bar of limitations may be avoided." [Id. at 740-41](#).

Jewell thus stands for two propositions: (1) [HN2](#) a federal court ordinarily may not toll the running of a limitations period, and (2) [HN3](#) the limitations period begins to run upon the dismissal of an action without prejudice. While Dr. Johnson correctly notes that Jewell dealt with the question whether a federal court has the power to toll a period of limitations borrowed from State law, Dr. Johnson cites no authority in support of the argument that this distinction warrants a different result here and the Court has found none. The federal antitrust laws, like the New York statutes in Jewell, make no provision for tolling in these circumstances. Even more important, however, neither Judge Sweet nor the Second Circuit, unlike the District Court in Jewell, purported to toll the [\[**12\]](#) running of the period of limitations in *Johnson I*. The dismissal without prejudice did no more than permit Dr. Johnson to commence a new federal action after recourse to the PHC, subject to whatever defenses -- including limitations -- there might be. Indeed, any other interpretation of the Second Circuit's decision would require the conclusion that Dr. Johnson had an unlimited period of time in which to initiate proceedings in the PHC and, for that matter, to commence a new action after obtaining a ruling from the PHC, a manifestly improbable result.

Dr. Johnson's contention that the period of limitations was equitably tolled by the Second Circuit's ruling pending his diligent pursuit of a remedy in the PHC fares no better for at least two reasons.

First, it is quite doubtful that the doctrine of equitable tolling applies in these circumstances at all. While the Ninth Circuit in [*Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394](#) (9th Cir.), cert. denied, 449 U.S. 831, 66 L. Ed. 2d 36, 101 S. Ct. 99 (1980), held that the antitrust period of limitations was tolled during a plaintiff's pre-suit resort, required by the doctrine of primary jurisdiction, to the Interstate [\[**13\]](#) Commerce Commission, the decision has not met with favor in this Circuit or elsewhere. The Second Circuit declined to follow *Mt. Hood* in [*Higgins v. New York Stock Exchange*, 942 F.2d 829, 833 \(2d Cir. 1991\)](#), characterizing it "as at best a very narrow ruling, at worst a wholly anomalous decision," and held that the running of the statute on a claim relating to an alleged antitrust violation in the securities business was not tolled by the plaintiff's pre-suit resort to the Securities and Exchange Commission. See also [*Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 268-69 \(7th Cir. 1984\)](#).

This Court recognizes that Higgins, in a strict sense, is not dispositive because it dealt only with pre-suit resort to an agency with primary jurisdiction rather than post-suit resort, as occurred here. The post-suit situation is different because the filing of the suit puts the defendant on notice of the antitrust claim and may permit the defendant to preserve certain evidence for its defense. See [*Higgins*, 942 F.2d at 833](#). But this difference is insufficient to warrant a different result here. For one thing, pre-suit resort to an administrative agency often puts a prospective [\[**14\]](#) defendant on notice of a likely claim almost as surely as service of process. More important, certain of the prejudicial consequences of the passage of time -- consequences [\[*161\]](#) that statutes of limitation are designed to guard against -- cannot be prevented by notice of a claim. Witnesses may die and move out of the jurisdiction and testimony may change, usually as memories dim, quite without regard to whether the defendant is on notice of a claim. Hence, while the argument for tolling pending recourse to an agency with primary jurisdiction is somewhat stronger when recourse occurs after the filing of suit than before, it is only marginally so. The Court therefore holds that the running of the period of limitation was not tolled pending recourse to the PHC. Nor does the Court rest on that ground alone.

Dr. Johnson acknowledges that the equitable tolling doctrine, even if applicable, would suspend the running of the limitation period only if he acted with reasonable diligence. (Pl. Br. 38, citing [*Singletary v. Continental Illinois National Bank and Trust Co. of Chicago*, 9 F.3d 1236 \(7th Cir. 1993\)](#)). Here, however, Dr. Johnson did not act with reasonable diligence within the meaning [\[**15\]](#) of the doctrine.

It is undisputed that three years of the four year limitation period had expired before Dr. Johnson commenced *Johnson I*. Following the Second Circuit's decision, Dr. Johnson then waited the following additional periods before commencing this action: (1) approximately twelve months from May 11, 1992 until the OPMC decision on May 6, 1993, (2) three months from the OPMC decision on May 6, 1993 until filing his PHC complaint on August 9, 1993, (3) thirteen months from the filing of his PHC complaint on August 9, 1993 until the PHC ruling on September 7, 1994, and (4) approximately one month from the PHC decision on September 7, 1994 until the filing of this action on October 14, 1994.

Even accepting *arguendo* Dr. Johnson's logic concerning the delay in his resort to the PHC, there is no substantial argument for holding that the limitation period was tolled during the four months attributable to the delays between the OPMC decision and the filing of the PHC complaint and between the PHC ruling and the filing of this action. Nor does the Court accept Dr. Johnson's contention that the period was tolled for the twelve months during which he delayed going to the PHC [**16] because he preferred first to resolve the OPMC charges against him. As the cases Dr. Johnson cites hold, [HN4](#)[¹] equitable tolling "permits a plaintiff to sue after the statute of limitations has expired if *through no fault or lack of diligence on his part he was unable to sue before*, even though the defendant took no active steps to prevent him from suing." [*Singletary, 9 F.3d at 1241*](#) (emphasis added); accord, [*Heck v. Humphrey, 997 F.2d 355, 357 \(7th Cir. 1993\)*](#).

While it is not for the Court to question counsel's tactical judgment that Dr. Johnson perhaps stood a better chance of success before the PHC if the license revocation proceeding first were concluded, the fact remains that Dr. Johnson was not foreclosed by that proceeding from going to the PHC. He decided to delay in the pursuit of his own interests and must bear the consequences of that decision. Nor is there anything inequitable in this conclusion. If Dr. Johnson's decision were sufficient to toll the running of the limitation period, then by his own action he would have delayed resolution of the claim against Nyack Hospital for another year or more -- a period during which both sides are at risk that the vicissitudes [**17] of time will prejudice their respective cases. While Dr. Johnson chose to run that risk for himself, there is no basis for concluding that he had the right to subject the defendants to that risk by his unilateral action. In consequence, even if the doctrine of equitable tolling were applicable here, the Court would hold that Dr. Johnson did not act with reasonable diligence in failing to commence proceedings in the PHC between May 6, 1992 and August 9, 1993 and in failing to commence this action between the date of the PHC decision, September 7, 1994, and October 14, 1994. These periods, when combined with the three years that elapsed prior to the commencement of *Johnson I*, exceed the statutory limitation period even without regard to the period during which the matter was pending in the PHC as to which the Court need not express any opinion. Accordingly, [*162] the antitrust claims are barred by the statute of limitations.

Civil Rights Claims

[HN5](#)[¹] The statute of limitations for claims brought under [*Sections 1981*](#) and [*1985*](#) of the Civil Rights Act is three years. [*Tadros v. Coleman, 898 F.2d 10, 12*](#) (2d Cir.), cert. denied 498 U.S. 869, 112 L. Ed. 2d 149, 111 S. Ct. 186 (1990); [**18] [*Gilliard v. New York Public Library System, 597 F. Supp. 1069, 1076 \(S.D.N.Y. 1984\)*](#). The claim accrues and the limitation period begins to run when the plaintiff has notice of the act that is claimed to have caused the injury. [*Chardon v. Fernandez, 454 U.S. 6, 8, 70 L. Ed. 2d 6, 102 S. Ct. 28 \(1981\)*](#); [*Delaware State College v. Ricks, 449 U.S. 250, 259, 66 L. Ed. 2d 431, 101 S. Ct. 498 \(1980\)*](#). As Dr. Johnson's privileges were revoked on February 10, 1987, the statute of limitations on civil rights claims arising from that event appears to have expired on February 10, 1990.⁴ While Dr. Johnson acknowledges the general rule, he contends that his 1987 civil rights claims are timely because they are part of a continuing violation of the Civil Rights Act.

[HN6](#)[¹]

Under Title VII of the Civil Rights Act of 1964, the existence of a continuous [**19] practice and policy of discrimination delays the commencement of the limitation period until the last discriminatory act in furtherance thereof.⁵ [**20] E.g., [*Cornwell v. Robinson, 23 F.3d 694, 703 \(2d Cir. 1994\)*](#); [*Lambert v. Genesee Hospital, 10*](#)

⁴ While Dr. Johnson commenced *Johnson I* three days before the expiration of the statute on the civil rights claims, he did not assert any of those claims in that case.

⁵ This contrasts sharply with the principle applied to continuous courses of wrongful conduct in other areas of the law, where each act in furtherance of the wrongful scheme or pattern begins a new limitations period but does not reach back to render timely claims based on acts outside the statutory limitation period. E.g., [*Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 502, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)*](#) (continuing antitrust violation); [*Singleton v. City of New York, 632 F.2d 185 \(2d Cir. 1980\)*](#); [*Rutkin v. Reinfeld, 229 F.2d 248*](#) (2d Cir.), cert. denied sub nom. [*Kaplow v. Reinfeld, 352 U.S. 844, 1*](#)

F.3d 46, 53 (2d Cir. 1993); Gomes v. Avco Corp., 964 F.2d 1330 1333 (2d Cir. 1992); Association Against Discrimination in Employment, Inc. v. Bridgeport, 647 F.2d 256, 274-75 (2d Cir. 1981), cert. denied, 455 U.S. 988, 71 L. Ed. 2d 847, 102 S. Ct. 1611 (1982); see Havens Realty Corp. v. Coleman, 455 U.S. 363, 71 L. Ed. 2d 214, 102 S. Ct. 1114 (1982) (Fair Housing Act); Delaware State College, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498, 66 L. Ed. 2d 431, 101 S. Ct. 498; United Air Lines, Inc. v. Evans, 431 U.S. 553, 558-60, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977). The Second Circuit has applied this Title VII doctrine to claims under 42 U.S.C. §§ 1981 and 1985, albeit without discussion.⁶ Cornwell 23 F.3d at 703-04. In consequence, the question is whether Dr. Johnson comes within the continuing violation doctrine.

As one commentator has written, the continuing violation doctrine "continues to be one of the most confusing and inconsistently [**21] applied developments in employment discrimination law." Ramona L. Paetzold & Anne M. O'Leary-Kelly, *Continuing Violations and Hostile Environment Sexual Harassment: When Is Enough, Enough?* 31 AM. BUS. L.J. 365, 382 (1993) (hereinafter *When is Enough, Enough?*). To begin with, while most Circuits have held that a continuing violation may be established by proof either of a discriminatory policy or mechanism or of a series of related acts of discrimination,⁷ [*163] the decisions in this Circuit do not necessarily yield that conclusion. In *Lambert*, the Court held that the continuing violation doctrine is limited to "specific discriminatory policies or mechanisms, such as discriminatory seniority lists, . . . or discriminatory employment tests . . ." 10 F.3d at 52. In *Cornwell*, a different panel wrote that the occurrence of "specific and related instances of discrimination tolerated by an employer over a sufficient period" may be evidence of a continuing violation, apparently viewing protracted employer indifference as a policy or mechanism. 23 F.3d at 704.

[**22] Nor are many courts clear as to the criteria that determine when pre-limitation discriminatory acts cross the line from being "unfortunate event[s] in history which have no present legal consequences"⁸ to being elements in a continuing violation. Perhaps the most specific standard articulated thus far is that adopted by the Fifth Circuit in Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971 (5th Cir. 1983), cert. denied, 479 U.S. 868, 93 L. Ed. 2d 158, 107 S. Ct. 232 (1986), which held that HN7 the determination of whether a continuing violation exists depends principally upon a three-pronged analysis:

"The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly pay check) or more in the nature of an isolated employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness and

L. Ed. 2d 60, 77 S. Ct. 50 (1956) (continuing conspiracy); II PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW P 338(b), at 149 (rev. ed. 1995) (continuing antitrust violation).

⁶ There are important differences between Title VII cases and actions based on claims under Sections 1981 and 1985(3) that may warrant different treatment with respect to continuing violations. The limitation period in Title VII cases is 180 to 300 days, recovery of back pay is capped at two years, and compensatory and punitive damages are capped at legislatively determined amounts, even in continuing violation cases. 42 U.S.C. §§ 1981a, 2000e-5(g) (1988 & Supp. 1993). The limitation period in Section 1981 and 1985(3) cases is much longer. Even more important, there is no cap on the period for which monetary damages may be awarded. Hence, simple transplantation of the continuing violation doctrine from Title VII to Sections 1981 and 1985(3) may produce unintended consequences. In view of this Court's conclusion that the requirements of the continuing violations doctrine, as it is applied in Title VII cases, are not satisfied here, this issue need not be decided.

⁷ See Purrington v. University of Utah, 996 F.2d 1025 (10th Cir. 1993); Selan v. Kiley, 969 F.2d 560 (7th Cir. 1992); Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992); Johnson v. Rodriguez, 943 F.2d 104 (1st Cir. 1991); Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989); Berger v. Iron Workers Reinforced Rodmen Local 201, 269 U.S. App. D.C. 67, 843 F.2d 1395 (D.C. Cir. 1988); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1984); Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971 (5th Cir. 1983) (either a policy or practice or a series of related acts against an individual can form the basis of a continuing violation); but see Stoller v. Marsh, 221 U.S. App. D.C. 22, 682 F.2d 971, 975 (D.C. Cir. 1982) (suggesting that a policy or practice is required before a continuing violation will be found).

⁸ United Air Lines, Inc., 431 U.S. at 558.

duty to assert his or her rights, or which should indicate to the employee that the continued existence of the [**23] adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" [715 F.2d at 981](#).

This analysis, which has been adopted by several circuits,⁹ seems to this Court to give appropriate regard to the policies that animate both the civil rights laws and the law governing statutes of limitations.

[HN8](#)

The *Berry* standard, first of all, presupposes that related acts may come within the continuing violation doctrine even absent a formal discriminatory structural mechanism. This seems correct in light of the Supreme Court's [**24] decisions in this area. In [Havens Realty Corp., 455 U.S. 363, 71 L. Ed. 2d 214, 102 S. Ct. 1114](#), for example, the Court upheld the use of the continuing violation theory to reach multiple acts of racial steering. Nor, given *Delaware State College*, may *Havens* be passed over as a case involving a formal discriminatory mechanism. The Court in *Delaware State College* acknowledged the possibility that a continuing violation, in appropriate circumstances, might be established by multiple discriminatory acts directed at an individual. [449 U.S. at 257-58](#). That brings us to the question addressed by *Berry*, viz. when multiple acts ought be characterized as a continuing violation and thus permit the plaintiff to recover for acts which, if sued upon in isolation, would be time-barred, a question best approached with an appreciation of the underlying problem of discrimination in the workplace.

Discriminatory or allegedly discriminatory behavior in the employment context takes [*164] many forms. Some acts, if taken in isolation, may be ambiguous. The apparent existence of a discriminatory motive or effect may be perceptible only with repetition or over time.

Even unambiguously biased [**25] behavior in the workplace is not all alike. Some consists of acts directed at the employee by co-workers, but which reflect no more than the individual prejudices of the actors. Some involves the product of explicit, employer-promulgated policies, practices or mechanisms. There are a myriad of intermediate situations, which may include employer tolerance of employee bias, covert employer-sponsored discrimination and other variations. Nor are these categories neat and mutually exclusive. Rather, they are points along a continuum ranging from no employer involvement through employer awareness to employer tolerance and ultimately employer sponsorship.

The situation of the individual employee, particularly with reference to the prospect of litigation, can vary tremendously depending upon circumstances such as these. The employee at first may not be certain that he or she is confronting discrimination at all. Even where the prejudice is manifest, it may be unclear whether the employer fairly can be taxed with responsibility. And even where the employer is responsible, an employee who seeks to hold on to his or her job may face a difficult choice in deciding whether or not to sue. See [**26] generally *When is Enough, Enough?* 31 AM. BUS. L.J. at 377, 393-94.

[HN9](#)  The first two factors in the *Berry* test -- subject matter and frequency -- bear on whether acts both within and without the limitation period are part of "a discriminatory policy or practice" chargeable to the employer, [Cornwell, 23 F.3d at 704](#), as distinguished from unrelated if deplorable manifestations of individual prejudice. They thus reflect the view that a claim involving an employer's discriminatory policy or practice should not always be cabined by the statutory limitation period in recognition of the special difficulties with which an employee may have to deal.

[HN10](#)  The third factor -- whether the nature of the events outside the limitation period should have triggered awareness of the need to assert one's rights -- evokes considerations central to statutes of limitations generally. Moreover, as suggested by the passage from *Berry* quoted above, it generally is regarded as the core and most

⁹ [West v. Philadelphia Elec. Co., 45 F.3d 744, 754 n.9 \(3d Cir. 1995\)](#); [Mascheroni v. Board of Regents of University of California, 28 F.3d 1554, 1561 \(10th Cir. 1994\)](#); [Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 \(10th Cir. 1993\)](#); [Selan v. Kiley, 969 F.2d 560, 565-66 & n.7 \(7th Cir. 1992\)](#); [Roberts v. Gadsden Mem. Hosp., 835 F.2d 793, 800 \(11th Cir. 1988\)](#).

important element of the *Berry* test. See [*Selan*, 969 F.2d at 565-66](#) & n.7; [*Sabree v. United Brotherhood of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 402 \(1st Cir. 1990\)](#); [*Hendrix v. City of Yazoo* \[**27\]](#) [*City*, 911 F.2d 1102, 1104 \(5th Cir. 1990\)](#); [*Glass v. Petro-Tex Chemical Corp.*, 757 F.2d 1554, 1561 n.5 \(5th Cir. 1985\)](#).

Statutes of limitation, of course, are intended to protect against stale claims. [*Havens*, 455 U.S. at 380](#). They do so out of a sense that prospective litigants have a right to repose after a legislatively determined period, as well as a concern that the passage of too much time without assertion of a claim may prejudice the ability of the defendant to obtain a fair resolution. [*United States v. Kubrick*, 444 U.S. 111, 117, 62 L. Ed. 2d 259, 100 S. Ct. 352 \(1979\)](#); [*Gadsden Memorial Hospital*, 835 F.2d at 800](#). But they are not without exception, and the limits of the continuing violation doctrine perhaps are best understood in the broader context of the numerous doctrines that ease the rigor with which statutes of limitation are applied.

One such ameliorating doctrine is [HN11](#)[] the discovery rule, which holds that certain causes of action, notably fraud, accrue (i.e., the limitation period begins to run) only when the plaintiff knows, or in the exercise of reasonable diligence should know, of the existence of or basis for the claim. E.g., [*Woods v. Candela*, \[*28\] 13 F.3d 574 \(2d Cir. 1994\)](#); [*Leon v. Murphy*, 988 F.2d 303 \(2d Cir. 1993\)](#); [*Gnazzo v. G.D. Searle & Co.*, 973 F.2d 136 \(2d Cir. 1992\)](#) (Connecticut law); [*15 U.S.C. § 77m \(1988\)*](#); [*N.Y. CPLR 203\(g\)*](#) (McKinney 1990 & Supp. 1995). Another is the principle that [HN12](#)[] the limitation period is tolled during a defendant's fraudulent concealment of facts that would alert the plaintiff to the plaintiff's claim. See [*Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45, 48 \(2d Cir. 1985\)](#). A defendant may be equitably estopped to assert the statute where the defendant's actions cause the plaintiff to forebear [*165] from asserting the plaintiff's rights. See [*Hoemke v. New York Blood Center*, 720 F. Supp. 45 \(S.D.N.Y. 1989\)](#); [*Barrett v. Hoffman*, 521 F. Supp. 307 \(S.D.N.Y. 1981\)](#); [*Simcuski v. Saeli*, 44 N.Y.2d 442, 406 N.Y.S.2d 259, 377 N.E.2d 713 \(1972\)](#). The limitation period, at least in New York and no doubt elsewhere, is tolled with respect to a malpractice claim against a professional during the course of treatment in which the alleged malpractice occurred. E.g., [*McDermott v. Torre*, 56 N.Y.2d 399, 452 N.Y.S.2d 351, 437 N.E.2d 1108 \(1982\)](#); [*Borgia v. City of New York*, \[*29\] 12 N.Y.2d 151, 155, 237 N.Y.S.2d 319, 321, 187 N.E.2d 777 \(1962\)](#). There are other examples. See, e.g., [*Cullen v. Margiotta*, 811 F.2d 698, 721-24 \(2d Cir.\), cert. denied, *Nassau County Republican Committee v. Margiotta*, 483 U.S. 1021, 97 L. Ed. 2d 764, 107 S. Ct. 3266 \(1987\)](#) (duress). But they all boil down to a simple proposition: [HN13](#)[] the statutory period of limitation does not run while the plaintiff fails to bring suit as a result of blameless ignorance, culpable action by the defendant, or the continued existence of a close and important relationship that reasonably may be regarded as making the commencement of litigation inappropriate or unduly costly in human terms.

Against this background, the *Berry* test comes into sharp focus. [HN14](#)[] If the discriminatory acts within and without the limitation period are sufficiently similar and frequent to justify a conclusion that both are part of a single discriminatory practice chargeable to the employer, the continuing violation doctrine permits assertion of claims based on both in recognition of the special problems inherent in the employment context. But the third of the *Berry* factors limits the scope of this otherwise boundless [*30] exception to the statute of limitations by permitting suit on a continuing violation theory only if the circumstances are such that a reasonable person in the plaintiff's position would not have sued earlier. See, e.g., [*West*, 45 F.3d at 755](#); [*Martin*, 3 F.3d at 1415 n.6](#). This proviso gives due regard both to the defendant's interest in being protected against stale claims and to the plaintiff's interest in adopting strategies designed to deal both with employment discrimination and of being certain that matters have reached a point affording a proper basis for resort to the courts. See generally *When is Enough, Enough?* 31 AM BUS. L.J. at 393-94.

In this case, the Court assumes *arguendo* that Dr. Johnson has satisfied the first prong of the *Berry* standard.¹⁰ His case with respect to the second prong is much weaker, as the alleged discriminatory behavior apart from the 1987

¹⁰ The first prong of the *Berry* standard assumes that the act within the period of limitation itself constitutes a violation of the civil rights laws, as it must in light of *Delaware State College*'s holding that a mere consequence within the period of an earlier violation is insufficient to trigger the continuing violation doctrine. [*449 U.S. at 257-58*](#). The parties therefore have debated whether the 1994 reinstatement application involved, as Dr. Johnson claims, an unprincipled manipulation or, as the hospital claims, a straightforward application of the credentialing process established by the hospital's By-Laws. If it was the former, there

and 1994 privileges actions consists of less than a handful of racial epithets allegedly directed at Dr. Johnson over a period of many years. (Turgeon Dec. P 4; Fortuna Affs.) Without in any way condoning incidents of the character alleged, the evidence, taken in the light most favorable to Dr. [\[**31\]](#) Johnson, may not establish a pattern of frequent incidents of racial bias. But these issues need not be determined conclusively, as the Court is satisfied that Dr. Johnson has not satisfied the third prong of the *Berry* standard.

[\[**32\]](#) When Dr. Johnson's vascular and thoracic surgery privileges were revoked in 1987, he was well aware of the basis for the charges of racial discrimination included in the amended complaint in this action. In proceedings before the hospital's Peer Review and Ethics Committee on February 24, 1987, Dr. Johnson characterized the revocation of his privileges as racially motivated. (Def. Ex. 26, PP 3-4; Def. Ex. 27, PP 3-4) He charged in the 1987 State court action that the initial recommendation to terminate those privileges [\[*166\]](#) was the product of racial prejudice. (Def. Ex. 33, P 13) One of the affidavits on this motion attesting to an alleged instance of racial bias even was submitted in *Johnson I*. (Fortuna Aff., Feb. 5, 1991) Yet for reasons unknown, Dr. Johnson did not make any claims in *Johnson I* under the civil rights laws.

The question when a plaintiff in a discrimination case "has had enough" so as to warrant the commencement of litigation may be subtle and difficult. The Court acknowledges that many employees who seek to hold on to their jobs in the face of a hostile environment face hard choices. Fine lines sometimes must be drawn as to when a level of harassment or prejudice [\[**33\]](#) has risen to a level sufficient to charge the victim with knowledge that the victim must assert or lose his or her rights. See *When is Enough, Enough?* 31 AM. BUS. L.J. at 377. Such cases frequently may raise genuine issues as to the applicability of the continuing violation doctrine. But this is not such a case. Here Dr. Johnson brought two lawsuits within three years of the 1987 revocation of his privileges. He made a claim of racial discrimination in the State court case, but not in *Johnson I*. No reason has been advanced as to why the civil rights claims were not asserted in federal court until more than seven years after the privileges were revoked, and the Court can conceive of none. In consequence, the Court holds that the continuing violation doctrine does not apply and that Dr. Johnson's claims under [42 U.S.C. §§ 1981](#) and [1985\(3\)](#) with respect to the 1987 revocation of his privileges are barred by the statute of limitations.

The Tortious Interference Claim

Count V, Dr. Johnson's claim for tortious interference with prospective economic advantage, is based entirely on the assertion that the 1987 revocation of his privileges had a negative effect on contractual relationships [\[**34\]](#) that he then had or subsequently had or might have had. (Am Cpt PP 158-66; Johnson Dec. PP 152-54) The parties agree that the claim is governed by New York's three year statute of limitations. [N.Y. CPLR § 214](#) (McKinney 1990). Dr. Johnson argues, however, that the claim is not time-barred because he has been injured within the three year limitation period. The argument, however, must be rejected.

[HN15](#) A tort claim of this nature accrues, and the limitation period begins to run, under New York law when the last of the elements of the cause of action, typically injury, exists. [Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 933-34, 612 N.E.2d 289 \(1993\)](#); [Schmidt v. Merchants Despatch Transportation Co., 270 N.Y. 287, 300, 200 N.E. 824 \(1936\)](#). As the wrongful conduct underlying the claim all occurred in 1987, and as Dr. Johnson alleged a similar tortious interference claim in 1990 in *Johnson I*, he cannot deny that the elements of the cause of action were satisfied at least as early as *Johnson I*. The subsequent injuries alleged are immaterial to the issue of timeliness. [Piracci Construction Co. v. Skidmore, Owings & Merrill, 490 F. Supp. 314, 321 \(S.D.N.Y.\), \[**35\] aff'd 646 F.2d 562 \(2d Cir. 1980\) \(table\); see Kronos, Inc., 81 N.Y.2d at 94-95, 595 N.Y.S.2d at 934](#) (claim for interference with contract not barred, although contract breached before limitation period, because injury first sustained within limitation period). The running of the limitation period was not tolled for the reasons stated above. In consequence, this claim is time-barred as well.

may well be a basis for concluding that Dr. Johnson has established a *prima facie* case that the 1994 incident was a violation of the same character alleged with respect to the 1987 decision. If it was the latter, there probably is not. In view of the basis upon which the Court disposes of this motion, it need not determine this issue.

The 1994 Reinstatement Application

Dr. Johnson does not here assert antitrust claims with respect to the 1994 reinstatement application, acknowledging that *Johnson I* requires him resort to the PHC before bringing such an action. Nor does the tortious interference claim rest in any part on the 1994 events. He does contend, however, that the denial of the reinstatement application violated [42 U.S.C. §§ 1981](#) and [1985\(3\)](#).

The defendants argue that *Johnson I* requires Dr. Johnson to resort to the PHC before proceeding in federal court. In *Johnson I* the Second Circuit stated:

"Primary jurisdiction demands that Johnson resort to the PHC before seeking redress in federal court. The question whether defendants had a proper medical reason to terminate Johnson's privileges requires [**36] a skilled evaluation of whether Johnson provided inadequate treatment to Nyack's patients. This decision necessitates examination of various medical data concerning Johnson's cases. The medical [*167] expertise of the PHC will prove extremely helpful in sorting through these complex records and resolving the factual questions at stake." [964 F.2d at 122](#).

Dr. Johnson's response to defendants' primary jurisdiction argument is that the PHC "does not even have jurisdiction to hear a federal civil rights claim." He asserts also that he still must be given an opportunity to prove that any "legitimate" reasons for denial of reinstatement were pretextual. (Pl. Br. 36) He is right on both counts, but that nonetheless does not defeat defendants' argument, given the premises of the Second Circuit's ruling in *Johnson I*.

The PHC has no more jurisdiction over antitrust claims than it does over civil rights claims. Moreover, even a PHC ruling adverse to Dr. Johnson on the 1987 revocation of privileges would not necessarily have foreclosed his antitrust claim, just as an adverse ruling on the 1994 reinstatement issue would not necessarily foreclose his civil rights claims. The Second Circuit nevertheless [**37] held that the federal courts were likely to benefit from a PHC review of the medical issues before they considered the antitrust claims. While the PHC's action on Dr. Johnson's complaint with respect to the 1987 events demonstrates that the Court of Appeals' hope pending relate solely to the 1994 reinstatement application. The legal issues decided on this motion are unique to the claims relating to the 1987 events. Appellate review of those issues therefore will involve issues entirely distinct from the aspect of the case not yet disposed of. Accordingly, there is no just reason for delay, and the Clerk is directed to enter judgment pursuant to [FED. R. CIV. P. 54\(b\)](#) dismissing Counts I, II and V and so much of Counts III and IV as relate to the 1987 revocation of privileges.

SO ORDERED.

Dated: June 27, 1995

Lewis A. Kaplan

United States District Judge

Pedrina v. Han Kuk Chun

United States District Court for the District of Hawaii

June 27, 1995, Decided ; June 27, 1995, FILED

CIV. No. 89-00439 ACK

Reporter

906 F. Supp. 1377 *; 1995 U.S. Dist. LEXIS 16334 **

RAYMOND PEDRINA, et al. Plaintiffs, v. HAN KUK CHUN, et al., Defendants.

Disposition: [**1] PEDRINA v. CHUN; CV. NO. 89-00439 ACK; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT FOR ALL DEFENDANTS

Core Terms

tenants, relocation, state court, Defendants', rights, enterprise, crops, mail fraud, eviction, deed, claim preclusion, summary judgment motion, predicate act, parties, bribes, res judicata, relitigating, motions, leases, issue preclusion, allegations, conspired, contributions, counterclaim, bribery, privity, absolute immunity, merits, adverse possession, litigated

LexisNexis® Headnotes

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

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 shall be granted 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\(c\)](#).

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

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

[HN2](#)[] Entitlement as Matter of Law, Appropriateness

Summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to its case where that party will bear the burden of proof of that essential element at trial. If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment.

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

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > Oral Arguments

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 > Memoranda of Law

[HN3](#)[] Summary Judgment, Motions for Summary Judgment

[*Fed. R. Civ. P. 56\(e\)*](#) requires that the nonmoving party set forth, by affidavit or as otherwise provided in [*Rule 56*](#), specific facts showing that there is a genuine issue for trial. At least some significant probative evidence tending to support the complaint must be produced. Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment.

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

[HN4](#)[] Summary Judgment, Entitlement as Matter of Law

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. Thus, the question is whether reasonable minds could differ as to the import of the evidence.

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

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

[HN5](#)[] Summary Judgment, Entitlement as Matter of Law

When the moving party has carried its burden under [*Fed. R. Civ. P. 56\(c\)*](#), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Indeed, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would

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otherwise be necessary to show that there is a genuine issue for trial. Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN6 **Preclusion of Judgments, Res Judicata**

The doctrine of "res judicata" or former adjudication prevents parties from relitigating claims or issues that have already been decided by a competent tribunal. It protects the integrity of the courts and promotes reliance upon judicial pronouncements by requiring that the decisions and findings of the courts be accepted as undeniable legal truths. Res Judicata furthers the finality of legal disputes and eliminates the time and expense of relitigation by requiring that parties bring all claims arising out of a transaction, or series of connected transactions, in one action.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Constitutional Law > Relations Among Governments > Full Faith & Credit

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

Constitutional Law > Relations Among Governments > General Overview

HN7 **Full Faith & Credit, Full Faith & Credit Statutes**

The doctrine of "res judicata" arises from the *full faith and credit clause of the United States Constitution*. The statute implementing the *full faith and credit clause* requires that federal courts give state court proceedings the same full faith and credit as they have by law or usage in the courts of such state from which they are taken.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN8 **Preclusion of Judgments, Full Faith & Credit**

To determine whether a state decision precludes a party from litigating a claim or issue, federal courts must apply the res judicata rules of the state court in which the prior judgment was rendered.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

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Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN9 [down] **Estoppel, Collateral Estoppel**

"Res judicata" encompasses two distinct types of preclusion, claim preclusion and issue preclusion.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN10 [down] **Preclusion of Judgments, Res Judicata**

According to the doctrine of claim preclusion the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation not only of the claims which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

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

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN11 [down] **Estoppel, Collateral Estoppel**

Claim preclusion thus bars plaintiffs from pursuing successive suits where the claim was either litigated or could have been litigated in the first action. It also bars defendants from pursuing a subsequent action that could have been raised as a defense or counterclaim in the first suit. By contrast, issue preclusion only bars relitigation of particular issues actually litigated and decided in the prior suit. Issue preclusion may be asserted in a subsequent action on a totally different claim.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN12 [down] **Preclusion of Judgments, Res Judicata**

Claim preclusion is applicable only where (1) the claim asserted in the action in question was or could have been asserted in the prior action; (2) the parties in the present action are identical to, or in privity with, the parties in the prior action; and (3) a final judgment on the merits was rendered in the prior action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

[**HN13**](#) [blue icon] **Preclusion of Judgments, Res Judicata**

Claim preclusion requires that the parties to the second action are the same as, or in privity with, the parties to the first action. Whether sufficient privity exists to bind a nonparty to a judgment is determined under the circumstances in each case as it arises.

[Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata](#)

[Civil Procedure > Judgments > Preclusion of Judgments > General Overview](#)

[**HN14**](#) [blue icon] **Preclusion of Judgments, Res Judicata**

The party asserting claim preclusion must demonstrate that the interests of the nonparty were adequately represented and that the nonparty's rights were afforded proper protection in the prior action.

[Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata](#)

[**HN15**](#) [blue icon] **Preclusion of Judgments, Res Judicata**

To determine whether a litigant is asserting the "same claim" in a second action, courts look to whether the claim arises out of the same transaction or the same series of connected transactions out of which the first action arose. The claim extinguished by an action includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions. This inquiry is made based on the facts of the transaction and does not depend on the number of substantive theories, or variant forms of relief flowing from those theories, that may have been available to the plaintiff; the number of primary rights that may have been invaded; or the variations in the evidence needed to support the theories or rights.

[Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata](#)

[Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities](#)

[Civil Procedure > Judgments > Preclusion of Judgments > General Overview](#)

[Healthcare Law > ... > Actions Against Facilities > Defenses > General Overview](#)

[**HN16**](#) [blue icon] **Preclusion of Judgments, Res Judicata**

A plaintiff cannot avoid the bar of claim preclusion merely by alleging conduct that was not alleged in his prior action or by pleading a new legal theory. All claims arising from a single injury must be raised in a single action or they will be barred by res judicata. This is true even where some of the claims arise under state law and some arise under federal law. Because claim preclusion bars all claims and defenses which could have been brought, it bars claims and defenses which were voluntarily withdrawn if a final judgment is rendered on the remainder of the case.

[Civil Procedure > Dismissal > Involuntary Dismissals > General Overview](#)

[Civil Procedure > Dismissal > Voluntary Dismissals > General Overview](#)

[Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata](#)

[HN17](#) [blue document icon] Dismissal, Involuntary Dismissals

Either a bench or jury trial is an adjudication on the merits of a case. Likewise, rulings on summary judgment motions are an adjudication of the merits of the disputed issues. A dismissal with prejudice is an adjudication on the merits of all issues that were raised or could have been raised in the pleadings.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Comply

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Dismissal > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

[HN18](#) [blue document icon] Involuntary Dismissals, Failure to Comply

Haw. R. Civ. P. 41(b) and [Fed. R. Civ. P. 41\(b\)](#) provide for involuntary dismissal when a plaintiff fails to comply with the rules or with an order of the court. These rules specifically provide that such dismissal operates as an adjudication on the merits: unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under [Fed. R. Civ. P. 19](#), operates as an adjudication upon the merits.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

[HN19](#) [blue document icon] Default & Default Judgments, Default Judgments

Actions may be dismissed with prejudice for want of prosecution where all defendants are in default and if the plaintiff fails to apply for default judgment within a specific time period. Dismissal for want of prosecution pursuant to *Fed. Cir. R. 12* also operates as a dismissal with prejudice and thus precludes a party from relitigating claims which were or could have been brought in the dismissed action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

[HN20](#) [blue document icon] Preclusion of Judgments, Res Judicata

A judgment is final for purposes of res judicata where the time to appeal has expired without an appeal being taken. Where an appeal has been taken, a judgment of the trial court is not final, at least for purposes of res judicata.

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Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Appeals > Motions on Appeal

HN21 [] Dismissal, Involuntary Dismissals

When an appeal from the dismissal of the first suit has been taken and is pending so that it ultimately may result that the subject matter of the second suit becomes triable in the first suit, the proper remedy is not a dismissal but instead a motion for stay of the proceedings in the second suit.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN22 [] Estoppel, Collateral Estoppel

Issue preclusion requires that (1) the issue decided in the prior adjudication is identical with the one presented in the present action; (2) the party against whom issue preclusion is asserted was a party to the prior action or in privity with a prior party; and (3) there was a final judgment on the merits.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN23 [] Estoppel, Collateral Estoppel

The privity rules for claim preclusion and issue preclusion are identical.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN24 [] Estoppel, Collateral Estoppel

Issue preclusion is permitted to be raised defensively by one who was not a party to the prior action. Defensive issue preclusion may only be asserted against someone who was a party, or in privity with a party, to the prior suit.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

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Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN25 [] **Estoppel, Collateral Estoppel**

In contrast to claim preclusion, issue preclusion does not bar litigation of all claims that were or could have been asserted. Rather, it only prevents a party from relitigating an issue which was actually raised, litigated and decided in the prior action. "Actually litigated" requires that the party against whom preclusion is sought had a "full and fair opportunity" to litigate the issue in the earlier case.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN26 [] **Estoppel, Collateral Estoppel**

Application of issue preclusion, like claim preclusion, requires that a final judgment was rendered in the first action.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN27 [] **Default & Default Judgments, Default Judgments**

Fed. Cir. R. 29 provides that a case may be dismissed with prejudice for want of prosecution after notice of not less than five days where all defendants are in default and if the plaintiff fails to obtain entry of default and fails to apply for default judgment within six months after all defendants are in default.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Civil Procedure > Attorneys > General Overview

HN28 [] **Pleadings, Service of Process**

Haw. R. Civ. P. 4 provides that every order required by its terms to be served shall be served upon each of the parties affected thereby. Where the party is represented by an attorney, service shall be made upon the attorney by mailing it to him at his last known address. Haw. R. Civ. P. 4(b). Haw. R. Civ. P. 4 further provides that service by mail is complete upon mailing.

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Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Real Property Law > Adverse Possession > Defenses

Real Property Law > Adverse Possession > General Overview

HN29 [blue document icon] **Pleadings, Rule Application & Interpretation**

Haw. Rev. Stat. § 12.1 requires that a party raising the defense of adverse possession submit affidavits describing the nature and extent of the land in question.

Civil Procedure > Judicial Officers > Court Reporters > Court Reporter Immunity

Governments > State & Territorial Governments > Employees & Officials

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Governments > Courts > Court Personnel

HN30 [blue document icon] **Court Reporters, Court Reporter Immunity**

The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. Officials seeking absolute immunity bear the burden of showing that such immunity is justified.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Governments > State & Territorial Governments > Employees & Officials

HN31 [blue document icon] **Defenses, Demurrs & Objections, Affirmative Defenses**

Whether absolute immunity is available to an official does not depend on the official's job title or agency. The focus is on the function that the official was performing when taking the actions that provoked the law suit. Officials performing legislative acts which involve the formulation of policy and apply to the community at large are afforded absolute immunity. Those performing administrative or executive functions involving ad hoc decision making directed at one or a few individuals are not.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Torts > Public Entity Liability > Immunities > General Overview

HN32 [blue document icon] **Defenses, Demurrs & Objections, Affirmative Defenses**

Absolute immunity is only available when the official's conduct is within the scope of his or her official duties and when the conduct is discretionary in nature. However, if an official is entitled to absolute immunity, legitimacy or illegitimacy of the official's motive is irrelevant.

Torts > Public Entity Liability > Immunities > General Overview

[HN33](#) [blue document icon] **Public Entity Liability, Immunities**

Government officials performing discretionary functions within the scope of their authority are protected from liability for civil damages unless the law clearly proscribes the actions they took.

Governments > State & Territorial Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > General Overview

[HN34](#) [blue document icon] **State & Territorial Governments, Employees & Officials**

Whether an official is immune turns on the objective reasonableness of their conduct in light of clearly established law, not on their subjective good faith. An official who acts in good faith will only be held liable where the unlawfulness of the official's actions would have been apparent to a reasonable official in light of preexisting law. Qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law.

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

Torts > Public Entity Liability > Immunities > General Overview

[HN35](#) [blue document icon] **Liability, Claim Presentation**

In order to avoid a claim of qualified immunity, the plaintiff must prove that the law clearly established that the official's actions were unlawful at the time of the alleged misconduct.

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

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

[HN36](#) [blue document icon] **Summary Judgment, Opposing Materials**

To defeat summary judgment based on qualified immunity, the plaintiff must produce evidence that would allow a fact-finder to find that no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts.

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

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

[HN37](#) [blue document icon] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Racketeering Influenced and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-1968](#), prohibits any person" from using money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. [18 U.S.C.S. §§ 1962\(a\)-\(c\)](#). [Section 1962\(d\)](#) prohibits any person from conspiring to violate any of the provisions of [18 U.S.C.S. §§ 1962\(a\), \(b\) or \(c\)](#).

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

HN38 [] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The purpose of the Racketeering Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. §§ 1961-1968](#), statute is to allow a single prosecution of persons who engage in a series of criminal acts for an enterprise. It applies even where different defendants perform different tasks or participate in separate acts of racketeering. If a defendant is found to have violated RICO, he will be liable for all harm caused by the enterprise, regardless of whether he committed or endorsed the specific acts of racketeering which led to the injury.

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

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

Real Property Law > Landlord & Tenant > Lease Agreements > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

HN39 [] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Racketeering Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. §§ 1961-1968](#), authorizes a private civil action by any person injured in his business or property by reason of a violation of [§ 1962](#). [18 U.S.C.S. § 1964\(c\)](#). Private litigants have standing under RICO only to the extent that they have been injured in their business or property by the conduct constituting the RICO violation. This injury must consist of a concrete financial loss, and not mere injury to a valuable, but intangible, property interest.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

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

HN40 [] **Shareholder Actions, Actions Against Corporations**

The compensable injury of a private litigant under the Racketeering Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. §§ 1961-1968](#), is the harm caused by the predicate acts. To recover, private litigants must not only show that their harm was actually caused by defendants' acts, they must also establish proximate causation. To establish proximate cause under RICO, plaintiffs must show that their injury flows directly from the defendants' commission of the predicate acts. It is not sufficient that the injury was foreseeable; there must be a direct relationship between the injury and the prohibited conduct.

Commercial Law (UCC) > Leases (Article 2A) > Construction & Formation > General Overview

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

Contracts Law > Statute of Frauds > General Overview

HN41 [Leases (Article 2A), Construction & Formation]

A lease for real property which extends beyond one year must be (1) in writing and (2) signed by the party to be charged. [Haw. Rev. Stat. § 656-1.](#)

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Statute of Frauds > General Overview

Contracts Law > Statute of Frauds > Exceptions > General Overview

Contracts Law > Statute of Frauds > Exceptions > Partial Performance

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

HN42 [Types of Contracts, Oral Agreements]

An oral contract with respect to an interest in land may become enforceable, in spite of the statute of frauds, where there has been part performance. There are three factors to be used in determining whether acts constituting part performance are sufficient to free a promise from the statute of fraud requirements: (1) the acts must be pursuant to the contract; (2) the acts must be undertaken with the knowledge and consent of the other party; and (3) the acts must be such that to allow the other party to repudiate would be a fraud upon the plaintiff.

Business & Corporate Compliance > ... > Consideration > Enforcement of Promises > Forbearance

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Statute of Frauds > General Overview

Contracts Law > Statute of Frauds > Exceptions > General Overview

Contracts Law > Statute of Frauds > Exceptions > Partial Performance

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

HN43 [Enforcement of Promises, Forbearance]

Although forbearance to exercise a right is good consideration for a promise, mere proof of forbearance is not sufficient evidence of part performance to remove a verbal agreement from the operation of the statute of fraud. A party relying upon forbearance must demonstrate that the forbearance was primarily and substantially motivated by the oral agreement.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Bilateral Contracts

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Contracts Law > Contract Interpretation > General Overview

HN44 [] **Types of Contracts, Bilateral Contracts**

In determining whether injustice can be avoided only by the enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor.

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

HN45 [] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See [18 U.S.C.S. § 1962\(c\)](#).

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

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

HN46 [] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Liability under [18 U.S.C.S. § 1962\(c\)](#) requires: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

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

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

HN47 [] **Shareholder Actions, Actions Against Corporations**

Only persons participating in the operation or management of the enterprise itself may be held liable under [18 U.S.C.S. § 1962\(c\)](#).

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Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

HN48 [] Shareholders, Shareholder Duties & Liabilities

In order to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs, a person must have a part in directing the operation or management of those affairs.

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

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

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

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

HN49 [] Shareholders, Shareholder Duties & Liabilities

An enterprise is "operated" not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management. An enterprise might also be "operated" or "managed" by others "associated with" the enterprise who exert control over it. Thus, regardless of whether a person is "outside" or "inside" the enterprise, he may be liable under [18 U.S.C.S. § 1962\(c\)](#) if he participated in the operation or management of the enterprise itself.

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

HN50 [] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See [18 U.S.C.S. § 1961\(1\)](#).

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN51 [] Crimes Against Persons, Bribery

[Haw. Rev. Stat. § 710-1040\(1\)\(b\)](#) makes it illegal for: (1) a public servant; (2) to solicit, accept or agree to accept (either directly or indirectly); (3) pecuniary benefit; (4) with the intent that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced. It is likewise illegal for a person to: (1) confer, or offer or agree to confer (directly or indirectly); (2) pecuniary benefit; (3) upon a public servant; (4) with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion or other action in his official capacity.

Criminal Law & Procedure > ... > Bribery > Public Officials > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

[**HN52**](#) [blue icon] **Public Officials, Elements**

Not every gift, favor or contribution to a government or political official constitutes bribery. Rather, the intent that the official's actions be influenced by the gift, favor or contribution is crucial to a violation of the state bribery statute. [Haw. Rev. Stat. § 710-1040\(1\)\(b\)](#).

Banking Law > ... > Criminal Offenses > Bank Fraud > General Overview

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

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

[**HN53**](#) [blue icon] **Criminal Offenses, Bank Fraud**

To allege a violation of the mail fraud statute, [18 U.S.C.S. § 1341](#), a plaintiff must show that: (1) Defendants devised a scheme to defraud; (2) Defendants used the mails in furtherance of the scheme; (3) Defendants did so with the specific intent to deceive or defraud.

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

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

[**HN54**](#) [blue icon] **Mail Fraud, Elements**

The requirement of specific intent under [18 U.S.C.S. § 1341](#), the mail fraud statute, is satisfied by the existence of a scheme which was reasonably calculated to deceive persons of ordinary prudence and comprehension and this intention is shown by examining the scheme itself.

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

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

[**HN55**](#) [blue icon] **Fraud Against the Government, Mail Fraud**

Fraudulent intent requires that a person knowingly and willfully act to defraud. Therefore, good faith generally constitutes a complete defense to any crime which requires fraudulent intent.

Criminal Law & Procedure > Accessories > Aiding & Abetting

[**HN56**](#) [blue icon] **Accessories, Aiding & Abetting**

The elements necessary to convict an individual under an aiding and abetting theory are: (1) that the accused had the specific intent to facilitate the commission of a crime by another; (2) that the accused had the requisite intent of the underlying substantive offense; (3) that the accused assisted or participated in the commission of the underlying substantive offense; and (4) that someone committed the underlying substantive offense.

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

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

HN57 [blue icon] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Racketeering Influenced and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-1968](#) defines the term "pattern of racketeering activity" as requiring at least two predicate acts of racketeering activity the last of which occurred within ten years after the commission of a prior act of racketeering activity. [18 U.S.C.S. § 1961\(5\)](#).

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

HN58 [blue icon] **Causes of Action, Fraud & Misrepresentation**

To prove a pattern of racketeering activity a plaintiff must also show that: (1) the racketeering predicates are related; and (2) that the predicate acts amount to, or pose a threat of, continued criminal activity.

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

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

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

HN59 [blue icon] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Conspiracy to carry on an enterprise through racketeering activity, indictable under [18 U.S.C.S. § 1962\(d\)](#), is a separate crime from the participation in an enterprise through racketeering acts (which may include conspiracy or attempts), indictable under [18 U.S.C.S. § 1962\(c\)](#).

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

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

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

HN60 [blue icon] **Conspiracy, Elements**

Conspiracy to violate the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961-1968 requires a showing that a defendant was aware of the essential nature and scope of the enterprise and intended to participate in it. A RICO conspiracy requires the assent of each defendant charged, although it is not necessary that each conspirator knows all of the details of the plan or conspiracy.

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Judges: KAY, Chief United States District Judge

Opinion by: KAY

Opinion

[*1393] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT FOR ALL DEFENDANTS

BACKGROUND

This action arises out of Defendant Y.Y. Valley Corporation's ("YYVC") attempt to relocate and evict Plaintiffs,¹ who were tenants at will on land purchased by YYVC. In 1986, Royal Hawaiian Country Club, Inc. ("RHCC"), a [**2] subsidiary of YYVC, applied for and was granted a Conditional Use Permit ("CUP") from the Director of the Department of Land Utilization ("DLU") of the City and County of Honolulu, allowing the corporation to develop a golf course and country club on the property. Approval of the CUP was granted on the condition that the agricultural tenants presently located within the project site be offered an opportunity to relocate to an adjacent area. In 1989, YYVC sought city approval of a relocation plan which provided tenants living on the proposed project site an opportunity to relocate to an adjacent area under 10 year leases. Tenants living on adjacent areas were likewise

¹ Plaintiffs Raymond Pedrina, Jupiterrex Uraniumrhi and Rosita Uraniumrhi are not included in this order.

included in the plan, although they were not generally required to vacate their current premises. After the city granted its approval on or about June 13, 1986, the corporation presented the plan to the tenants. Some tenants accepted the offer; others did not, including all those who lived in the area which was to be developed. Tenants who did not accept the relocation offer were served notices to vacate the property and summary possession actions were brought against them.

[**3] Plaintiffs brought the current action against Defendants Han Kuk Chun, Tetsuo Yasuda, Masanori Kobayashi, Yoshinori Hayashida, Y. Y. Valley Corporation, Hiroshi Kobayashi, Eugene Lum, Norma Lum and former mayor Frank F. Fasi ("Defendants") under the Racketeering Influenced and Corrupt Organizations Act (RICO). [18 U.S.C. §§ 1961-68](#). In particular, Plaintiffs allege that Defendants violated [§ 1962\(c\)](#), prohibiting any person from conducting an enterprise through a pattern of racketeering activity and [§ 1962\(d\)](#), prohibiting any person from conspiring to violate any of the provisions of subsections (a), (b) and (c). To support their RICO claims, Plaintiffs alleged the following injuries:

- a. loss of 10-year home/farm leases in Maunawili Valley which they are entitled to as third party beneficiaries of the Conditional Use Permit;
- b. loss of 10-year home/farm leases in Maunawili Valley which they are entitled to as third party beneficiaries under an oral option contract;
- c. injury to rights under the implied covenant of quiet enjoyment in that their intended use of the property was substantially interfered with in many ways, including not being able to make needed [**4] repairs;²
- d. loss of crops and improvements which they are entitled to under a negative covenant in the deed through which YYVC obtained the property;³ [**5]

[*1394] e. the Wongs were robbed and their bull was shot;

f. certain Plaintiffs' ⁴ interest in the property as adverse possessors was injured when they were evicted from the property.

As predicate acts establishing "racketeering activity," Plaintiffs allege that various Defendants committed bribery, robbery, state and federal extortion and mail fraud, and/or aided and abetted or conspired in those activities.⁵ With

² In particular, Plaintiffs allege that:

- a) All Plaintiffs lost farming income from sales and subsistence and rental income from family members;
- b) Wong, Pedrina, Kamai, Augustus, Jones, Amit, Manuel, Uraniumrhi, Duque and Aurio lost income from sale of livestock;
- c) Dumadag, Bolo, Duque and Amit lost fishery income from sales and subsistence. Some of the fish ponds were filled in by bulldozers in 1988 and 1989.

³ In particular Plaintiffs allege that

- a) Manuel, Miguel, Batalona and Duque's homes were destroyed by bulldozers in 1988-89. Plaintiff James Jones' cabin was destroyed;
- b) Igartas and Sullivans voluntarily gave up their homes, crops and improvements, because they were not informed of their rights under the CUP or the Deed;
- c) Bolos, Dilays, Dumadag, Coloyans, Uraniumrhis, Batalona, Manuel, Miguel and Amit crops were destroyed by bulldozers in 1988 or '89 and they were prevented from attending to their crops;
- d) Dumadag, Bolos, Duque and Amit's fish ponds were filled in by bulldozers.

⁴ Nicanor Amit, Alfredo Aurio, Sr., Benita Aurio, Frances Manuel, Cristita Bolo, Wilfredo Bolo, Josefina Bolo, Alejandro Coloyan, Ofelia Coloyan, Isidro Dilay, Margaret Dilay, Lorraine Dilay, Violeta Dumadag, Estrella Igarta, Sebastian Igarta, Raphael Kamai, Lynda Augustus, Milnor Lum, Jennie Olinger, Francisco Pedrina, Adoracion Pedrina, William Sullivan, Jocelyn Sullivan.

⁵ Plaintiffs' allegations that Defendant Fasi aided and abetted in robbery and extortion were dismissed by this Court in an order filed December 18, 1990. In an order filed April 19, 1990, the Court dismissed the claims of all Plaintiffs except the Wongs as to the robbery count.

regard to their bribery claims, Plaintiffs' allege that Defendant/Developers (i.e., Y.Y. Valley Corporation, Han Kuk Chun, Tetsuo Yasuda, Masanori Kobayashi and Yoshinori "Ken" Hayashida) and Defendant Hiroshi Kobayashi made and conspired to make bribes to Defendant Fasi and other politicians in the form of illegal campaign contributions. Most of these contributions were made in August and September of 1987 with one being made in June of 1988. Although these contributions were returned [**6] by Fasi's campaign organization in October of 1988, Plaintiffs contend that the contributions were given back to Fasi in the form of cash payments. In addition, Plaintiffs allege that on or about June 1, 1988, Defendant Han Kuk Chun made an offer of \$ 5 million as a "gift" to the City and County of Honolulu through Defendant Fasi. According to Plaintiffs, these alleged bribes were intended to influence the actions of Defendant Fasi and other public officials concerning the issuance and enforcement of the CUP.

With regard to their mail fraud claims, Plaintiffs allege that Defendant/Developers (i.e., Y.Y. Valley Corporation, Han Kuk Chun, Tetsuo Yasuda, Masanori Kobayashi and Yoshinori "Ken" Hayashida) conspired to commit mail fraud [**7] in connection with a "bribery scheme," an "eviction scheme" and a "confiscatory relocation plan scheme." In particular, Plaintiffs assert that the campaign contributions discussed above constituted mail fraud because Defendants misrepresented that they were benign contributions when, according to Plaintiffs, Defendants knew the contributions were in fact illegal bribes. Plaintiffs also contend that a series of eviction notices, and letters in furtherance of the attempted evictions, constituted mail fraud because the mailings did not inform the Plaintiffs of their right to relocate and to remove improvements from the property. These evictions letters were sent in 1988 and 1987, after the CUP was granted but before Defendants offered Plaintiffs an opportunity to relocate. As to the "confiscatory relocation scheme," Plaintiffs claim that a series of letters between Defendants' and Plaintiffs' attorneys regarding the relocation plan constituted mail fraud because the mailings purported that the plan satisfied the CUP and that Plaintiffs had to surrender various rights in order to receive benefits under the CUP. These letters were sent in 1989, around the time the relocation plan was offered [**8] to Plaintiffs. Plaintiffs further allege that Defendant Fasi aided and abetted, and conspired to aid and abet, in the commission of mail fraud by accepting the campaign contributions and allowing the alleged eviction and confiscatory relocation schemes to happen.

Plaintiffs contend that the alleged mail fraud and certain other acts of Defendants constituted extortion under state and federal laws. In particular, Plaintiffs argue that the eviction notices and letters, combined with Defendants' prior violent eviction methods, served to extort Plaintiffs of their various property interests discussed above. On May 16, 1987, some of the Defendants allegedly shot the Wong's bull and forcibly removed their other livestock and equipment from the [*1395] property on which the Wongs were operating a ranch. Defendants also allegedly destroyed the Wong's fences. Other Plaintiffs contend that YYVC's representative Robert Carter and some men "who looked like body guards" came to their homes and told them, in a threatening manner, that they would have to leave the property. These men also allegedly took Jupiterrex Uraniumrhi, a Plaintiff who is not a party to these current motions, to a secluded warehouse [**9] and attempted to force him to accept the relocation plan. The robbery allegations pertain to the 1987 shooting of the Wong's bull and theft of the Wong's other livestock and equipment.

On November 7, 1988, prior to filing the current action in federal court, most of the Plaintiffs⁶ ("State Court Plaintiffs") filed an action against Defendants Han Kuk Chun and YYVC in the Circuit Court of the First Circuit for the State of Hawaii. Like the current action, Plaintiffs' state court action arose out of Defendant YYVC's attempt to evict the tenants from the property. The allegations and resolution of this action will be discussed below in the section on former adjudication.

[**10] In June 1990, while the current action was pending in federal court, YYVC commenced 23 summary possession actions in the District Court for the First Circuit Court of the State of Hawaii against all of the Plaintiffs in this action except Huberto Dumadag and the Estate of Laurencia Canencia. On October 12, 1990, these actions

⁶ Raymond Pedrina, Leonard Wong, Cheryl Wong, Isidro Dilay, Margaret S. Dilay, Lorraine Dilay, Nicanor Amit, Alejandro Coloyan, Raphael Kamai, Lynda Augustus, Alfredo Aurio, Sr., Jennie Olinger, James Jones, Sebastian Igarta, Estrella Igarta, Wilfredo Bolo, Josefina Bolo, Cristita Bolo, Francisco Pedrina, Adoracion Pedrina, William Sullivan, Jocelyn Sullivan, Violeta Dumadag, Estate of Laurencia Canencia, John Batalona.

were consolidated. The tenants named in the summary possession actions each filed an answer and six counterclaims. These counterclaims and their dispositions are discussed below in the section on former adjudication.

On September 30, 1994, Defendants filed the following eighteen motions for summary judgment and partial summary judgment:

- (1) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS RAYMOND PEDRINA, LUZ PEDRINA, ALFREDO AURIO, SR., BENITA AURIO, RAPHAEL KAMAI, LYNDA AUGUSTUS, MINOR LUM, JUPITERREX URANIUMRHI AND ROSITA URANIUMRHI (res judicata/ collateral estoppel);
- (2) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT AGAINST CERTAIN PLAINTIFFS (res judicata/ collateral estoppel);
- (3) DEFENDANTS HAN KUK CHUN, TETSUO YASUDA, MASANORI KOBAYASHI, YOSHINORI "KEN" HAYASHIDA, AND Y.Y. VALLEY CORPORATION'S [*11] MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS RAYMOND PEDRINA, LUZ PEDRINA, LEONARD WONG, CHERYL WONG, ISIDRO DILAY, et al. (res judicata/ collateral estoppel);
- (4) DEFENDANTS Y.Y. VALLEY CORPORATION, HAN KUK CHUN (AKA YASUO YASUDA), AND TETSUO YASUDA'S MOTION FOR SUMMARY JUDGMENT AGAINST ALL PLAINTIFFS (res judicata/ collateral estoppel);
- (5) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT REGARDING IMMUNITY;
- (6) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING "FEDERAL CAMPAIGN SPENDING ACT";
- (7) DEFENDANTS MASANORI KOBAYASHI AND YOSHINORI "KEN" HAYASHIDA'S MOTION FOR SUMMARY JUDGMENT FOR (A) RELOCATION UNDER CONDITIONAL USE PERMIT & (B) ESTOPPEL AND BREACH OF NEGATIVE COVENANT IN DEED (injury to property rights);
- [*1396] (8) DEFENDANTS MASANORI KOBAYASHI AND YOSHINORI "KEN" HAYASHIDA'S MOTION FOR SUMMARY JUDGMENT RE STATUTE OF FRAUDS (injury to property rights);
- (9) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT REGARDING BRIBERY;
- (10) DEFENDANTS MASANORI KOBAYASHI AND YOSHINORI "KEN" HAYASHIDA'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFFS' BRIBERY CLAIMS;
- (11) DEFENDANTS MASANORI [*12] KOBAYASHI AND YOSHINORI "KEN" HAYASHIDA'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO COUNTS 4, 5 AND 6 OF THE VERIFIED FOURTH AMENDED COMPLAINT (mail fraud and extortion);
- (12) DEFENDANTS MASANORI KOBAYASHI AND YOSHINORI "KEN" HAYASHIDA'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO ALL CLAIMS OF INTERFERENCE WITH OR VIOLATION OF PLAINTIFFS' PROPERTY RIGHTS;
- (13) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT REGARDING AIDING AND ABETTING IN THE COMMISSION OF MAIL FRAUD;
- (14) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT REGARDING CONSPIRACY TO AID AND ABET THE COMMISSION OF MAIL FRAUD;
- (15) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS BASED UPON 18 U.S.C. § 1962(c);
- (16) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS BASED UPON 18 U.S.C. § 1962(d);
- (17) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT REGARDING "PATTERN" OF RACKETEERING ACTIVITY;
- (18) DEFENDANT MAYOR FRANK F. FASI'S MOTION FOR SUMMARY JUDGMENT REGARDING LACK OF STANDING AND/OR CAUSATION (injury to property rights);

Defendant Fasi joined in motions 3 and 7. **[**13]** Defendants YYVC, Han Kuk Chun and Tetsuo Yasuda joined in motions 1, 2, 7, 8, 10, 11, 12, 16, 17 and 18. Masanori Kobayashi and Yoshinori Hayashida joined in motions 1, 4, 6, 9, 13, 15, 16, 17 and 18. Hiroshi Kobayashi joined in motions 1, 2, 3, 4, 7, 8, 10, 11, 12, and 18. Eugene and Norma Lum joined in motions 1, 3, 4, 7, 8, 11, and 18.

Consideration of these motions was initially delayed pending settlement negotiations. After negotiations broke down, the motions were heard before this Court on May 15 and 22, 1995. For the reasons stated below, the Court GRANTS summary judgment in favor of Defendants. The Court finds that Plaintiffs' claims against all Defendants except Fasi are barred by the doctrine of claim preclusion. The Court also finds that Plaintiffs' claims against Defendant Fasi cannot survive summary judgment because Plaintiffs have failed to establish a genuine issue of fact whether Defendant Fasi participated, or agreed to participate, in the operation or control of RHCC. Accordingly, Defendant Fasi cannot be found liable under [18 U.S.C. 1962\(c\)](#) or [\(d\)](#).

Although the above rulings are wholly dispositive of this action, the following order disposes of the remaining **[**14]** motions as well. Both the parties and this Court have expended considerable time and effort briefing, arguing and reviewing these issues. The Court notes that although this action is being disposed of at summary judgment, Plaintiffs have had ample opportunity to present their side. Plaintiffs were given the opportunity to amend their complaint four times and survived innumerable motions previously brought before the Court.

[*1397] STANDARD OF REVIEW

HN1  Summary judgment shall be granted 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\(c\)](#). One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The United States Supreme Court has declared that **HN2**  summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to its case where that party will bear the burden of proof of that essential element at trial. *Id. at 322*. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions **[**15]** of the materials on file that it believes demonstrate the absence of any genuine issue of material fact [citations omitted], the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." [T.W. Electrical. Serv. v. Pacific Elec. Contractors Assoc.](#), 809 F.2d 626, 630 (9th Cir. 1987). Instead, **HN3**  [Rule 56\(e\)](#) requires that the nonmoving party set forth, by affidavit or as otherwise provided in [Rule 56](#), specific facts showing that there is a genuine issue for trial. *Id.* At least some "significant probative evidence tending to support the complaint" must be produced. *Id.* Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. [British Airways Bd. v. Boeing Co.](#), 585 F.2d 946, 952 (9th Cir. 1978).

HN4  The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. See [Eisenberg v. Ins. Co. of North America](#), 815 F.2d 1285, 1289 (9th Cir. 1987), citing, [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Thus, the question is whether "reasonable minds could differ as to the **[**16]** import of the evidence." *Id.*

The Ninth Circuit has established that "no longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." [California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.](#), 818 F.2d 1466, 1468 (9th Cir. 1987). Moreover, the United States Supreme Court has stated that **HN5**  "when the moving party has carried its burden under [Rule 56\(c\)](#), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Indeed, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." [Franciscan Ceramics](#), 818 F.2d at 1468 (emphasis original), citing, [Matsushita](#), 475 U.S. at 587. Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. [T.W. Elec. Services](#), 809 F.2d at 630-31.

DISCUSSION

I. PRELIMINARY MATTERS

[**17] A. DISMISSAL OF IMPROPERLY ADDED PARTIES

In their Fourth Amended Complaint, Plaintiffs joined Huberto Dumadag and Rosita Uraniumrhi as Plaintiffs. In motion 1 and 2, Defendant Fasi requests that the Court dismiss these Plaintiffs because they were not properly added to the complaint. Plaintiffs did not seek leave of the Court to add these parties as required by [Rule 15 of the Federal Rules of Civil Procedure](#). Nor did they bring a motion to amend their complaint before the Magistrate Judge as required by this Court's order of April 19, 1990. Therefore, the Court DISMISES all claims of Huberto Dumadag and Rosita Uraniumrhi.

Additionally, although the Court dismissed the estate of Laurencia Canencia in a prior order, Plaintiffs continued to name the estate in their Fourth Amended Complaint. The Court hereby strikes the estate from the complaint.

[*1398] B. [FIFTH AMENDMENT PRIVILEGE](#)

Throughout their opposition to Defendants' motions for summary judgments, Plaintiffs argue that summary judgment should not be granted because various Defendants asserted their [Fifth Amendment](#) right against self-incrimination during their depositions. Although the Court does not agree that [**18] summary judgment is inappropriate where a defendant has asserted the [Fifth Amendment](#), the Court recognizes that this is a factor which requires consideration in certain instances. For example, Defendants may not rely on their own testimony or affidavits to support their version of a disputed issue where they have asserted their [Fifth Amendment](#) right not to answer questions concerning that very same issue. See [United States v. Parcels of Land](#), 903 F.2d 36, 43 (1st Cir. 1990). Likewise, the Court may draw an adverse inference from the refusal of any of the Defendants to answer questions in response to probative evidence offered against them. [Baxter v. Palmigiano](#), 425 U.S. 308, 318-19, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976); [United States v. Ianniello](#), 824 F.2d 203, 208 (2nd Cir. 1987); [Ramil v. Keller](#), 68 Haw. 608, 620, 726 P.2d 254 (1986).

II. FORMER ADJUDICATION (Res Judicata)

Defendants have filed four motions for summary judgment based on the preclusive effect of prior state court actions.⁷ In motions 1 and 2, Defendant Fasi contends that the claims and issues in the instant case are precluded by the doctrines of res judicata and/or collateral estoppel based on the summary possession actions. [**19] Defendants YYVC, Han Kuk Chun and Tetsuo Yasuda raise the same argument in motion 4. All Defendants joined in one or more of these motions. In motion 3, Defendants contend that Plaintiffs' claims in this action are barred by Plaintiffs' state court action. All Defendants joined in this motion.

⁷ In response to these motions, Plaintiffs make several arguments that can be dealt with summarily. First, Plaintiffs contend that summary judgment is inappropriate because some of the Defendants asserted the [Fifth Amendment](#) during their depositions. This argument is clearly without merit. Defendants' subsequent assertion of their right to be free from self incrimination cannot possibly impact the preclusive effect of prior decisions by a competent tribunal.

Second, Plaintiffs argue that Defendants waived their right to assert issue preclusion by not raising it in their answer. This argument is without merit. Plaintiffs admit that Defendants raised an affirmative defense of res judicata. The term res judicata is often used to encompass both issue and claim preclusion. [Migra v. Warren City School District](#), 465 U.S. 75, 77 n.1, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984); [Robi v. Five Platters, Inc.](#), 838 F.2d 318, 320 (9th Cir. 1988); *In the Matter of the Dowsett Trust*, 7 Haw. App. 640, 644 n.2, 791 P.2d 398 (1990). Plaintiffs also contend that Defendants' assertion of this affirmative defense was premature because the state courts had not yet ruled on the state actions. This contention is likewise without merit. Plaintiffs' state court action was pending when Defendants filed their answer. Accordingly, it was appropriate for Defendants to raise the defense of res judicata at that time. If the actions were not final by the time this court considered their preclusive effect, the defense would simply fail.

Third, Plaintiffs argue that the Court should not give the prior actions preclusive effect because they have discovered new evidence since those decisions were rendered. This alleged discovery, however, does not alter the preclusive effect of the prior decisions. If anything, the evidence provides Plaintiffs a grounds for challenging the validity of the actions in the state courts.

[**20] Generally, [HN6](#)[↑] the doctrine of "res judicata" or former adjudication prevents parties from relitigating claims or issues that have already been decided by a competent tribunal. [Santos v. State of Hawaii, 64 Haw. 648, 652, 646 P.2d 962 \(1982\)](#); [Dowsett, 7 Haw. App. 640, 642, 791 P.2d 398, 402 \(1990\)](#). It protects the integrity of the courts and promotes reliance upon judicial pronouncements by requiring that the decisions and findings of the courts be accepted as undeniable legal truths. Res Judicata furthers the finality of legal disputes and eliminates the time and expense of relitigation by requiring that parties bring all claims arising out of a transaction, or series of connected transactions, in one action.

In the federal courts, [HN7](#)[↑] the doctrine of "res judicata" arises from the [Full Faith and Credit Clause of the United States Constitution](#). The statute implementing the [Full Faith and Credit Clause](#) requires that [*1399] federal courts give state court proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken." [28 U.S.C. § 1738](#). [Migra v. Warren City School District Board of Education, 465 U.S. 75, 80, 79 L. Ed. 2d 56, 104 S. Ct. 892 \(1984\)](#); [Robi v. Five Platters, \[**21\] Inc., 838 F.2d 318, 322 \(9th Cir. 1988\)](#). [HN8](#)[↑] To determine whether a state decision precludes a party from litigating a claim or issue, federal courts must apply the res judicata rules of the state court in which the prior judgment was rendered. [Migra, 465 U.S. at 81](#); [Robi, 838 F.2d at 322](#). In the case at bar, Defendants assert that Plaintiffs' claims are precluded by various Hawaii state court actions. Accordingly, this Court must apply Hawaii's res judicata rules.

[HN9](#)[↑] "Res judicata" encompasses two distinct types of preclusion -- claim preclusion and issue preclusion.⁸ [Santos v. State of Hawaii, 64 Haw. 648, 652, 646 P.2d 962 \(1982\)](#); [Dowsett, 7 Haw. App. 640, 644, 791 P.2d 398 \(1990\)](#). [HN10](#)[↑] According to the doctrine of claim preclusion

the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation not only of the [claims] which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.

[**22] E.g., [Dowsett, 7 Haw. App. at 644](#) (citing [In re Bishop Estate, 36 Haw. 403, 416 \(1943\)](#)). [HN11](#)[↑] Claim preclusion thus bars plaintiffs from pursuing successive suits where the claim was either litigated or could have been litigated in the first action. It also bars defendants from pursuing a subsequent action that could have been raised as a defense or counterclaim in the first suit. By contrast, issue preclusion only bars relitigation of particular issues actually litigated and decided in the prior suit. [Id. at 644](#). Issue preclusion may be asserted in a subsequent action on a totally different claim.

A. CLAIM PRECLUSION

[HN12](#)[↑] Claim preclusion is applicable only where (1) the claim asserted in the action in question was or could have been asserted in the prior action; (2) the parties in the present action are identical to, or in privity with, the parties in the prior action; and (3) a final judgment on the merits was rendered in the prior action. [Santos, 64 Haw. at 653](#).

1. Same Parties

⁸ Issue preclusion and claim preclusion have historically been called collateral estoppel and bar or merger respectively. "Res judicata" has also been used narrowly on occasion to refer solely to claim preclusion. Both the United States Supreme Court and the Ninth Circuit, however, have indicated a preference for the use of the modern terms of issue and claim preclusion to avoid confusion. [Migra, 465 U.S. at 77 n.1](#); [Robi, 838 F.2d at 320](#); see also, [Dowsett Trust, 7 Haw. App. 640, 644 n.2, 791 P.2d 398 \(1990\)](#).

HN13 [↑] Claim preclusion requires that the parties to the second action are the same as, or in privity with, the parties to the first action. *Dowsett, 7 Haw. App. at I**231 646*. Whether sufficient privity exists to bind a nonparty to a judgment is determined under the circumstances in each case as it arises. *Id.* Under Hawaii law, "the concept of privity has moved from the conventional and narrowly defined meaning of 'mutual or successive relationship[s] to the same rights of property' to 'merely a word used to say that the relationship between the one who is a party of record and another is close enough to include that other within the res adjudicata.'" *Id.* **HN14** [↑] The party asserting claim preclusion must demonstrate that the interests of the nonparty were adequately represented and that the nonparty's rights were afforded proper protection in the prior action. *Id.*

Although a close family relationship is one factor that a court may consider in determining privity, under Hawaii "res judicata" principles, such ties alone are not sufficient to bind a nonparty to a judgment. *Id.* (privity was not established by mother-child relationship where interests were divergent; mother had an interest in the trust income and children had an interest in the trust [*1400] corpus). Rather, the party asserting claim preclusion must demonstrate that the interests of [*24] the nonparty were adequately represented and that the nonparty's rights were afforded proper protection in the prior action. *Id.*

The Ninth Circuit has held that a nonparty may be bound if a party is so closely aligned with the nonparty as to be its "virtual representative." *United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980); Jackson v. Hayakawa, 605 F.2d 1121, 1126 (9th Cir. 1979)*. Some courts have suggested that the concept of virtual representation contemplates an "express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues." *ITT Rayonier, Inc., 627 F.2d at 1003*. In practice, however, courts that have used the term "legal relationship" have applied it quite loosely. In the *ITT Rayonier* case itself, for example, the Ninth Circuit held that the EPA was bound by an enforcement action brought by the Department of Energy in an earlier state proceeding. The court backed away from requiring a strict agency relationship between the DOE and the EPA. Instead, the court focused on the fact that the interests of the DOE and the EPA were identical and their involvement [*25] substantially similar, that they maintained the same position with respect to the action, and that they shared more than "an abstract interest" in enforcement. *Id. at 1003*. The court emphasized that the relationship between the DOE and the EPA "however it may be labeled" was sufficiently close so as to preclude relitigation. *Id.*

The Ninth Circuit's decision in *Jackson, 605 F.2d at 1121* is particularly instructive. In *Jackson*, students and a former college instructor brought a civil rights action charging that the college president and others had violated their *First Amendment* rights by having them arrested after a campus rally. The district court held that the *Jackson* plaintiffs were bound by an earlier decision in which a different group of students unsuccessfully challenged arrests arising out of the same incident. Although the plaintiffs in the initial action had never been certified as a class, the Ninth Circuit affirmed the lower court's decision, holding that the plaintiffs were bound by the doctrine of virtual representation because they were attempting to vindicate the same rights as the plaintiffs in the earlier action. *Id. at 1126*.

The Ninth [*26] Circuit's doctrine of virtual representation is in accord with Hawaii's requirement that a non-party's interests must have been adequately represented and that his or her rights must have been afforded proper protection in the prior action. Where a party to the action shared identical or substantially similar interests or was attempting to vindicate the same rights, and stood in the same position as a non-party, the rights and interests of the non-party would be adequately represented and protected.

2. Same Claim

The Hawaii courts follow the Second Restatement's transactional view of "same claim" for purposes of claim preclusion. *Kauhane v. Acutron Company, Inc., 71 Haw. 458, 464, 795 P.2d 276 (1990)*. Accordingly, **HN15** [↑] to determine whether a litigant is asserting the "same claim" in a second action, Hawaii courts look to whether the claim arises out of the same transaction or the same series of connected transactions out of which the first action arose. *Id.*; *Restatement (Second) of Judgments § 24* (1982) [hereinafter "*Restatement § 24*"]. The claim extinguished by an action "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part [*27] of the transaction, or series of connected transactions." *Restatement § 24*. This inquiry is made

based on the facts of the transaction and does not depend on the number of substantive theories, or variant forms of relief flowing from those theories, that may have been available to the plaintiff; the number of primary rights that may have been invaded; or the variations in the evidence needed to support the theories or rights. *Id. at 463 n. 6; Restatement § 24 comment at* 197.

Accordingly, [HN16](#) a plaintiff cannot avoid the bar of claim preclusion merely by alleging conduct that was not alleged in his prior action or by pleading a new legal theory. [*1401] [McClain v. Apodaca, 793 F.2d 1031, 1034 \(9th Cir. 1986\)](#). All claims arising from a single injury must be raised in a single action or they will be barred by res judicata. [Silver v. Queen's Hospital, 63 Haw. 430, 437, 629 P.2d 1116 \(1981\)](#). This is true even where some of the claims arise under state law and some arise under federal law. *Id.* (actions under federal civil rights act and state conspiracy and **antitrust law** arising from a single injury should be raised in a single action). Moreover, because claim preclusion bars all claims and defenses [**28] which could have been brought, it bars claims and defenses which were voluntarily withdrawn if a final judgment is rendered on the remainder of the case. [Hall v. State of Hawaii, 7 Haw. App. 274, 283, 756 P.2d 1048 \(1988\)](#).

3. Final Judgment on the Merits

a. On the merits

Clearly, [HN17](#) either a bench or jury trial is an adjudication on the merits of a case. See, [Morneau, 56 Haw. at 421](#). Likewise, rulings on summary judgment motions are an adjudication of the merits of the disputed issues. See [Hall, 7 Haw. App. at 277, 283](#). Under Hawaii law, it is equally settled that a dismissal with prejudice is an adjudication on the merits of all issues that were raised or could have been raised in the pleadings. E.g., [Land v. Highway Construction, 64 Haw. 545, 551, 645 P.2d 295 \(1982\)](#); [Caires v. Kualoa Ranch, Inc., 6 Haw. App. 52, 56, 708 P.2d 848 \(1985\)](#). [HN18](#) H.R.C.P. [Rule 41\(b\)](#) and [Fed. R. Civ. P. Rule 41\(b\)](#) provide for involuntary dismissal when a plaintiff fails to comply with the rules or with an order of the court. [Silver v. Queen's Hospital, 63 Haw. 430, 440, 629 P.2d 1116 \(1981\)](#). These rules specifically provide that such dismissal operates as an adjudication on the merits:

Unless the court [**29] in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under [Rule 19](#), operates as an adjudication upon the merits.

H.R.C.P. 41(b). The United States Supreme Court has similarly held that dismissal 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 \(1981\)](#). Rule 29 of the Hawaii Rules of Circuit Courts provides that [HN19](#) actions may be dismissed with prejudice for want of prosecution where all defendants are in default and if the plaintiff fails to apply for default judgment within a specific time period. The Hawaii courts have held that dismissal for want of prosecution pursuant to Circuit Court [Rule 12](#) also operates as a dismissal with prejudice and thus precludes a party from relitigating claims which were or could have been brought in the dismissed action. [Lundburg v. Stinson, 5 Haw. App. 394, 400, 695 P.2d 328 \(1985\)](#).⁹

[**30] The Hawaii Court of Appeals has also given preclusive effect to a default judgment. [Quality Sheet Metal v. Woods, 2 Haw. App. 160, 164, 627 P.2d 1128 \(1981\)](#). The court noted that the time for the defaulting party to assert its defenses was in the prior action. To permit it to later assert those claims would in effect reverse the default judgment. Hawaii courts would apparently likewise grant preclusive effect to prejudicial consent judgments. See, [Dowsett, 7 Haw. App. at 645](#) (citing [Sullivan v. Easco Corp., 662 F. Supp. 1396, 1408 \(D. Md. 1987\)](#) (a stipulation

⁹ In September, 1990, the Hawaii legislature amended [Rule 12](#) to provide that a dismissal for want of prosecution *where no pretrial statement has been filed* is without prejudice. Rules of Circuit Courts, [Rule 12\(q\)](#) (emphasis added).

of dismissal with prejudice constitutes a final judgment on the merits for the purpose of claim preclusion)). Dismissal of an entire complaint without prejudice, by contrast, does not operate as an adjudication on the merits and thus does not bar a subsequent action on the same claim. [Land, 64 Haw. at 551.](#)

b. Finality

Under Hawaii law, [HN20](#)[ a judgment is final for purposes of res judicata where the time to appeal has expired without an appeal being taken. [Glover v. Fong, 42 Haw. 560](#) [[*1402](#)] (1958). A Hawaii appellate court has noted that it follows "that where an appeal has been taken, a judgment of the trial court [**31](#) is not final, at least for purposes of res judicata." [Littleton v. State of Hawaii, 6 Haw. App. 70, 708 P.2d 829, 833](#) (1985). The Hawaii Supreme Court apparently concurs. See, [Kauhane, 71 Haw. at 465](#) (circuit court's judgment became final for res judicata purposes once plaintiff's appeal was withdrawn); [Silver, 63 Haw. at 440](#) (district court's judgment was finalized by the Supreme Court's denial of certiorari); [City and County of Honolulu v. Kam, 48 Haw. 349, 358 n.17, 402 P.2d 683](#) (issue of whether there was a garnishable debt became res judicata on affirmance of the judgment).

Defendants urge this Court to find that a judgment is final for purposes of res judicata pending appeal based on *In re Chong*, a decision by the United States Bankruptcy Court for the District of Hawaii. 16 Bankr. 1 (D. Hawaii 1980). The bankruptcy court cited a Hawaii case, [Solarana v. Industrial Electronics, 50 Haw. 22, 428 P.2d 411](#) (1967), for the proposition that an appeal from a judgment does not vacate the judgment appealed from, and then presumed that the appeal would likewise not affect the res judicata effect of a judgment. *In re Chong*, 16 Bankr. at 3-4. A close reading of *Solarana*, however, reveals that [**32](#) the Hawaii court did not suggest that a judgment should be given res judicata effect pending appeal. See [Solarana, 50 Haw. at 30.](#) Rather, the court stated that:

[HN21](#)[ When an appeal from the dismissal of the first suit has been taken and is pending so that it ultimately may result that the subject matter of the second suit becomes triable in the first suit, the proper remedy is not a [dismissal] but instead a motion for stay of the proceedings in the second suit.

This language indicates that the *Solarana* court intended that pending actions which might be barred by the res judicata effect of a case on appeal should be stayed until the appeal was finalized and the decision could be given res judicata effect.

Defendants further cite to federal cases establishing the general rule adopted by federal courts that a judgment is final for purposes of res judicata despite the pendency of an appeal. See [Hawkins v. Risley, 984 F.2d 321, 324-25](#) (*9th Cir. 1993*); [Robi, 838 F.2d at 327; 1 Rest. 2d, Judgments § 13, cmt. f](#) at 135 (1985); [United States v. Tropic Seas, 887 F. Supp. 1347](#), Cv. No. 94-00317SPK (citing *Hawkins v. Risley* for federal rule that the preclusive effect of [**33](#) a lower court judgment is not suspended by an appeal). In the case at bar, however, the Court is determining the preclusive effect of a state court action and must apply the res judicata principles adopted by the Hawaii courts.

B. ISSUE PRECLUSION

[HN22](#)[ Issue preclusion requires that (1) the issue decided in the prior adjudication is identical with the one presented in the present action; (2) the party against whom issue preclusion is asserted was a party to the prior action or in privity with a prior party; and (3) there was a final judgment on the merits. [Santos, 64 Haw. at 653.](#)

1. Same Parties

[HN23](#)[ The privity rules for claim preclusion and issue preclusion are identical. Additionally, Hawaii law permits [HN24](#)[ issue preclusion to be raised defensively by one who was not a party to the prior action. *Morneau*, 56 Haw. at 423. Defensive issue preclusion may only be asserted against someone who was a party, or in privity with a party, to the prior suit. *Id.*

2. Identical Issue

HN25 [↑] In contrast to claim preclusion, issue preclusion does not bar litigation of all claims that were or could have been asserted. Rather, it only prevents a party from relitigating [**34] an issue which was actually raised, litigated and decided in the prior action. *Dowsett, 7 Haw. App. at 640*. Hawaii courts have generally interpreted "actually litigated" as requiring that the party against whom preclusion is sought had a "full and fair opportunity" to litigate the issue in the earlier case. *Morneau v. Stark Enterprises, Ltd., 56 Haw. 420, 423, 539 P.2d 472 (1975)*.

[*1403] 3. Final Judgment

HN26 [↑] Application of issue preclusion, like claim preclusion, requires that a final judgment was rendered in the first action. The inquiry of whether a judgment is final for purposes of issue preclusion purposes is identical to the discussion above for claim preclusion. Because issue preclusion only precludes issues that were actually litigated and decided, however, the inquiry of whether a decision is "on the merits" may be answered differently. For example, a stipulated dismissal or judgment will generally not support a claim of issue preclusion because the issues would not have been actually litigated and decided. *Dowsett, 7 Haw. App. at 645*. By contrast, parties are precluded from relitigating issues decided at summary judgment because they had a full and fair opportunity to address [**35] the merits of the issues at this stage.

C. EFFECT OF PLAINTIFFS' STATE COURT ACTION

On November 10, 1988, most of the Plaintiffs ("State Court Plaintiffs") filed an action against YYVC and Han Kuk Chun ("State Court Defendants") in the Circuit Court of the First Circuit of the State of Hawaii. In their complaint, State Court Plaintiffs alleged claims of defamation, slander, violation of contract, intentional infliction of mental and physical duress and wrongful conversion against State Court Defendants for their activities in connection with obtaining the Conditional Use Permit and attempting to evict the tenants. In particular, State Court Plaintiffs claimed that they were third party beneficiaries of the CUP as successors in interest to that agreement, that State Court Defendants failed to inform them that they had a right to be relocated under the CUP and that Defendants removed them from the property in violation of the CUP. State Court Plaintiffs claimed to have suffered loss of economic income from "attempting to comply with the defendants non-conforming demands for relocation" and further economic loss and physical damage from "not being relocated as required under [**36] the CUP and from being threatened with eviction by the Defendants or by being evicted in violation of the CUP." Plaintiffs claimed to have lost their homes, livestock, agricultural products, equipment and profits related thereto. Plaintiffs expressly declined to assert their claims of adverse possession in this action.

On June 22, 1989, the state court entered an order of dismissal for want of prosecution pursuant to Circuit Court Rule 29, granting State Court Plaintiffs five days to show good cause why the case should not be dismissed.¹⁰ Plaintiffs responded that they had delayed acting because they were considering incorporating the matter into the RICO suit which they had filed in the federal district court. This response was accompanied by an affidavit of Thomas Lavigne, then paralegal for Plaintiffs' attorney. The state court subsequently withdrew its order of dismissal and Defendants filed an answer.

[**37] On November 10, 1989, the state court entered a notice of proposed dismissal pursuant to Circuit Court Rule 12, warning Plaintiffs that the action would be dismissed with prejudice unless they filed objections showing good cause within 10 days. This time, Plaintiffs responded that they had delayed acting because they were considering joining the state court action and the federal action "for judicial economy." The state court withdrew its notice of proposed dismissal.

On February 7, 1990, Plaintiffs filed a pretrial statement in the state court action. This pretrial statement bore the name and address of Thomas Lavigne, then co-counsel of Plaintiffs. On August 2, 1991, the state court once again issued an order of dismissal, noting that "cases dismissed with prejudice for want of prosecution can be reinstated

¹⁰ **HN27** [↑] Rule 29 of the Rules of the Circuit Courts provides that "a case may be dismissed with prejudice for want of prosecution after notice of not less than 5 days where all defendants are in default and if the plaintiff fails to obtain entry of default and fails to apply for default judgment within six months after all defendants are in default."

by way of objection to the Order of Dismissal within ten days." After Plaintiffs failed to object, the Court issued a final order of dismissal on August 22, 1991.

1. Claim Preclusion

a. Same Parties

State Court Plaintiffs brought their action against Han Kuk Chun and YYVC. [*1404] These parties were likewise named in the current action before this Court. [**38] Accordingly, Han Kuk Chun and YYVC may invoke claim preclusion to estop State Court Plaintiffs, and those in privity with them, from relitigating the claims brought in the state action. Likewise, those in privity with Han Kuk Chun and YYVC may assert claim preclusion to prevent State Court Plaintiffs, and those in privity with them, from relitigating those claims.

Tetsuo Yasuda, Masanori Kobayashi and Yoshinori Hayashida, all sued in their capacity as "officers" of Defendant YYVC, are clearly in privity with the corporation. Their interests and involvement in the alleged events are identical to that of YYVC and they stand in the same position with respect to these actions as the corporation. Accordingly they may invoke claim preclusion to the same extent as YYVC.

Defendants Hiroshi Kobayashi, Eugene Lum and Norma Lum are all named both personally and as agents for corporate Defendant YYVC. However, the allegations against them pertain solely to their actions as agents for YYVC. Clearly, with respect to these activities, their interests and involvement are substantially the same as that of the corporation. They also stand in the same position as the corporation with respect to these [**39] actions. Therefore, the Court finds that these Defendants are in privity with YYVC and may invoke claim preclusion to same extent as YYVC.

Defendant Fasi is not in privity with Defendant YYVC or Han Kuk Chun and therefore may not invoke the doctrine of claim preclusion.

All State Court Plaintiffs are clearly subject to claim preclusion based on the state court action. Likewise, Plaintiffs who were not party to the state court action are bound by the doctrines of privity and virtual representation. The interests of these non-party Plaintiffs are essentially identical to the State Court Plaintiffs: they share the same attorney in the current action and are all trying to vindicate the same rights and interests that were at issue in the prior action. Therefore, the Court finds that the interests of the non-party Plaintiffs were adequately represented and their rights afforded proper protection in the state action.

b. Same Claim

The fact that State Court Plaintiffs brought state common law claims in their state action and RICO claims in their federal action is not a defense to claim preclusion. Because these claims all arose out of Defendants' attempt to relocate and [**40] evict the tenants from the property, Plaintiffs could and should have brought the claims together in one action. The state law claims and RICO claims involve the same acts -- Defendants' alleged violation of the CUP and failure to inform the tenants of their alleged rights as third party beneficiaries under the CUP. Plaintiffs are likewise seeking to redress the same injury in both actions -- eviction from the property, loss of homes, livestock, agricultural products, equipment and profits related thereto. Tenants cannot avoid claim preclusion in this Court simply by alleging new conduct (i.e. bribery, threats and mail fraud) or pleading a new legal theory (i.e. RICO), or by deleting a theory (i.e. slander) from the second action.

Because state and federal courts share concurrent jurisdiction over RICO claims, State Court Plaintiffs could have raised their federal claims in their state court action. Tafflin v. Levitt, 493 U.S. 455, 460, 107 L. Ed. 2d 887, 110 S. Ct. 792 (1990); Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987). Conversely, they could have sought supplemental jurisdiction over the state court claims in federal court. 28 U.S.C. § 1367.¹¹ Instead, Plaintiffs chose

¹¹ In fact, in 1989, Plaintiffs indicated to the state court that they were considering such action, but had decided not to. In this Court's Order filed December 18, 1990, the Court refused to assert supplemental jurisdiction over Plaintiffs' other state court

to split their claims and **[**41]** simultaneously seek relief in both the state and federal courts, thus causing duplicated **[*1405]** efforts and wasting judicial resources. Because Plaintiffs chose to pursue two concurrent actions, the final decision rendered in the state court prior to completion of the federal action became the full measure of relief to be accorded between the parties. The state decision thus precludes Plaintiffs from further litigating their claims in this Court.

c. Final Decision on the Merits

The state court's order of dismissal, **[**42]** filed August 2, 1991, indicated that Plaintiffs' state court action would be dismissed with prejudice if Plaintiffs did not show good cause for their failure to act within 10 days. After Plaintiffs did not respond, the state court entered a final order dismissing the action on August 22, 1991.¹² Plaintiffs do not dispute that the dismissal was with prejudice for failure to prosecute the case, see [Compass Development, Inc. v. Blevins, 10 Haw. App. 388, 391, 876 P.2d 1335 \(1994\)](#), and that such a dismissal acts as a final decision on the merits for purposes of res judicata. Rather, Plaintiffs contend that the state court's dismissal of their action should not be given preclusive effect because one of their attorneys, Anthony Locricchio, did not timely receive a copy of the order of dismissal or final order of dismissal. The Court notes that Plaintiffs' do not deny that their co-counsel, Thomas Lavigne, timely received the orders.

[43]** The Court finds that Plaintiffs' argument pertains to the validity of the state court's decision and is not relevant to the preclusive impact of that decision in this Court. If Plaintiffs believed that the dismissal of their action was improper, their appropriate remedy was to file a motion to set aside the state court's order or to appeal the order before the state court. See [Compass Development, 10 Haw. App. at 396; Lim v. Harvis, 65 Haw. 71, 72, 647 P.2d 290 \(1982\)](#). Having failed to do so, Plaintiffs cannot now resort to a collateral attack of the state court judgment in this Court.

The Court further finds that Plaintiffs' argument as to the validity of the state court's dismissal lacks merit. [HN28](#) Rule 4 of the Hawaii Rules of Civil Procedure provide that "every order required by its terms to be served . . . shall be served upon each of the parties affected thereby." Where the party is represented by an attorney, "service shall be made upon the attorney . . . by mailing it to him at his last known address." H.R.C.P. 4(b). Rule 4 further provides that "service by mail is complete upon mailing." *Id.*; [Korean Buddhist Dae Won Sa Temple of Hawaii, Inc. v. Zoning Board of Appeals of the \[**44\] City and County of Honolulu, 9 Haw. App. 298, 304, 837 P.2d 311 \(1992\).](#)

Plaintiffs do not dispute that copies of the dismissal orders were mailed to Anthony Locricchio at 47-677 Hui Kelu St., # 1, Kaneohe, HI 96744, the address of Locricchio's co-counsel, Thomas Lavigne. This address appeared on the heading of documents filed by Plaintiffs in both their state court case and the current action before this Court. Plaintiffs' pretrial statement, filed in the state court action on February 7, 1990, lists "Locricchio & Lavigne" as attorneys for Plaintiffs and gives the names and addresses of both attorneys. Defendants YYVC et. al. reply to Motion 3, Exhibit A. Likewise, documents filed in this Court shortly before and after the state court dismissed Plaintiffs' action on August 22, 1991, list Thomas Lavigne as co-counsel, bear the signature of Thomas Lavigne and give the same Kaneohe address. See Plaintiffs' Amended Certificate of Service, filed June 26, 1991; Plaintiffs' Response, filed Aug. 1, 1991, Plaintiffs' Notice of Appeal, filed Oct. 4, 1991; Plaintiffs' Notice of Appeal, filed Oct. 30, 1991. Thomas Lavigne's name also appears on the state court docket sheet in connection with filing **[**45]** of documents in the state court. Defendants YYVC et. al. Motion 3, Exhibit I.

The Court notes that Plaintiffs had previously responded to several orders by the state court threatening dismissal of their action for lack of prosecution. Clearly, Plaintiffs' attorney was on notice that if he didn't move this case along

claims. However, this was because the Court found the allegations concerning the state claims to be "woefully inadequate." The Court was unwilling to waste time and resources allowing Plaintiff's to amend their complaint for the fifth time.

¹² The Court notes that [Rule 12\(g\)](#) of the Hawaii Rules of the Circuit Courts, providing for dismissal for lack of prosecution *prior to the filing of a pretrial statement* is not applicable because Plaintiffs had filed such a statement on February 7, 1990 (emphasis added).

it would be dismissed. Yet, several years after the state court entered [*1406] a final order of dismissal, he has still never moved to have the case reopened. Therefore, the Court finds that the state court's dismissal of Plaintiffs' action precludes relitigation of the same claims in this Court.

2. Issue Preclusion

Because this action was dismissed for lack of prosecution none of the issues in the suit were actually decided by the state court. Therefore, issue preclusion is not appropriate with respect to this action.

D. EFFECT OF SUMMARY POSSESSION ACTIONS

The named tenants each filed six counterclaims in response to YYVC's summary possession actions.

(1) Leases Under an Option Contract

In their answers to the summary possession actions, the tenants claimed that they were parties and/or beneficiaries under an option contract. According to [**46] the tenants, YYVC "conditionally promised [tenants], both verbally and in writing, that [tenants] could remain on the property . . . if they abstained from opposing, and if [tenant] Leonard Wong testified in favor of [sic] [YYVC's] golf course project at the CUP public hearing." The tenants claimed that these promises grant them the right to renewable leases of the property.

On November 1, 1990, YYVC filed a motion to dismiss this defense and counterclaim for failing to satisfy the statute of frauds. According to Hawaii law, leases for real property which extend beyond one year are unenforceable unless (1) in writing, and (2) signed by the party charged. Tenants opposed YYVC's motion claiming that the statute of frauds was satisfied by the Conditional Use Permit and that the doctrine of part performance removed the agreement from the statute of frauds.

On May 29, 1991, the District Court for the First Circuit of the State of Hawaii granted YYVC's motion to dismiss this counterclaim with prejudice. The state court issued a minute order stating that "having considered the Exhibits, Affidavits and Memoranda submitted, together with the Arguments of Counsel, and further being [**47] fully advised in the premises, and good cause appearing therefore, it is, ordered [that] . . . [tenants'] first. . . defense and counterclaim[] is dismissed with prejudice."

(2) Relocation Under the Conditional Use Permit

In their answers to the summary possession actions, the tenants also claimed that they were third party beneficiaries under the conditional use permit ("CUP") permitting the development of a private golf course and country club on the property. According to the tenants, one condition of the CUP was relocation of the tenants living on the property. According to the tenants, the relocation plan provided by YYVC violated the CUP because (a) it did not provide for relocating the tenants' homes, (b) the plan offered relocation in a flood plain area not contemplated in the CUP, and (c) the plan was "unconscionable in that it is absolutely conditioned upon [tenants] waiving a multitude of rights against [YYVC] and its agents."

On November 1, 1990, YYVC filed a motion for partial summary judgment of this defense and counterclaim, arguing that the relocation offer made by YYVC was not inconsistent with the Conditional Use Permit. The CUP provided that: [**48]

. . . The applicant proposes to give tenants the option to relocate to a 50-acre portion of the project site adjacent to the residential fringe and obtain a 10-year permit to use the land for agricultural purposes.

. . . Agricultural tenants presently located within the project site shall be offered an opportunity to relocate to an adjacent area indicated for agricultural use in the Exhibit Map.

Aside from prescribing the area and specifying that the relocatees be allowed to stay for 10 years, the CUP did not restrict YYVC's authority to set the terms of its relocation proposal. YYVC's relocation plan was approved by the City and County of Honolulu. YYVC's Exhibit 7. Tenants opposed YYVC's [*1407] motion, claiming there was a factual dispute over proper interpretation of the CUP.

On May 29, 1991, the District Court for the First Circuit of the State of Hawaii granted YYVC's motion for summary judgment as to the second defense and counterclaim in a minute order as described above.

(3) Adverse Possession

Certain of the tenants also defended against the summary possession actions by asserting a claim for title to YYVC's property under the law of adverse possession.

[**49] On November 1, 1990, YYVC filed a motion to dismiss this defense and counterclaim for failure to comply with [HN29](#) H.R.S. 12.1, which requires that a party raising the defense submit affidavits describing the nature and extent of the land in question. According to YYVC, the tenants' claim of adverse possession was insufficient because they had not, and could not, come forward with evidence of the precise location or boundaries of the land they allegedly possessed. The tenants opposed this motion, arguing that the defense was valid and that they had complied with rule 12.1.

On May 29, 1991, the District Court for the First Circuit of the State of Hawaii granted YYVC's motion to dismiss this defense and counterclaim with prejudice in a minute order as described above.

(4) Breach of Covenant of Quiet Enjoyment

The tenants claimed that certain acts attributable to YYVC, including "bulldozing and threatening to bulldoze homes, crops and other improvements; attempting to wrongfully evict; shooting and stealing livestock; leading Uraniumrhi to a secluded warehouse and intimidating him in attempting to force him to sign a waiver permitting [YYVC] to bulldoze Uraniumrhi's improvements [**50] and crops," breached the implied covenant of quiet enjoyment which YYVC, as the lessor, implicitly promised.

On August 13, 1991, the state district court entered an order dismissing this defense and counterclaim *without prejudice* pursuant to H.R.C.P. 41(a)(2), prescribing voluntary dismissal by order of court.

(5) Estoppel and Breach of Negative Covenant in Deed

In the summary possession actions, the tenants also claimed that they were beneficiaries of a deed which provided that occupants of YYVC's property would be entitled to remove improvements, including crops and trees, upon vacating the land. According to the tenants, YYVC wrongfully concealed from them their rights pursuant to that deed.

On November 1, 1990, YYVC filed a motion for partial summary judgment on this defense and counterclaim, arguing that the relocation offer made by YYVC was not inconsistent with the deed. YYVC submitted evidence showing that the relocation plan offered informed the tenants that YYVC did not claim any right to dwelling structures or other improvements, including crops. The tenants opposed this motion claiming that there was a factual dispute over whether the relocation agreement [**51] offered the tenants violated the covenant in the deed.

On May 29, 1991, the District Court for the First Circuit of the State of Hawaii granted YYVC's motion for summary judgment as to this defense and counterclaim in a minute order as described above.

(6) State RICO

The tenants also claimed that YYVC was liable to them for violations of HRS Chapter 842, the state counterpart to the federal RICO Act. As part of their state RICO defense, tenants Raphael Kamai and Linda Augustus claimed that YYVC's conduct interfered with their relationship with a third party to sell trees to that party. Various other tenants claimed they lost farming and rental income from sales and subsistence. On August 13, 1991, the state district court entered an order dismissing the state RICO defense and counterclaim *without prejudice* pursuant to H.R.C.P. 41(a)(2), prescribing voluntary dismissal by order of court.

Subsequent to the above mentioned rulings, on September 23, 1991, the state court struck the answers and remaining counterclaims [***1408**] of the following tenants after they failed to appear at their depositions noticed by YYVC:

James Jones, Loretta Jones, Severo Duque, Cristita Bolo, [****52**] Josefina Bolo, Wilfredo Bolo, Alejandro Coloyan, Ofelia Coloyan, Isidro Dilay, Margaret Dilay, Violeta Dumadag, Estrella Igarta, Sebastian Igarta, Cipriano Manuel, Frances Miguel, Jennie Olinger, Adoracion Pedrina, Francisco Pedrina, Luz Pedrina, Jocelyn Sullivan, William Sullivan, Cheryl Wong, and Leonard Wong.

The state court previously warned these tenants that this adverse action would be taken against them if they failed to appear at scheduled depositions. The state court ordered that default judgments be entered against these tenants in the summary possession actions and entered Final Judgments for Possession and Writs of Possession against the defaulting tenants. Three other tenants, Peter Barcia, Nicanor Amit, and Lorraine Dilay, stipulated to the entry of judgment for possession.

YYVC's claims against tenants Jupiterrex Uraniumrhi, Alfredo Aurio, Sr., Benita Aurio, Raphael Kamai, Linda Augustus, Milnor Lum, and Raymond Pedrina were subsequently tried. YYVC prevailed in these actions. At trial the state court concluded that:

YYVC has met all its legal obligations under the Relocation Plan. The Plan, as written and as applied, satisfied the requirements [****53**] imposed by the City and County of Honolulu under the CUP.

At this time, the state court also dismissed Kamai and Augustus' claim for tortious interference with prospective business advantage for lack of merit. Subsequently, the state court entered judgment for possession in favor of YYVC against these tenants.

YYVC asserts that their claims against John Batalona were also tried but that the court did not issue any written findings. Judgment for possession was entered against Batalona by the state court.

Tenants Alfredo and Benita Aurio, Raphael Kamai, Linda Augustus, Milnor Lum, Luz and Raymond Pedrina and Jupiterrex Uraniumrhi timely appealed from the judgments for possession and the underlying orders, including the orders granting YYVC's motion to dismiss and motion for partial summary judgment. The appeals are still pending. The remaining tenants either failed to appeal before the time for appeal expired or had their appeals dismissed.

1. Claim Preclusion

a. Same Parties

YYVC was the plaintiff in these actions and thus may clearly invoke claim preclusion to prevent the tenants involved in these actions from relitigating claims and defenses [****54**] which they either raised or could have raised in that action. As discussed above, Defendants sued in their capacity as officers of YYVC, or for their alleged actions as agents of the corporation, are in privity with the corporation for purposes of claim preclusion and thus may invoke the doctrine to the same extent as YYVC. Because Defendant Fasi was neither a party to the summary possession actions, nor in privity with YYVC, he may not invoke claim preclusion to estop the tenants from litigating claims against him.

The only tenants who were not named in the summary possession actions where Rosita Uraniumrhi, Huberto Dumadag and the Estate of Laurencia Canencia. As discussed above, the Court has dismissed these parties because they were added to Plaintiffs' Fourth Amended Complaint in violation of [Rule 15](#) and this Court's prior orders. In any event, the Court finds that Uraniumrhi and Dumadag's interests were adequately protected by their spouses and their attorney in the prior action. Likewise, the Estate's interests was adequately protected by Cristita Bolo and Lorraine Dilay, administrators of the Estate, who were also parties to the state court action. Therefore, all Plaintiffs [****55**] to the current action are subject to the preclusive effect of the summary possession actions.

b. Same Claim

The six defenses and counterclaims asserted by Tenants in the summary possession actions were virtually identical to [*1409] the property entitlements alleged in their complaint in this action. Clearly Tenants could, and should, have asserted their federal RICO claims as a defense to this action. Not only do the state courts share concurrent jurisdiction over RICO claims; *E.g., Rafflin, 493 U.S. at 460; Lou, 834 F.2d at 739*; state law permits defendants to a summary possession action to bring any counterclaims arising out of and referring to the land the plaintiffs are seeking possession of. *Lum v. Sun, 70 Haw. 288, 296-97, 769 P.2d 1091 (1989); H.R.S. § 604-5(a)*.

c. Final Adjudication on the Merits

Raphael Kamai, Lynda Augustus, Alfredo Aurio, Benita Aurio and Milnor Lum have pending appeals of the state court rulings on the summary possession actions. Therefore, the summary possession actions will not have preclusive effect for these Plaintiffs.

The remaining tenants failed to timely appeal the state court summary possession actions. John Batalona went [**56] to trial and judgment was entered in favor of Defendants. Clearly a trial is a final adjudication on the merits which precludes Batalona from relitigating any claims or defenses which he could have asserted in this action. Of the remaining tenants, all but three suffered default judgments for failing to appear at their depositions. Because the default judgments serve as complete adjudications of all the rights of these tenants, they are precluded from relitigating their claims in the current action. The remaining three tenants entered stipulated judgments in favor of Defendants. Hawaii courts would likewise grant preclusive effect to these judgments. Accordingly, all tenants except those who appealed the summary possession actions are precluded by these actions from relitigating their claims in this Court.

2. Issue Preclusion

Defendant Fasi may invoke defensive issue preclusion to preclude Plaintiffs from relitigating issues which were actually litigated and decided in the summary possession actions. As discussed above, all of the Plaintiffs in the federal action were either parties, or in privity with parties, to the summary possession actions. As discussed above, however, [**57] Defendant Fasi may not assert issue preclusion against Raphael Kamai, Lynda Augustus, Alfredo Aurio, Benita Aurio or Milnor Lum because the decisions against them are on appeal.

With respect to the remaining Plaintiffs, Defendant Fasi may invoke issue preclusion to estop them from relitigating the issue of whether they had a right to renewable leases on the property as parties to, or beneficiaries under, an option contract. Plaintiffs had a full and fair opportunity to litigate this issue in the summary possession action in state court. YYVC moved to dismiss the counterclaim based on the leases in that action for failing to satisfy the statute of frauds. The Plaintiffs asserted two defenses to the statutes of frauds in that action: (1) that it was satisfied by the CUP, and (2) that the doctrine of part performance removed the agreement from the statute. In granting YYVC's motion, the state court necessarily rejected both defenses. If the tenants disagreed with the state court's holding, their recourse was to appeal, as several tenants did. The remaining Tenants who failed to appeal are bound by the state court's dismissal of their defense and counterclaim and are estopped from relitigating [**58] the issue of whether they had a right to renewable leases in this action.

These Plaintiffs are also precluded from relitigating their claims of adverse possession. Although Tenants had a full and fair opportunity to prove these claims in the state court, they failed to come forward with sufficient evidence to withstand Defendants' motion to dismiss.

The state court also rejected Plaintiffs' claim that Defendants' relocation plan violated the CUP and granted Defendants' motion for summary judgment on this issue. Thus, the Plaintiffs who did not appeal this decision are precluded from rehashing the issue before this Court.

Similarly, Plaintiffs may not relitigate the issue of whether the relocation agreement offered by Defendants violated the negative [*1410] covenant contained in the deed for the property. The state court rejected the tenants argument that there was a factual dispute concerning this issue and granted Defendants motion for summary judgment on the counterclaim and defense based on estoppel and breach of covenant.

Defendant Fasi cannot invoke issue preclusion to preclude Tenants from relitigating their state RICO claims or their claims that their covenant of quiet enjoyment [**59] was breached because these claims were dismissed without prejudice by the state court. Therefore, these claims were neither actually litigated nor decided in the summary possession actions. Likewise, Plaintiffs are not precluded from litigating their federal RICO claim against Defendant Fasi because this claim was not raised in the summary possession actions. Unlike claim preclusion, issue preclusion does not preclude litigation of all claims which could have been brought in the prior action. Rather, it only precludes relitigation of issues which were actually decided by the prior court.

In conclusion, the Court GRANTS motion 3 to the effect that Plaintiffs' state court action bars all of Plaintiffs' claims against Y.Y. Valley Corporation, Han Kuk Chun, Tetsuo Yasuda, Masanori Kobayashi, Yoshinori Hayashida, Hiroshi Kobayashi, Eugene Lum and Norma Lum.

The Court GRANTS in part motions 1, 3 and 4 against all Plaintiffs except Raphael Kamai, Lynda Augustus, Alfredo Aurio, Benita Aurio and Milnor Lum. All Plaintiffs except the aforementioned are precluded by the state court summary possession actions from relitigating the following issues:

- a. that Plaintiffs have no right [**60] to renewable leases on the property under an option contract;
- b. that YYVC's relocation plan did not violate the CUP;
- c. that YYVC's relocation plan did not violate a negative covenant contained in the deed to the property.
- d. that Tenants Nicanor Amit, Cristita Bolo, Wilfredo Bolo, Josefina Bolo, Alejandro Coloyan, Ofelia Coloyan, Isidro Dilay, Margaret Dilay, Lorraine Dilay, Violeta Dumadag, Estrella Igarta, Sebastian Igarta, Jennie Olinger, Francisco Pedrina, Adoracion Pedrina, William Sullivan, and Jocelyn Sullivan did not have a claim to the property under adverse possession.

III. IMMUNITY

Plaintiffs allege that Defendant Fasi committed bribery, aided and abetted in the commission of mail fraud, and conspired to aid and abet the commission of mail fraud. According to Plaintiffs, Defendant Fasi provided favorable treatment to YYVC as a result of bribes in the form of illegal political contributions. This favorable treatment included issuing the CUP, refraining from disclosing to Plaintiffs their rights or requiring YYVC to disclose Plaintiffs' rights as well as refusing to enforce or revoke the CUP after the developers violated the conditions [**61] of the CUP and other laws. Plaintiffs further claim that Defendant Fasi implicitly authorized the eviction of Plaintiffs, which resulted in the deprivation of their property interests, by failing to enforce the CUP and other laws violated by the developers.

In motion 5, Defendant Fasi moves for summary judgment on all claims against him on the grounds that as mayor he enjoyed absolute and/or qualified immunity from civil liability.¹³

[62] A. ABSOLUTE IMMUNITY**

The Supreme Court has been quite sparing in its recognition of absolute immunity. E.g., *Burns v. Reed*, 500 U.S. 478, 487, [*1411] 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991); *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 363, 116 L. Ed. 2d 301 (1991) (Auditor General not entitled to absolute immunity for administrative employment decisions); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 124 L. Ed. 2d 391, 113 S. Ct. 2167, 2169 n.4 (1993) (court reporters not entitled to absolute immunity). **HN30** The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. *Burns*, 500 U.S. at 486. Officials seeking absolute immunity bear the burden of showing that such immunity is justified. *Id.*

¹³ Fasi's claim of absolute and/or qualified immunity is in fact an argument in the alternative. His primary contention is that he "did not have the authority, duty or responsibility to enforce the applicant's compliance with the Conditional Use Permit ("CUP")." See Fasi's Memorandum In Support Of Motion 5 at 2. He states that approval of the CUP, enforcement of the CUP conditions, and other matters associated with the CUP (including appellate review) did not involve his vote, opinion, judgment, exercise of discretion, or other action as a public servant. *Id.* Instead, Fasi alleges, "the person who had the authority, duty, and responsibility to enforce compliance with the CUP was the Director of the DLU, *not* Fasi." *Id.*

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HN31 [↑] Whether absolute immunity is available to an official does not depend on the official's job title or agency. *Bothke v. Fluor Engineers and Constructors, Inc.*, 713 F.2d 1405, 1412 (1983); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 579 (9th Cir. 1984). The focus is on the function that the official was performing when taking the actions that provoked the law suit. *Id.*; *Hafer*, 112 S. Ct. at 364. Officials performing legislative acts which involve the formulation [**63] of policy and apply to the community at large are afforded absolute immunity. *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1982) (legislators who voted to enact a general zoning ordinance were entitled to absolute immunity). Those performing administrative or executive functions involving ad hoc decision making directed at one or a few individuals are not. *Trevino v. Gates*, 23 F.3d 1480, 1481 (9th Cir. 1994) (city council members who voted to pay police officers' punitive damages were not entitled to absolute immunity); *Cinevision*, 745 F.2d at 580 (council member voting to disapprove concerts was not entitled to absolute immunity); *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988) (city council members' who denied building permit were not entitled to absolute immunity); *Zamsky v. Hansell*, 933 F.2d 677, 679 (9th Cir. 1991) (commission members who ruled on whether the county's proposed land use plan complied with existing regulations were not entitled to absolute immunity).

HN32 [↑] Absolute immunity is only available when the official's conduct is within the scope of his or her official duties and when the conduct is discretionary in nature. *Westfall* [**64] *v. Erwin*, 484 U.S. 292, 297-98, 98 L. Ed. 2d 619, 108 S. Ct. 580 (1988). However, if an official is entitled to absolute immunity, legitimacy or illegitimacy of the official's motive is irrelevant. E.g., *Thillens, Inc. v. Community Currency Exchange Association of Illinois, Inc.*, 729 F.2d 1128, 1131 (7th Cir. 1984); *Callaway v. Hafeman*, 628 F. Supp. 1478, 1487 (W.D. Wis. 1986).

Defendant Fasi is not entitled to absolute immunity. To the extent he acted beyond the sphere of his legitimate activity, he cannot invoke the doctrine to shield him from liability. If, on the other hand, he acted within his sphere of legitimate activity, the nature of the activities do not justify granting him absolute immunity. Plaintiffs' allegations pertain to the Department of Land Utilization's grant of a CUP to YYVC, non-enforcement of the CUP's conditions and refusal to revoke the CUP for noncompliance. Clearly enforcement or nonenforcement of the CUP involves an executive function. Likewise, the Court finds that the grant of the CUP was an administrative or executive, rather than legislative function. The grant of the permit was an ad hoc decision, aimed at permitting an individual party, YYVC, to utilize land in a particular [**65] manner. Although the CUP clearly impacted the tenant farmers living on the land, it did not create rules which are applicable to the tenant farmers or the community at large.

Fasi's reliance on *Thillens, Inc. v. Community Currency Exchange Association of Illinois, Inc.*, 729 F.2d 1128 (7th Cir. 1984), is misplaced. In *Thillens*, government officials, acting within the sphere of legitimate legislative activity, attempted to use their positions to influence regulation of currency exchanges. Fasi's alleged involvement, in contrast, was executive or administrative. Accordingly, Fasi is not absolutely immune from suit for his alleged conduct.

[*1412] A. QUALIFIED IMMUNITY

HN33 [↑] Government officials performing discretionary functions within the scope of their authority are protected from liability for civil damages unless the law clearly proscribes the actions they took. E.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). **HN34** [↑] Whether an official is immune "turns on the objective reasonableness of their conduct in light of clearly established law, not on their subjective good faith." *Bateson*, 857 F.2d at 1304. [**66] An official who acts in good faith will only be held liable where the unlawfulness of the official's actions would have been apparent to a reasonable official in light of preexisting law. *Anderson*, 107 S. Ct. at 3039; *Cinevision*, 745 F.2d at 580. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986).

HN35 [↑] In order to avoid a claim of qualified immunity, the plaintiff must prove that the law clearly established that the official's actions were unlawful at the time of the alleged misconduct. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991); *Han v. Department of Justice*, 824 F. Supp. 1480, 1491 (D. Hawaii 1993). **HN36** [↑] To defeat

summary judgment based on qualified immunity, the plaintiff "must produce evidence that would allow a fact-finder to find that no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

Defendant Fasi argues that he is entitled to qualified immunity because "Plaintiffs cannot prove that, **[**67]** at the time that Fasi allegedly acted or failed to act, the law 'clearly established' that: (1) the developer failed to comply with Condition No. 1 of the CUP or the Deed; (2) Fasi had a duty to require the developer to comply with the condition and the Deed; and (3) Fasi breached his duty which, to any reasonable official, would have been clearly apparent." This argument ignores Plaintiffs' main contention -- that Fasi accepted illegal bribes and granted the developers favorable treatment in return for the bribes. If Plaintiffs' allegations are true, Defendant Fasi cannot invoke the doctrine of qualified immunity to shield him from liability for these actions. The illegality of accepting bribes in exchange for favors would have been apparent to a reasonable official in Defendant Fasi's position. If, on the other hand, Plaintiffs do not prove that Defendant Fasi engaged in the alleged conduct, he will not need immunity to protect him from liability.

In conclusion, the Court DENIES motion 5. To the extent that Defendant Fasi acted beyond the sphere of his legitimate activity, neither absolute nor qualified immunity will shield him from liability. To the extent that he acted within **[**68]** the scope of his authority, the administrative or executive nature of his activities do not justify granting him absolute immunity. Moreover, because the granting of favors in exchange for bribes is not "objectively reasonable in light of clearly established law," Defendant Fasi is not entitled to qualified immunity for these alleged actions.

IV. FEDERAL CAMPAIGN SPENDING ACT

As part of their bribery claims Plaintiffs allege in paragraph 116 of their Complaint that:

Defendant Mayor Frank F. Fasi illegally permitted foreign money to influence, interfere and effect the election in violation of the Federal Campaign Spending Act.

In paragraph 122 Plaintiffs allege:

All bribes made to the Mayor and offered to the City were known by the Mayor to be illegal and in violation of the Federal Campaign Spending Act and were none the less accepted and used by the Mayor in his re-election campaign.

In motion 6, Defendant Fasi urges the Court to strike these allegations based on two grounds. First, Fasi argues that Plaintiffs do not have standing to assert or bring such claims before this Court and that the Court lacks subject matter jurisdiction **[**69]** to adjudicate these claims because they involve **[*1413]** alleged violations of the Federal Election Campaign Act ("FECA"). Second, Fasi argues that these allegations are in violation of this Court's Order filed April 19, 1990.

Plaintiffs contend that Defendant Fasi's standing argument is irrelevant because they are not seeking enforcement of federal election laws or a review of the findings of the Federal Election Commission ("FEC"). Rather, they are alleging violations of the FECA, already adjudicated by the FEC,¹⁴ in support of their bribery claims.

[70]** Although Defendant is correct in his assertion that Plaintiffs lack standing to enforce violations of the FECA, the Court agrees with Plaintiffs that standing is not an issue. Plaintiffs are not asking this Court to enforce the FECA. Rather, Plaintiffs simply allege as evidence the fact that the FEC entered Conciliation Agreements with YYVC, RHCC and the Yasuda's finding that contributions were made to Fasi and other officials in violation of the FECA. Plaintiffs do not need standing to assert these facts.

¹⁴ Plaintiffs have submitted Conciliation Agreements demonstrating that the FEC found "reason to believe" that Royal Hawaiian Country Club, YYVC, Tetsuo Yasuda (a.k.a. Han Soo Chun) and Yasuo Yasuda (a.k.a. Han Kuk Chun) violated [2 U.S.C. § 441e](#), prohibiting foreign nationals from contributing to candidates for political office. The parties participated in informal conciliation prior to a finding of probable cause and agreed to findings that the statute was violated. RHCC, YYVC and the Yasuda's were assessed civil penalties for these violations.

The Court finds that the allegation contained in paragraph 122 does not violate its Order filed April 19, 1990. In that Order, the Court struck Plaintiffs' allegations concerning the claims before the FEC because Plaintiffs failed to demonstrate how the claims were related to their RICO claims. In the Fourth Amended Complaint, Plaintiffs contend that the contributions to Defendant Fasi and other public officials were bribes which serve as predicate acts under RICO. That the contributions were illegal and Defendant Fasi allegedly knew of their illegality is relevant because this fact makes it more likely that the contributions were bribes. Paragraph 116, on the other hand, alleges [**71] that Fasi allowed the illegal contributions to interfere and effect the election. This claim is not relevant to Plaintiffs' RICO action. Therefore, the Court strikes Paragraph 116.

V. RACKETEERING INFLUENCED & CORRUPT ORGANIZATIONS ACT ("RICO")

HN37[] RICO prohibits "any person" from using money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. [18 U.S.C. §§ 1962\(a\)-\(c\)](#). [Section 1962\(d\)](#) prohibits any person from conspiring to violate any of the provisions of [18 U.S.C. 1962\(a\), \(b\) or \(c\)](#).

HN38[] The purpose of the RICO statute is to allow a single prosecution of persons who engage in a series of criminal acts for an enterprise. [United States v. Brooklier, 685 F.2d 1208, 1222 \(9th Cir. 1982\)](#). It applies even where different defendants perform different tasks or participate in separate acts of racketeering. *Id.* If a defendant is found to have violated RICO, he will be liable for all harm caused by the enterprise, regardless of whether he committed or endorsed the specific acts of racketeering which [**72] led to the injury. See *id.*

A. PRIVATE REMEDIES UNDER RICO: [18 U.S.C. § 1964\(c\)](#)

HN39[] RICO authorizes a private civil action by "any person injured in his business or property by reason of a violation of [section 1962](#)." [18 U.S.C. § 1964\(c\)](#). Private litigants have standing under RICO only to the extent that they have been injured in their business or property by the conduct constituting the RICO violation. [Sedima, S.P.R.L. v. Imrex Company, 473 U.S. 479, 495-96, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#). This injury must consist of a concrete financial loss, and not mere injury to a valuable, but intangible, property interest. [Oscar v. University Students Co-op Ass'n, 965 F.2d 783, 785, 787 \(9th Cir. 1992\)](#) (diminution in enjoyment of leasehold interest does not constitute a loss of a tangible property interest to tenant); [Steele v. Hospital \[*1414\] Corporation of America, 36 F.3d 69 \(9th Cir. 1994\)](#)(depletion of insurance funds by excess medical payments does not constitute a financial loss to patients). Likewise, speculative injuries do not confer standing under RICO, unless they become concrete and actual. [Steele, 36 F.3d at 71](#) (claim that father of patient "could have used some of those [insurance] [**73] benefits for myself" was insufficient where father did not specify an instance where he had to pay a claim out of his own funds because the funds had been exhausted); [Oscar, 965 F.2d at 787](#) (claim that plaintiff suffered losses in the reduced rent she could charge to sublet her apartment was insufficient where plaintiff did not allege that she had a right to sublet her apartment nor that she ever sublet the apartment or attempted to sublet the apartment); [Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1311 \(9th Cir. 1992\)](#)(claim that plaintiff suffered loss of profits was insufficient where it was impossible to determine whether plaintiffs were alleging lost opportunity to realize profits or loss of specific identifiable profits).

HN40[] The compensable injury of a private litigant is the harm caused by the predicate acts. [Sedima, 473 U.S. at 497](#). To recover, private litigants must not only show that their harm was actually caused by defendants' acts, they must also establish proximate causation. [Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 112 S. Ct. 1311, 1318, 117 L. Ed. 2d 532 \(1992\)](#). To establish proximate cause under RICO, plaintiffs must show that their injury flows [**74] directly from the defendants' commission of the predicate acts. *Id.* It is not sufficient that the injury was foreseeable; there must be a direct relationship between the injury and the prohibited conduct. [Imagineering, 976 F.2d at 1311](#).

Defendants challenge both the substance of Plaintiffs' alleged injuries as well the causal link between those injuries and Defendants' alleged racketeering activities. In Motion 7, all Defendants join in arguing that Plaintiffs cannot establish that Defendants injured any rights which Plaintiffs may have had under the CUP, the negative covenant in the deed or adverse possession. In motion 8, all Defendants except Fasi contend that Plaintiffs' claim to 10 year

leases based on an oral option contract must fail because Plaintiffs cannot overcome the statute of frauds. In motion 18, Defendant Fasi, joined by the remaining Defendants, asserts that Plaintiffs cannot prove that Defendant Fasi's conduct was the proximate cause of Plaintiffs' injuries or that Plaintiffs suffered any concrete financial loss. Although the focus of Defendant Fasi's motion is on the conduct of Fasi, the Court notes that under RICO, the inquiry must include the harm caused [**75] by all of the predicate acts, regardless of which Defendants actually committed, or agreed to commit, the alleged acts.

1. Entitlement to remove crops and improvements under a Negative Covenant in the deed

Plaintiffs claim Defendants' injured their interests as beneficiaries of a deed which provided that occupants of YYVC's property would be entitled to remove improvements, including crops and trees, upon vacating the land. The negative covenant in the deed provides as follows:

Notwithstanding the language of any lease to the contrary, all tenants and others occupying the Property, except the Hedemanns and Kakalias, shall be entitled, when they vacate the Property, to remove any improvements, including crops and trees, which they or their predecessors-in-interest have made to or placed on the Property. The Grantors shall have no obligation, liability or responsibility to the Grantee for the presence of such tenants . . .

According to Plaintiffs, YYVC violated this covenant by: (1) failing to inform them of their rights pursuant to this deed; (2) bulldozing and destroying their homes, crops, fish ponds and other improvements; and (3) preventing them [**76] from attending to their crops.

Defendants do not dispute Plaintiffs' claim that the deed entitled them to remove crops and improvements from the land. Rather, Defendants argue that YYVC's relocation offer fulfilled the requirements of the deed by providing Plaintiffs with an opportunity to [*1415] remove any improvements, including crops, to the new site as follows:

Notwithstanding anything to the contrary elsewhere contained in this Agreement, Eligible Occupant has executed this Agreement upon the following express understandings and conditions:

(a) That if Eligible Occupant is the owner and/or occupant of any dwelling structure, or other improvements, including crops (herein collectively "Improvements"), situated within and upon the Project Site, the title thereto or ownership thereof will not be claimed by Owner or Permittee, excepting as expressly provided in subparagraphs (c)(i) and (ii) hereafter;

(b) That Eligible Occupant may remove said Improvements within a period commencing with the date hereof to and including the shortest of:

(i) that date which is one hundred twenty (120) days from the date hereof; or

(ii) if such Improvements are situated [**77] within the area covered by the Makilii Lease (as defined in said Satisfaction Agreement), the date of execution by Owner of said Makilii Lease; or

(iii) if such Improvements are situated within the area covered by the Maunawili Lease (as defined in said Satisfaction Agreement), the date of execution by Owner of said Maunawili Lease.

(c) That if Eligible Occupant shall fail or refuse to timely remove said Improvements within the period next above described, and Eligible Occupant recognizing that time is of the essence in Owner's development and use of the lands, including Owner's obligation to execute said Makilii Lease and Maunawili Lease as set forth in said Satisfaction Agreement, said Improvements will be conclusively deemed to have been abandoned by Eligible Occupant and/or shall be deemed to have been included in the quitclaim made by Eligible Occupant as set forth in paragraph 1 of this Agreement.

Plaintiffs contend that many of them were unaware of the relocation plan and thus had no notice of their right to remove crops and improvements. This argument ignores the deep-rooted maxim of constructive notice. Both the deed and the CUP were of public record, [**78] providing Plaintiffs notice of their rights. The Court finds it highly unlikely that Plaintiffs were not aware of the relocation plan. All Plaintiffs claim to have been aware of the CUP proceedings, indicating that they either testified at, or stayed away from, the hearings at the request of the developers. Because Plaintiffs had a stake in the outcome of the hearings, it is unfathomable that they did not keep abreast of the CUP proceedings and developments. Accordingly, the Court finds that Plaintiffs either knew, or had constructive notice of, their right to remove crops and improvements.

The right to remove crops and improvements under the deed applied only to tenants occupying the land at the time it was transferred. Moreover, it only granted tenants the right to remove items when they vacated the premises. Those tenants who vacated the property without removing crops or improvements abandoned any interest they had under the deed. Likewise, the deed does not afford any protection to Plaintiffs who failed to tend their crops or repair their homes because of the impending evictions. To the extent that any of Plaintiffs' improvements or crops were destroyed while they still occupied [**79] the premises, such injuries are protected by the implied covenant of quiet enjoyment, not the negative covenant in the deed.

Plaintiffs were all warned of YYVC's intent to remove them from the property in either late 1985 or early 1986. In 1987, Plaintiffs were again informed of YYVC's intent to seek eviction. Plaintiffs were not actually evicted, however, until 1991-92, sometime after the summary possession actions were decided. Plaintiffs thus had some five years or more in which to remove their crops and improvements from the land. For the above reasons, the Court finds that Defendants did not injure Plaintiffs' interest in removing crops and improvements under the negative covenant in the deed.

2. Right to relocation under the Conditional Use Permit

Plaintiffs claim that Defendants' injured their interests as third party beneficiaries [*1416] under the Conditional Use Permit ("CUP") which permitted the development of a private golf course and country club on YYVC's property. According to Plaintiffs, the CUP required the owners of the golf course project to grant them "unconditional" relocation with ten year leases in exchange for the owners being permitted to use the land [**80] for a conditional use. Plaintiffs claim that Defendants deprived them of their right to the 10-year leases by serving them with summary possession actions and subsequent notices to vacate the property after they refused to accept YYVC's proposed relocation plan.

The parties agree that the relevant provisions of the CUP provide that:

The applicant proposes to give tenants the option to relocate to a 50-acre portion of the project site adjacent to the residential fringe and obtain a 10-year permit to use the land for agricultural purposes.

Agricultural tenants presently located within the project site shall be offered an opportunity to relocate to an adjacent area indicated for agricultural use in the Exhibit Map.

Defendants do not dispute that these provisions grant Plaintiffs the right to an opportunity to relocate on the property. Rather, Defendants contend that their relocation plan, which was approved by the City of Honolulu, complied with the CUP's conditions.¹⁵

[**81] Plaintiffs contend that the Court should not consider the DLU's acceptance of the relocation plan as evidence that the plan complied with the CUP. According to Plaintiffs' Defendant Fasi and other city officials refused to enforce the conditions of the CUP in return for alleged bribes from the developers. Assuming, without so finding, that Plaintiffs' bribery allegations are true, the Court agrees that the DLU's approval of the relocation plan should not be considered in support of Defendants' motion. However, the Court has reviewed the other evidence before it and has made an independent determination that YYVC's relocation plan complied with the CUP. It is undisputed that the relocation plan met the explicit requirements of the CUP: the plan provided tenants an opportunity to relocate to an area of the proper size and that the tenants were to be granted 10 year leases. Moreover, the Court notes that since most of the tenants accepted the relocation, it would appear that the plan was objectively acceptable.

¹⁵ The Court rejects Defendants' argument that there has been a "final, adjudicated finding that the City acted properly and within its discretion in accepting the CUP in this case." Defendants are referring to the companion case of *Aurio v. Fasi*, Civil No. 90-00526, in which Plaintiffs brought an action against the City of Honolulu for inverse condemnation. The Court dismissed that action as not ripe for federal review because Plaintiffs had not yet pursued all available state remedies. In an order denying Plaintiffs' motion for reconsideration of this dismissal, the Court noted that "Plaintiffs charge the City with unlawfully approving the relocation plan under the Conditional Use Permit ("CUP") in this case and the related RICO action of *Pedrina v. Chun*, 906 F. Supp. 1377, Civ. 89-00439 ACK. Yet, all evidence before this Court shows that the City acted within their discretion and for a public purpose." This dicta by the Court on motion for reconsideration of a dismissal without prejudice does not adequately demonstrate that the issue was "actually litigated" for purposes of issue preclusion.

Plaintiffs' main objection to the plan is based upon the following release provision:

Eligible Occupant hereby releases and forever discharges Owner . . . from any [**82] and all actions, causes of action, suits at law or in equity, liabilities, claims, demands or damages of whatsoever kind or nature . . . which Eligible Occupant has or may have in respect of any claim to or interest in the land (including crops and improvements, excepting as hereinafter provided) comprising the Project Site or the right to control or use said land . . .

The agreement further provided that the eligible occupants reserved the right to remove improvements as well as to retain claims and causes of action currently pending in this Court and the state courts except for "claims respecting any interest in the land comprising the Project Site." Thus, although the agreement protected Plaintiffs right to improvements and maintain pending actions in most respects, had Plaintiffs signed the agreement they would have waived any right of adverse possession to the portion of the property which formed the project site.

[*1417] The Court finds that the CUP does not require Defendants to provide Plaintiffs with "unconditional" relocation. The Court finds that it was reasonable for Defendants to condition the grant of 10 year leases on Plaintiffs' waiver of possible claims to the [**83] property comprising the project site. As discussed below, the Court finds Plaintiffs' claims of adverse possession to be insubstantial and tenuous at best. See *infra*, p. 62-63. Moreover, in light of the numerous claims Plaintiffs have already filed against Defendants, the Court finds it was reasonable for Defendants to seek to protect themselves from further litigation once the tenants were relocated in accordance with the CUP.

Plaintiffs' concern that Defendants may claim title to their houses once they were relocated under the plan is unfounded; the plan clearly provides that Defendants relinquish any such claims. In particular, the relocation agreement provides that "the title thereto or ownership thereof (of improvements) will not be claimed by Owner or Permittee, excepting as expressly provided in subparagraphs (c)(i) and (ii)." Subparagraphs (c)(i) and (ii) provide that YYVC may claim title to improvements only where the tenants abandon them. Accordingly, if Plaintiffs had removed their improvements to a new location, they would have maintained title to the improvements.

For the above stated reasons, the Court finds that the relocation plan offered to Plaintiffs complied [**84] with the CUP. The Court also finds that Plaintiffs' alleged loss of 10 year leases under the CUP was not caused by Defendants. Plaintiffs refused Defendants' offer of relocation, thereby voluntarily relinquishing their rights under the CUP. Thus, Plaintiffs have failed to demonstrate that Defendants' actions were either the actual or proximate cause of the alleged injuries to their interests under the CUP.

3. Rights under Adverse Possession

Defendants contend that "adverse possession has been eliminated as any basis for a legitimate property interest by court order in this case." On December 18, 1990, the Court dismissed Plaintiffs' state law claims of adverse possession. Although the Court had granted Plaintiffs four opportunities to amend their complaint, Plaintiffs' claims of adverse possession were still conclusory and provided no basis for determining the merit of the claims or what land had been possessed. The Court noted at that time that even if the adverse possession claim had been adequately pled, the Court would have dismissed the claim on abstention grounds because of the ongoing state court proceedings. The Court also indicated that it would have declined [**85] to exercise supplemental jurisdiction over the adverse possession claim.

The Court's dismissal of Plaintiffs' quiet title action, however, does not necessarily eliminate Plaintiffs' claim that they had an interest in the property based on adverse possession for purposes of establishing standing under RICO. For example, had Plaintiffs established their adverse possession claims in a state court quiet title action, they could have argued before this Court that Defendants' eviction of them from the premises harmed their established interest in the property. In actuality, however, Plaintiffs have never filed a quiet title action. They also failed to establish their adverse possession claims in the summary possession actions before the state court. See *supra*, p. 36-37. Milnor Lum is the only Plaintiff asserting an injury based on adverse possession who has appealed the state court's decision. Therefore, all other Plaintiffs are estopped from claiming that they have an interest in the property based on adverse possession.

Even if Plaintiffs were not estopped from arguing that they have a property interest under adverse possession, these claims must fail as too speculative and intangible [**86] to confer standing under RICO. As discussed above, Plaintiffs do not have an established right in the property pursuant to adverse possession. Moreover, Plaintiffs' allegations regarding these claims are conclusory and give no basis for determining the extent of the land Plaintiffs' allegedly possessed or the merits of the claims.

[*1418] 4. Right to 10 year leases under an option contract

Plaintiffs claim that Defendants injured their rights to lease the property pursuant to an oral option contract wherein Defendants offered to allow the tenants to remain on the property if they did not testify against Defendants at the CUP hearing. Defendants also allegedly promised the Wongs that they would be able to remain on the property if Leonard Wong read testimony in favor of the golf course development at the CUP hearing. Defendants contend that this theory lacks merit because Plaintiffs cannot overcome the statute of frauds. In response, Plaintiffs' argue that the contract is removed from the statute because they performed their part of the agreement by abstaining from attending the CUP hearing and opposing the golf course. Plaintiff Wong alleges he performed his part of the agreement [**87] by reading testimony prepared by Defendants at the hearing.

In Hawaii, [HN41](#) a lease for real property which extends beyond one year must be (1) in writing and (2) signed by the party to be charged. See [H.R.S. § 656-1; Yee Hop v. Young Sak Cho, 25 Haw. 494, 499 \(1920\)](#). However, [HN42](#) an oral contract with respect to an interest in land may become enforceable, in spite of the statute of frauds, where there has been part performance. [Perreira v. Perreira, 50 Haw. 641, 642, 447 P.2d 667 \(1968\)](#). The Supreme Court of Hawaii has set forth three factors for determining whether acts constituting part performance are sufficient to free a promise from the statute of fraud requirements:

- (1) the acts must be pursuant to the contract;
- (2) the acts must be undertaken with the knowledge and consent of the other party; and
- (3) the acts must be such that to allow the other party to repudiate would be a fraud upon the plaintiff.

[Id. at 643](#). Moreover, [HN43](#) although forbearance to exercise a right is good consideration for a promise, mere proof of forbearance is not sufficient evidence of part performance to remove a verbal agreement from the operation of the statute of fraud. [Shannon \[*881\] v. Waterhouse, 58 Haw. 4, 7, 563 P.2d 391 \(1977\)](#). A party relying upon forbearance must demonstrate that the forbearance was primarily and substantially motivated by the oral agreement. [Id.](#)

The policy behind enforcing oral agreements which violate the statute of frauds is to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. [McIntosh v. Murphy, 52 Haw. 29, 35, 469 P.2d 177 \(1970\)](#). "Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract." [Id.](#) (citing [Monarco v. Lo Greco, 35 Cal. 2d 621, 623, 220 P.2d 737 \(1950\)](#)). [HN44](#) "In determining whether injustice can be avoided only by the enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established [**89] by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor." [Id.](#) (citing Restatement (Second) of Contracts § 217A (Supp. Tentative Draft No. 4, 1969)).

The Court finds that Plaintiffs have failed to present clear and convincing evidence of the existence and terms of the alleged oral contract. [Boteilho v. Boteilho, 58 Haw. 40, 42, 564 P.2d 144 \(1976\)](#) (party seeking to establish a parol contract must prove its existence and its terms by clear and convincing evidence); See also [Honolulu Waterfront Limited Partnership v. Aloha Tower Development Corporation, 692 F. Supp. 1230, 1234 \(D. Haw. 1988\)](#), aff'd, 891 F.2d 295 (9th Cir. 1989) (real estate development agreement was too indefinite to be enforceable where the rent term of the provision was left for future negotiations); [Clarkin v. Reimann, 2 Haw. App. 618, 638 P.2d 857 \(1981\)](#);

Lahaina-Maui [*1419] *Corp. v. Tau Tet Hew*, 362 F.2d 419 (9th Cir. 1966); *In re Sing Chong Co., Ltd.*, 1 Haw. App. 236, 617 P.2d 578 (1980); *Francone v. McClay*, 41 Haw. 72 (1955). Neither Plaintiffs' failure to attend the hearings, nor Wong's testimony at the hearings, sufficiently [*90] corroborate the making and terms of the promise to remove the alleged oral agreements from the statute of frauds. Nor is the making or terms of the agreement supported by other evidence of a clear and convincing nature. Plaintiffs' allegations concerning the terms of the alleged contract are sketchy and inconsistent. Various Plaintiffs contend that in exchange for not testifying, they were promised leases of 10 years, 20 years, 55 years, "long term" or "forever."

In any event, as Plaintiffs contend, any oral contract between Plaintiffs and Defendants was evidenced by and merged into the CUP. Plaintiffs' Opposition to Defendants Motion 8, p.6-7. As discussed above, the Court finds that Plaintiffs voluntarily waived their rights under the CUP by declining Defendants' offer of relocation. See *supra*, p. 59-63. Accordingly, any loss of Plaintiffs' right to leases under the alleged option contract was not caused by Defendants.

5. Rights under the implied covenant of quiet enjoyment

Plaintiffs claim that Defendants injured their right to quiet enjoyment by destroying their crops and homes and preventing them from tending their crops and maintaining their homes. In so far [*91] as Defendants destroyed or threatened to destroy Plaintiffs' crops or homes while they were living on the property, such injury supports Plaintiffs' RICO action. However, Plaintiffs' allegations that they failed to plant or tend crops and repair their homes because they lived under a constant fear of eviction are without merit. Eviction notices and summary possession actions do not support a claim of interference with quiet enjoyment; these procedures are the legal means by which a landlord may properly remove holdover tenants from his property. Because Defendants had a right to remove Plaintiffs from the property and to inform them that they intended to do so, Plaintiffs' fear of eviction was not a result of any illegal actions. Accordingly, Plaintiffs cannot establish a causal link between any injury allegedly resulting from such fear and Defendants' alleged racketeering activity.

6. Injury to the Wongs' personal property

The Wongs allege that they were robbed and that their bull was shot. Clearly this alleged injury was directly caused by the alleged predicate acts of robbery and extortion and therefore supports the Wongs' RICO action.

In conclusion, the Court GRANTS [*92] motions 7 and 8 and GRANTS in part motion 18. Plaintiffs failed to establish a genuine issue of fact whether Defendants' alleged racketeering activities caused them to suffer injury to any interest Plaintiffs had under the CUP, deed or option contract. Accordingly, these alleged injuries do not support Plaintiffs' RICO action. Plaintiffs' claims of injury to possible interests based on a theory of adverse possession also fail to support their RICO action. Plaintiffs have raised a genuine issue of fact whether Defendants' racketeering activities caused injury to Plaintiffs' rights under the implied covenant of quiet enjoyment. Likewise, the alleged injuries to the Wongs' property and bull support their RICO action.

B. 18 U.S.C. § 1962(c)

HN45 [↑] Section 1962(c) of RICO makes it unlawful for:

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

HN46 [↑]

Liability under § 1962(c) requires: (1) conduct, (2) of an enterprise, (3) through a [*93] pattern, (4) of racketeering activity. *Sedima*, 473 U.S. at 496.

[*1420] 1. Conduct of an Enterprise

In motion 15, Defendant Fasi contends that he cannot be held liable under [18 U.S.C. § 1962\(c\)](#) because he did not participate in the operation or management of Royal Hawaiian Country Club ("RHCC"), the enterprise. Although Defendants Masanori Kobayashi and Yoshinori Hayashida joined in this motion, they did not brief the issue of their own participation in the affairs of RHCC. Therefore, the Court will only consider this motion with respect to Defendant Fasi.

The Supreme Court recently held that [HN47](#) only persons participating in the operation or management of the enterprise itself may be held liable under [18 U.S.C. § 1962\(c\)](#). *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 1173, 122 L. Ed. 2d 525 (1993). The Reeves Court examined the plain language of RICO and concluded that the words "in the conduct of such enterprise's affairs" require some degree of direction and the words "to conduct or participate" require that a Defendant take some active part in that direction. *Id. at 1170*. [HN48](#) In order to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs," a [\[**94\]](#) person must have a part in directing the operation or management of those affairs. *Id.*

This "operation and management" test does not require that a person have primary responsibility for the enterprise's affairs or hold a formal position in the enterprise. *Reeves*, 113 S. Ct. at 1170, 1173. [HN49](#) "An enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." *Id. at 1173*. "An enterprise might also be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery." *Id.* Thus, regardless of whether a person is "outside" or "inside" the enterprise, he may be liable under [§ 1962\(c\)](#) if he participated in the operation or management of the enterprise itself. *Id.* The courts have applied this standard narrowly, however, finding that outside accountants and attorneys have not participated sufficiently in the operation or management of the enterprise to be held liable under [18 U.S.C. § 1962\(c\)](#). *Id.* (independent accounting firm which reviewed enterprise's records and advised enterprise was not liable under RICO); *Baumer* [\[*951\]](#) *v. Pachl*, 8 F.3d 1341, 1344 (9th Cir. 1993) (attorney who assisted limited partnership's fraudulent scheme by preparing letters, preparing the partnership agreement, and assisting in bankruptcy proceeding was not liable under RICO).

Plaintiffs in this action name RHCC as the enterprise. Plaintiffs contend that Defendant Fasi participated in the operation or management of RHCC by aiding RHCC in obtaining the CUP and thus enabling development of the country club. The Court does not agree that Fasi's alleged participation in granting the CUP satisfies the Reeves operation and management test. Clearly the attorney who drafted the partnership agreement in *Baumer*, was partially responsible for the partnership's existence; yet, the court found that he lacked sufficient control or direction to be liable under RICO. See *Baumer*, 8 F.3d at 1344.

Plaintiffs also suggest that the alleged bribery of Fasi satisfies the Reeves test. This is not, however, the classic situation where a defendant uses bribes to control an enterprise. Rather, in the case at bar, RHCC was allegedly using bribes to control the actions of outsiders. Plaintiffs have not submitted evidence suggesting [\[**96\]](#) that Fasi himself attempted to exert control over RHCC, or to direct the operations of the corporation. Likewise, Plaintiffs do not suggest that Fasi or any other city official attempted to direct the terms of the relocation plan or to control implementation of the plan. Indeed, Plaintiffs contend that Fasi failed to assert direction and control over the enterprise by refusing to enforce the terms and conditions of the CUP. Accordingly, the Court finds that Defendant Fasi cannot be held liable under [18 U.S.C. § 1962\(c\)](#) because he did not participate in the operation or management of RHCC. The Court thus GRANTS motion 15.

2. Racketeering Activity

[HN50](#) "Racketeering Activity" is defined in [18 U.S.C. § 1961\(1\)](#) as:

[\[*1421\]](#) (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

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(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . [including [section 1341](#), relating to mail fraud, and other enumerated federal statutes, covering some 30-40 [[**97](#)] types of crimes].

See also [Sun Savings and Loan Ass'n v. Dierdorff](#), 825 F.2d 187, 191 (9th Cir. 1987); [First Pacific Bancorp, Inc. v. Bro.](#), 847 F.2d 542, 546 (9th Cir. 1988).

a. **Bribery**

In motion 9 Defendant Fasi urges the Court to grant summary judgment in his favor with respect to Plaintiffs' claims based upon the alleged racketeering activity of bribery. In motion 10, Defendants Masanori Kobayashi and Yoshinori Hayashida likewise request summary judgment with respect to Plaintiffs' claims based upon bribery. Defendants YYVC, Han Kuk Chun and Tetsuo Yasuda join in this motion.

Hawaii state law [HN51](#)[[↑](#)] makes it illegal for: (1) a public servant; (2) to solicit, accept or agree to accept (either directly or indirectly); (3) pecuniary benefit; (4) with the intent that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced. [H.R.S. § 710-1040\(1\)\(b\)](#). It is likewise illegal for a person to: (1) confer, or offer or agree to confer (directly or indirectly); (2) pecuniary benefit; (3) upon a public servant; (4) with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion [[**98](#)] or other action in his official capacity.

Defendant Fasi argues that the bribery claims must fail because Plaintiffs' cannot prove that he solicited, accepted or agreed to accept the campaign contributions. Although Defendant Fasi states that the contributions were never formally accepted and that the money was returned, the Court will not consider his statements as support for this motion because Defendant Fasi subsequently refused to answer questions concerning the campaign contributions in his December 1994 deposition. Plaintiffs have submitted some evidence indicating that after the contribution checks were returned to YYVC, the funds were given back to the campaign in cash. See Affidavit of Robert Carter, Exhibit 55-16 of Plaintiffs' Memorandum in Opposition. Thus, the Court finds Plaintiffs have raised a genuine issue of fact whether Fasi accepted or agreed to accept the funds either directly, or indirectly through his campaign organization.

Defendant Fasi further argues that Plaintiffs cannot prove that Fasi accepted the alleged funds "with the intent that his vote, opinion, judgment, exercise of discretion, or other action as a public servant would thereby be influenced." [[**99](#)] According to Fasi, because the approval of the CUP occurred on June 13, 1986, prior to the date of the campaign contributions, he could not have accepted the contributions with the intent that his decision regarding the CUP be influenced. Fasi further contends that he could not have intended to be influenced by the contributions because he did not have the authority, duty, or responsibility to approve the CUP or to enforce YYVC's compliance with the conditions of the CUP.

The Court finds Defendant Fasi's assertion that, as mayor, he had no influence over the grant or enforcement of the CUP to be implausible. Although official power may well have been vested in the director of the DLU, the city directors are all members of the mayor's cabinet and answerable to the mayor. Moreover, Fasi himself testified that his directors were all appointed from among his "supporters and friends," and were all members of Friends of Fasi. As further evidence of Fasi's involvement in the decisions of his city directors, Plaintiffs submitted a letter concerning a "land swap" in connection with the Maunawili Valley Golf Course. This letter, addressed to Defendant Fasi and signed by the Deputy Director [[**100](#)] of the Departments of Parks and Recreation, demonstrates that the Director sought approval from the mayor prior to pursuing negotiations. Additionally, there is evidence that Defendant Fasi attended town meetings during which he indicated [[*1422](#)] his involvement in enforcing the provisions of the CUP. Moreover, the Court notes that the fact that the campaign contributions were made after the CUP was granted does not preclude a finding that the alleged bribes were given in exchange for Fasi's aid in obtaining approval or non-enforcement of the CUP. Based on the above, the Court finds Plaintiffs have raised a genuine issue of fact whether Fasi intended to be influenced by the campaign contributions.

Defendants Masanori Kobayashi and Yoshinori Hayashida contend that the illegal contributions were merely "good will" expenditures, intended to promote a favorable business climate generally, and not payments specifically intended to influence Fasi and others to act favorably towards the donors. [HN52](#) [↑] "Not every gift, favor or contribution to a government or political official constitutes bribery." [United States v. Arthur, 544 F.2d 730, 734 \(9th Cir. 1976\)](#). Rather, the intent that the official's actions [**101] be influenced by the gift, favor or contribution is crucial to a violation of the state bribery statute. *Id.*; [H.R.S. § 710-1040\(1\)\(b\)](#). Although vague expectations of some future benefit is not sufficient to make a campaign contribution a bribe, in the case at bar, Plaintiffs allege that Defendants sought specific benefit in the form of the CUP and non-enforcement of its provisions in exchange for the contributions. It is undisputed that Defendants illegally contributed the funds while YYVC was in the process of developing a golf course which it had recently obtained a special use permit to build. There is also evidence that at least some of the contributions, subsequently returned as improper, were then resubmitted in cash form. The Court further notes that all of the Defendants refused to answer questions regarding the contributions in their depositions. Therefore, the Court finds Plaintiffs have raised a genuine issue of fact as to whether Defendants made the illegal contributions with the intent to influence the decisions of Fasi or other government officials.

The Court finds that Plaintiffs have failed to establish that Defendant Fasi received pecuniary benefit from the [**102] \$ 5 million gift to the City and County of Honolulu. "Pecuniary benefit" is defined as "benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain." [H.R.S. § 710-1000\(14\)](#). Pecuniary benefit is to be distinguished from the term "benefit" which is much broader and which is defined as "gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested." [H.R.S. § 710-1000\(2\)](#). Plaintiffs contend that Fasi "used" the gift during his election campaign by taking credit for obtaining the funds for the City of Honolulu. This is not sufficient pecuniary benefit to establish a bribe under the Hawaii bribery statute.

In conclusion, the Court GRANTS in part motion 9. The Court finds Plaintiffs failed to establish a genuine issue of fact whether the \$ 5 million gift to the City and County of Honolulu was a bribe. The Court DENIES motions 9 and 10 with respect to the campaign contributions. The Court finds that Plaintiffs have raised a genuine issue of fact whether the campaign contributions were in fact bribes.

b. Mail Fraud [HN53](#) [↑]

[**103] To allege a violation of the mail fraud statute, [18 U.S.C. § 1341](#), Plaintiffs must show that:

- (1) Defendants devised a scheme to defraud;
- (2) Defendants used the mails in furtherance of the scheme;
- (3) Defendants did so with the specific intent to deceive or defraud.

[Sun Savings and Loan Association v. Dierdorff, 825 F.2d 187, 195 \(9th Cir. 1987\)](#). [HN54](#) [↑] The requirement of specific intent under the mail fraud statute is satisfied by "the existence of a scheme which was reasonably calculated to deceive persons of ordinary prudence and comprehension and this intention is shown by examining the scheme itself." [United States v. Green, 745 F.2d 1205, 1207 \(9th Cir. 1984\)](#).

[HN55](#) [↑] Fraudulent intent requires that a person knowingly and willfully act to defraud. Therefore, good faith generally constitutes a complete defense to any crime which requires fraudulent intent. [United States v. Faust, 850 F.2d 575, 583 \(9th Cir. \[*1423\] 1988\)](#). Reliance on the advice of counsel is a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of fraudulent intent. [Bisno v. United States, 299 F.2d 711, 719 \(9th Cir. 1961\)](#); *United* [**104] [States v. Piepgrass, 425 F.2d 194, 198 \(9th Cir. 1970\)](#). A claim of good faith reliance on counsel requires that the advice be obtained after full disclosure of all the facts to which the advice pertains. [United States v. Conforte, 624 F.2d 869, 877 \(9th Cir. 1980\)](#). The defendant must also show that he actually relied on the advice, believing it to be correct. *Id.* Reliance on advice of counsel will not shield a party who

simply confers with an attorney as one would confer with any business associate. *Piepgrass, 425 F.2d at 198*. It will also not shield defendants who retain counsel to insure the success of their fraudulent schemes, rather than to secure legal advice. *United States v. Shewfelt, 455 F.2d 836, 838 (9th Cir. 1972)*.

In motion 11 Defendants Masanori Kobayashi and Yoshinori Hayashida, joined by all Defendants except Fasi, contend that they lacked the requisite intent to defraud because the eviction notices and letters concerning the relocation plan were lawyer work product. Reliance on counsel, however, is not a complete defense to mail fraud. In the case at bar, Plaintiffs have, on various occasions, alleged that Defendants' attorneys aided Defendants in **[**105]** carrying out their fraudulent schemes. If Plaintiffs' allegations are true, then Defendants' reliance on the advice of their attorneys would not have been in good faith.

Nonetheless, the Court finds no basis for mail fraud under the alleged eviction scheme. As noted previously, Defendants had a right to evict Plaintiffs and to inform Plaintiffs that they intended to do so. This Court previously found Plaintiffs had either actual or constructive notice of their right to remove crops and improvements from the property. See *supra, p. 58*. Accordingly, Defendants' failure to inform them of this right could not have been reasonably calculated to defraud Plaintiffs of their interests under the deed. For the reasons discussed previously, the Court finds that Plaintiffs were also on notice of their right to be afforded an opportunity to relocate under CUP. Therefore, Defendants' failure to inform Plaintiffs of this right likewise does not support a finding of fraudulent intent.

The Court also finds that Plaintiffs' confiscatory relocation scheme lacks merit. There is no indication that Defendants' letters concerning the relocation plan were fraudulent. Plaintiffs claim the letters falsely **[**106]** purported that Defendants' relocation plan satisfied the CUP and that to take advantage of relocation Plaintiffs had to surrender certain interests in the land. As discussed previously, the Court finds that Defendants' plan satisfied the CUP and that it was reasonable for Defendants to require waiver of certain property interests as a condition of relocation under the CUP. See *supra, p. 62-63*.

For the above reasons, the Court GRANTS motion 11 in so far as it pertains to Plaintiffs' allegations of eviction and confiscatory relocation mail fraud schemes. The Court finds that these allegations are meritless.

c. Aiding and Abetting Mail Fraud

In motion 13 Defendant Fasi contends that he should be granted summary judgment with respect to Plaintiffs' claims that he aided and abetted in the commission of mail fraud because there is no evidence that he consciously assisted in the fraud. *HN56* [↑] The elements necessary to convict an individual under an aiding and abetting theory are:

- (1) that the accused had the specific intent to facilitate the commission of a crime by another;
- (2) that the accused had the requisite intent of the underlying substantive offense;
- (3) **[**107]** that the accused assisted or participated in the commission of the underlying substantive offense; and
- (4) that someone committed the underlying substantive offense.

United States v. Litteral, 910 F.2d 547, 550 (9th Cir. 1990).

Because the Court finds that neither the eviction notices nor the letters concerning the relocation plan support Plaintiffs' allegations of mail fraud, Plaintiffs' claims that Defendant Fasi aided and abetted the **[*1424]** commission of these crimes must also fail. See *supra, p. 79-80*. Moreover, the Court finds that there is absolutely no evidence that Defendant Fasi had knowledge of the letters, knew of their alleged fraudulent purpose, or had the specific intent to deceive or defraud Plaintiffs. See *United States v. Olson, 925 F.2d 1170, 1176 (9th Cir. 1991)*. Accordingly, the Court GRANTS motion 13 with respect to Plaintiffs' claims that Defendant Fasi aided and abetted mail fraud based on an eviction scheme or a confiscatory relocation scheme.

The Court likewise GRANTS motion 14 with respect to Plaintiffs' allegations that Defendant Fasi conspired to aid and abet the commission of these schemes of mail fraud. As stated above, there [**108] simply is no evidence whatsoever that Defendant Fasi had knowledge of the eviction letters or their allegedly fraudulent purpose. Therefore, there is no evidence that he agreed to commit the substantive offense of mail fraud. See [Literal, 910 F.2d at 550.](#)

d. Extortion

In motion 11, Defendants argue that any actions they took in evicting the tenants were taken in good faith reliance on the advice of counsel and thus lacked the requisite intent for state or federal extortion. Similarly, in motion 12, they argue that all actions taken by them after the City approved their relocation plan were taken in good faith reliance thereon and thus that they could not have possessed the criminal intent necessary to transform their actions into extortion, robbery or conspiracy.

The Court does not agree that either the actions of Defendants' attorneys or the City's approval of YYVC's relocation plan immunized Defendants from liability for any other wrongful actions which they might have taken. If, for example, Defendants intentionally destroyed Plaintiffs' crops or improvements while they were still tenants on the land, it would be irrelevant whether such action occurred under [**109] the advice of their attorneys or subsequent to the city's approval of their plan. Likewise advice of their attorneys does not shield Defendants from possible liability for allegedly robbing the Wongs and shooting their bull. Accordingly, the Court DENIES motions 11 and 12 to the extent that they pertain to Plaintiffs' claims of extortion, robbery and conspiracy.

3. Pattern of "Racketeering Activity"

In motion 17 Defendant Fasi contends that Plaintiffs cannot prove that he engaged in a pattern of racketeering activity. According to Defendant Fasi, the alleged bribes do not constitute a pattern of racketeering activity because they did not amount to, nor pose a threat of, continued criminal activity. The Court notes initially that Defendant Fasi's inquiry is again too narrow. To determine whether there is a pattern of racketeering activity, the Court must examine all of the predicate acts, regardless of which Defendants actually committed, or agreed to commit, the alleged acts. With respect to the individual Defendants, it is only necessary that they commit, or conspire to commit, two predicate acts. See [Brooklier, 685 F.2d at 1222.](#)

[HN57](#) RICO defines the term "pattern of [**110] racketeering activity" as requiring "at least two predicate acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity. [18 U.S.C. § 1961\(5\) \(1994\)](#). Aside from the minimal requirement of showing the existence of two predicate acts, RICO does not address the meaning of the term "pattern" as used throughout the statute. The United States Supreme Court, recognizing that Congress was concerned in RICO with long-term criminal activity, has held that [HN58](#) to prove a pattern of racketeering activity a plaintiff must also show that: (1) the racketeering predicates are related; and (2) that the predicate acts amount to, or pose a threat of, continued criminal activity. [H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 \(1989\).](#) Predicate acts are related if they involve "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." [Id. at 240.](#)

[*1425] Whether the predicate acts amount to, or pose a threat of, continued criminal activity depends on the specific facts of each [**111] case. [Id. at 242.](#) A plaintiff may establish that predicate acts amount to continued criminal activity by establishing that the predicate acts extended over a substantial period of time. [Id. at 250](#) (related predicate acts occurring with some frequency over at least a 6-year period may be sufficient to satisfy the continuity requirement); [United States v. Dischner, 974 F.2d 1502, 1507, 1510 \(9th Cir. 1992\)](#) (related predicate acts committed over approximately a three year period satisfied the continuity requirement). Although there is no bright line test for this "closed-ended continuity," the Ninth Circuit and other courts recognize that there are "no cases in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year." [Religious Technology Center v. Wollersheim, 971 F.2d 364, 366-67 \(9th Cir. 1992\)](#) (collecting cases); See also [Streck v. Peters, 855 F. Supp. 1156, 1164-65 \(D. Haw. 1994\)](#). Moreover, most courts that have found continuity in a closed

period did so in cases involving periods of several years. See [Religious Technology Center, 971 F.2d at 367, n.7; Streck, 855 F. Supp. at 1164-65.](#)

Where the predicate [\[**112\]](#) acts extend over only a few weeks or months, a plaintiff must also demonstrate a threat of future criminal activity. [H.G. Inc., 492 U.S. at 242; River City Markets, Inc. v. Fleming Foods West, 960 F.2d 1458, 1464 \(9th Cir. 1992\)](#) (related predicate acts occurring over a one month period was not sufficient to establish continuity); [Religious Technology Center, 971 F.2d at 366-67](#) (related predicate acts occurring over a six month period was not sufficient to establish continuity); [Streck, 855 F. Supp. at 1165](#) (related predicate acts occurring over a four month period was not sufficient to establish continuity). In other words, if the period of time is insufficient to establish "closed-ended" continuity, the past conduct must be of the type that threatens future repetition, or "open-ended" continuity. Illegal conduct which is "a regular way of conducting [a] defendant's ongoing legitimate business" may pose a sufficient threat of future criminal activity to satisfy the continuity requirement. [H.G. Inc., 492 U.S. at 242; Ticor Title Insurance Company, 937 F.2d 447, 450 \(9th Cir. 1991\)](#) (continuity requirement satisfied where frequency of three forged releases in [\[**113\]](#) a 13-month period suggested that the practice had become a regular way of conducting business).

The Court finds that there is a genuine issue of fact as to whether the alleged predicate acts extended over a sufficiently substantial period of time to amount to continued criminal activity. Plaintiffs allege that the first acts of threat and intimidation occurred in early 1987. These intimidation tactics allegedly continued to some extent through 1991 when Plaintiffs were evicted from the property. The alleged robbery and destruction of the Wongs' property occurred in May 1987. The alleged bribes occurred over a 13-15 month period, from August 1987 until December 1988. The alleged destruction of crops and homes appears to have occurred during 1988 and 1989. If these allegations prove to be true, they will support a finding of closed-ended continuity. Accordingly, the Court DENIES motion 17.

C. [18 U.S.C. § 1962\(d\)](#)

In motion 16, Defendant Fasi contends that Plaintiffs do not have a viable claim against him under [§ 1962\(d\)](#) for conspiring to violate [18 U.S.C. § 1962\(c\)](#).

[HN59](#)  Conspiracy to carry on an enterprise through racketeering activity, indictable under [§ 1962\(d\)](#), is [\[**114\]](#) a separate crime from the participation in an enterprise through racketeering acts (which may include conspiracy or attempts), indictable under [§ 1962\(c\)](#). [United States v. Brooklier, 685 F.2d 1208, 1221 \(9th Cir. 1982\)](#). Where defendants conspire to commit predicate acts prohibited by RICO, the acts may simply be part of the pattern of racketeering activity supporting a violation of [§ 1962 \(a\), \(b\) or \(c\)](#). It is only where an agreement is undertaken to invest in, acquire control of, or conduct an enterprise through a pattern of racketeering, that there is a RICO conspiracy chargeable under [§ 1962\(d\)](#). *Id.* Conversely, to establish a violation of [§ 1962\(d\)](#), a plaintiff need [\[*1426\]](#) not show that a defendant conspired or agreed to commit the individual predicate acts. [United States v. Tille, 729 F.2d 615, 619 \(9th Cir. 1984\)](#). Rather, "[proof] of an agreement, the objective of which is a substantive violation of RICO (such as conducting the affairs of an enterprise through a pattern of racketeering) is sufficient to establish a violation of [§ 1962\(d\)](#). *Id.*; [Baumer, 8 F.3d at 1346](#).

[HN60](#)  Conspiracy to violate RICO also requires a showing that a defendant "was aware of the essential [\[**115\]](#) nature and scope of the enterprise and intended to participate in it." [Baumer, 8 F.3d at 1346](#). "A RICO conspiracy 'requires the assent of each defendant charged, although it is not necessary that each conspirator knows all of the details of the plan or conspiracy.'" *Id.* (citing [Brooklier, 685 F.2d at 1222](#).)

In paragraph 104 of their complaint, Plaintiffs allege that Defendants, including Fasi, conspired to violate [18 U.S.C. § 1962\(c\)](#), in violation of [18 U.S.C. § 1962\(d\)](#). In particular, Plaintiffs contend that Defendants conspired to participate in the affairs of the enterprise and conspired to commit a pattern of racketeering activity in conducting said affairs.

In their RICO case statement, Plaintiffs describe the following as facts showing the existence of a conspiracy in violation of [18 U.S.C. § 1962\(d\)](#): Defendants conspired to make bribes; conspired to commit extortion, robbery and

mail fraud; conspired to "get the Wong Plaintiffs' cattle out of the way;" conspired "to threaten the entire little village;" and conspired to have valuable trees and crops remain on the property. Plaintiffs' RICO Case Statement, p.44-46.

These allegations do not suggest that Defendant **[**116]** Fasi conspired or agreed to participate in the operation or management of RHCC. Nor have Plaintiffs' submitted evidence sufficient to infer such an arrangement. See supra, **p. 72**. Accordingly, Plaintiffs' claim that Defendant Fasi violated § 1962(d) must fail. The Court therefore GRANTS motion 16.

CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part Defendants' various Motions for Summary Judgment. The Court GRANTS in part motions 1, 2 and 4 against all Plaintiffs except Raphael Kamai, Lynda Augustus, Alfredo Aurio, Benita Aurio and Milnor Lum. The Court finds that all Plaintiffs except the aforementioned are precluded by the state court summary possession actions from relitigating the following issues:

- a. that Plaintiffs have no right to renewable leases on the property under an option contract;
- b. that YYVC's relocation plan did not violate the CUP;
- c. that YYVC's relocation plan did not violate a negative covenant contained in the deed to the property;
- d. that Tenants Nicanor Amit, Cristita Bolo, Wilfredo Bolo, Josefina Bolo, Alejandro Coloyan, Ofelia Coloyan, Isidro Dilay, Margaret Dilay, Lorraine Dilay, **[**117]** Violeta Dumadag, Estrella Igarta, Sebastian Igarta, Jennie Olinger, Francisco Pedrina, Adoracion Pedrina, William Sullivan, and Jocelyn Sullivan did not have a claim to the property under adverse possession.

The Court GRANTS motion 3 to the effect that the final disposition of Plaintiffs' state court action bars all of Plaintiffs' claims against Y.Y. Valley Corporation, Han Kuk Chun, Tetsuo Yasuda, Masanori Kobayashi, Yoshinori Hayashida, Hiroshi Kobayashi, Eugene Lum and Norma Lum.

The Court DENIES Defendant Fasi's motions 5 and 6, based on immunity and the Federal Election Campaign Act. The Court STRIKES paragraph 116 of the complaint.

The Court GRANTS motions 7 and 8 and GRANTS in part motion 18. Plaintiffs failed to establish a genuine issue of fact whether Defendants' alleged racketeering activities caused them to suffer injury to any interest Plaintiffs had under the CUP, deed or option contract. Plaintiffs' claims of injury to possible interests based on a theory of adverse possession are too tenuous and insubstantial to support their RICO action.

[*1427] The Court GRANTS in part motion 9. The Court finds that Plaintiffs failed to establish a genuine issue of fact whether **[**118]** the \$ 5 million gift to the City and County of Honolulu was a bribe. The Court DENIES motions 9 and 10 with respect to the campaign contributions. The Court finds that Plaintiffs have raised a genuine issue of fact whether the contributions were in fact bribes.

The Court GRANTS in part motions 11, 13 and 14. The Court finds that Plaintiffs' eviction and confiscatory relocation mail fraud schemes are meritless. The Court DENIES motions 11 and 12 to the extent that they pertain to Plaintiff's extortion, robbery and conspiracy claims. There is a genuine issue of material fact whether Defendants' reliance on counsel or the city's approval of the plan immunized them from liability for these actions.

The Court GRANTS motions 15 and 16. Plaintiffs have failed to establish a genuine issue of fact whether Defendant Fasi participated, or agreed to participate, in the operation or management of the enterprise. Accordingly, Defendant Fasi is not liable under 18 U.S.C. § 1962(c) or (d).

The Court DENIES motion 17. The Court finds that there is a general issue of material fact whether the alleged predicate acts extended over a sufficiently substantial period to amount to continued criminal **[**119]** activity.

The end result is that Summary Judgment is hereby GRANTED in favor of all Defendants. The Court also DISMISSES all claims of Huberto Dumadag and Rosita Uraniumri and STRIKES the estate of Laurencia Canencia from the complaint.

906 F. Supp. 1377, *1427 1995 U.S. Dist. LEXIS 16334, **119

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUN 27 1995.

PEDRINA v. CHUN; 906 F. Supp. 1377, CV. NO. 89-00439 ACK; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT FOR ALL DEFENDANTS

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Thompson Everett, Inc. v. National Cable Advertising, L.P.

United States Court of Appeals for the Fourth Circuit

January 31, 1995, Argued ; June 27, 1995, Decided

No. 94-1656

Reporter

57 F.3d 1317 *; 1995 U.S. App. LEXIS 15835 **; 1995-1 Trade Cas. (CCH) P71,052; 23 Media L. Rep. 2132

THOMPSON EVERETT, INC., Plaintiff-Appellant, v. NATIONAL CABLE ADVERTISING, L.P.; CABLE NETWORKS, INC.; CABLE MEDIA CORPORATION, Defendants-Appellees.

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, District Judge. (CA-93-452).

Disposition: AFFIRMED.

Core Terms

cable, cable company, advertising, contracts, air time, media, district court, exclusive contract, anti trust law, sales, antitrust, spot, exclusive representation, cable television, summary judgment, compete, dollars, commissions, conspiracy, concerted activity, monopoly, buyer's, contractual, competitor, negotiate, rates, summary judgment motion, advertising agency, antitrust case, horizontal

LexisNexis® Headnotes

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

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

[**HN1**](#) **Entitlement as Matter of Law, Appropriateness**

While [Fed. R. Civ. P. 56](#) is to be applied to antitrust cases no differently from how it is applied to other cases, that is not to say that the summary judgment device is not an appropriate and useful tool for resolving antitrust cases. On the contrary, because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for [Rule 56](#) utilization.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

HN2 Summary Judgment, Entitlement as Matter of Law

While it is axiomatic that *Fed. R. Civ. P. 56* must be used carefully so as not improperly to foreclose trial on genuinely disputed, material facts, the mere existence of some disputed facts does not require that a case go to trial. The disputed facts must be material to an issue necessary for the proper resolution of the case, and the quality and quantity of the evidence offered to create a question of fact must be adequate to support a jury verdict. Thus, if the evidence is "merely colorable" or "not significantly probative," it may not be adequate to oppose entry of summary judgment.

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

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

HN3 Summary Judgment, Entitlement as Matter of Law

While the court has recognized generally that when considering a motion for summary judgment, the district court must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion, the court hastens to add that those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture. Moreover, the inferences which may be drawn vary from one substantive area of the law to another.

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

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

HN4 Summary Judgment, Entitlement as Matter of Law

On summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

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

HN5 Standards of Review, De Novo Review

The district court must determine whether the party opposing the motion for summary judgment has presented genuinely disputed facts which remain to be tried. If not, the district court may resolve the legal questions between

the parties as a matter of law and enter judgment accordingly. And in reviewing a summary judgment, the court applies de novo the same standard that the district court was required to apply for granting the motion for summary judgment.

Antitrust & Trade Law > Clayton Act > General Overview

Commercial Law (UCC) > Sales (Article 2) > 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 > General Overview

HN6 [down] Antitrust & Trade Law, Clayton Act

Section 4 of the Clayton Act grants private persons the right to sue for violations of the antitrust laws if the person has been injured in his business or property "by reason of" an antitrust violation. [15 U.S.C.S. § 15\(a\)](#). A private person may not, however, recover damages simply by establishing that his injury was causally linked to an illegal presence in the market. Rather, the damages sought must flow from that conduct which is proscribed by the antitrust laws.

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

HN7 [down] Private Actions, Remedies

Because the antitrust laws are intended to protect competition, and not simply competitors, only injury caused by damage to the competitive process may form the basis of an antitrust claim.

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

HN8 [down] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Exclusive dealing arrangements are prohibited only if they have a substantial adverse effect on competition.

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

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

HN9 [down] Regulated Practices, Market Definition

The relevant market is defined by the scope of reasonable interchangeability.

Counsel: ARGUED: Stephen Earl Baril, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, P.C., Richmond, Virginia; Theodore Voorhees, Jr., COVINGTON & BURLING, Washington, D.C., for Appellant.

Yvonne Susan Quinn, SULLIVAN & CROMWELL, New York, New York, for Appellees.

ON BRIEF: John J. Walker, III, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, P.C., Richmond, Virginia, for Appellant.

Richard C. Pepperman, II, SULLIVAN & CROMWELL, New York, New York; Stephen A. Northup, Robert D. Seabolt, MAYS & VALENTINE, Richmond, Virginia, for Appellee Cable Networks; Charles M. Allen, Jr., WRIGHT, ROBINSON, MCCAMMON, OSTMER & TATUM, Richmond, Virginia; Daniel G. Swanson, Julia A. Dahlberg, GIBSON, DUNN & CRUTCHER, Washington, D.C., for Appellee National Cable Advertising; Thomas E. Spahn, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia; Gerald J. Fields, Raymond J. Soffientini, Stewart Klein, BATTLE FOWLER, New York, New York, for Appellee Cable Media.

Judges: Before NIEMEYER and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge. Judge **[**2]** Niemeyer wrote the opinion, in which Judge Michael and Senior Judge Phillips joined.

Opinion by: NIEMEYER

Opinion

[*1319] OPINION

NIEMEYER, Circuit Judge:

Thompson Everett, Inc., a self-styled "independent cable television representative firm" engaged in placing "spot" advertising on cable television, contends that it is being illegally denied access to cable television companies and the "opportunity to earn rep commissions" in connection with the sale of cable air time for spot advertising. Thompson Everett has sued the traditional cable representatives (referred to as "traditional cable reps") who have exclusive representation contracts with cable television companies, alleging that the traditional cable reps are interpreting and enforcing their exclusive contracts in a concerted effort to exclude Thompson Everett from the "cable rep" business and the commissions flowing from that business. Thompson Everett contends that the traditional cable reps' conduct violates **[*1320]** [sections 1](#) and [2](#) of the Sherman Act (declaring restraints of trade and monopolization illegal), Virginia's antitrust laws, and related common law.

The district court granted the defendants' motion for summary judgment on the **[**3]** antitrust claims, concluding that Thompson Everett failed to present evidence sufficient to show that it suffered an "antitrust injury" and to establish a horizontal conspiracy among defendants to use their exclusive representative agreements to injure Thompson Everett. The district court also concluded that the exclusive agreements did not have a substantial anti-competitive effect. It dismissed the remaining claims on the ground that the defendants acted properly and in good faith in protecting their contractual rights under the exclusive cable company representation contracts.

Because we conclude that Thompson Everett, if injured at all, has not been injured by anything forbidden by the antitrust laws, we affirm.

I

Defendants National Cable Advertising, L.P., Cable Networks, Inc., and Cable Media Corporation are "traditional cable reps" retained by cable television companies to serve as their sales agents to sell cable air time to advertisers for spot advertising.¹ The traditional cable reps' sole function is to represent cable companies to obtain for them the greatest possible advertising revenues. The traditional cable reps compete with each other for the right to

¹ These traditional cable reps are companies founded in the early 1980s and are owned by the cable companies. National Cable is a limited partnership in which four cable companies are limited partners. The other two are corporations whose stock is owned by cable companies. All three operate nationally representing only cable companies, but not always the same ones.

represent [**4] cable companies and for the contracts by which the cable companies grant the exclusive right to represent them. These contracts are of short duration, often about one year, and when they expire, the traditional cable reps then compete for new contracts. As a result of this competition, cable companies are represented by various cable reps and the commissions for representation have declined. Recent years' commission rates have dropped from about 28% of spot time billings to a general range of 20% to 22%, and new contracts are being signed for as low as 15% of billings. Both the cable companies and the traditional cable reps claim that these exclusive contracts have a legitimate business purpose. The cable companies contend that they need a loyal, skilled sales staff, dedicated to furthering the cable companies' interests in developing advertising revenue from the sale of air time.

[**5] By employing exclusive contracts, the cable companies contend, they establish an ongoing relationship with the traditional cable reps so that the reps may work against sales quotas and focus their attention on securing the best available rates for the cable companies and on chasing limited advertising dollars in competition with other media. The traditional cable reps similarly maintain that exclusive contracts are necessary to protect their considerable investments in market and demographic research and technological innovation. They contend also that exclusive contracts provide financial stability, enabling them to invest in training a larger and more skilled sales staff.

Under these exclusive representation contracts, the traditional cable reps are compensated only through commissions on sales of spot air time to advertisers or advertising agencies. Absent an exclusive agreement, they argue, their effort would be undermined by "free riders" who could take advantage of the traditional cable reps' efforts in generating sales without making any of the necessary investment.

Thompson Everett is a Virginia corporation formed in 1984 for the purpose of "conducting both a general advertising [**6] agency business and representing agencies in their placement of advertising in various media." It claims that it is "independent" in that neither advertising interests nor cable companies own its stock. Its goal, similar to that of media buyers hired by advertisers to place their advertisements in the media, is to negotiate the cheapest price for the most air time or media exposure. On behalf of its clients, advertisers or advertising agencies, Thompson [*1321] Everett aims to place advertising not only on cable television, but also in other media such as network and local broadcast television, network cable television, radio, or printed media, whichever is most consistent with its clients' needs and desires.

When dealing with cable companies, Thompson Everett typically attempts to bypass the traditional cable reps and deal directly with the cable companies, using the leverage of its collective representation of numerous advertisers and advertising agencies in its negotiations. When successful, Thompson Everett demands receipt of the commissions that otherwise would be paid to the traditional cable reps. If the cable company declines to pay Thompson Everett a commission or pays a commission [**7] which Thompson Everett considers to be inadequate, Thompson Everett "creates" a commission for itself through a practice referred to as "popping the advertiser." Under this practice, Thompson Everett negotiates a rate with the cable company that is below the amount budgeted by the advertiser for the spot time, but it informs the advertiser that the cable company would only agree to sell at the budgeted amount and retains the difference as its commission.

Thus, even though Thompson Everett has dealt directly with cable companies and has received commissions from them for selling their air time, its efforts and loyalties are always tied to the advertisers and advertising agencies. Unlike the traditional cable reps, who seek to *maximize* the cable company's revenue from the sale of spot air time, Thompson Everett seeks to *minimize* that amount in its representation of advertising interests. For that reason, Thompson Everett readily acknowledges, it cannot sign exclusive cable rep contracts with the cable companies.²

² As Thompson Everett's chief operating officer explained in response to questioning:

Q. If the interest of the advertiser are inconsistent with selling spot cable for a particular cable operator, you are 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.

[**8] Neither Thompson Everett nor the traditional cable reps buy cable air time on their own account and then resell it. Rather, they act as agents, performing the service of negotiating a price for cable air time on behalf of their clients. The traditional cable reps represent only the interests of cable companies, seeking to sell cable company air time in competition with other media. Much like a real estate broker representing the seller in a real estate transaction, these traditional cable reps negotiate the best rate obtainable for acceptance by the cable company. Thompson Everett, on the other hand, serves in the transaction in a position analogous to the buyer's real estate broker, representing the potential buyer of cable air time. While the buyer's agent may consider cable air time for its clients' advertising, it may also consider other media. Thompson Everett maintains that even from its position as the buyer's agent in the transaction, it can provide the same service provided by the traditional cable reps to the cable companies without the cable companies' need to engage a traditional cable rep as an intermediary.

Troubled by Thompson Everett's disregard for their exclusive [**9] cable rep contracts, the traditional cable reps began to insist on their contractual rights of exclusive representation, advising cable companies that only the cable reps were contractually entitled to represent the cable companies and to receive commissions. In response, Thompson Everett filed this action.

In its complaint, Thompson Everett claims that the traditional cable reps are acting in concert in using their exclusive contracts to exclude Thompson Everett from the cable rep market and to drive Thompson Everett out of business. Thompson Everett alleges that the traditional cable reps entered into a horizontal conspiracy with each other and a vertical conspiracy with the cable companies to use their exclusive contracts for the purpose of fixing prices and maintaining high commission rates, eliminating competition among themselves and excluding Thompson [*1322] Everett and others as competitors, causing the cable companies to boycott Thompson Everett, and extending each cable company's natural monopoly. It bases its complaint on [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1](#) and [2](#), and similar provisions of Virginia's antitrust laws, [Va. Code §§ 59.1-9.5](#) and [59.1-9.6](#). Thompson Everett [**10] also alleges related statutory and common law claims. It requests a declaratory judgment that the cable rep's activities are illegal and an injunction prohibiting such conduct in the future. It also demands treble and punitive damages of an unspecified amount and reasonable attorney's fees.

Granting the defendants' motion for summary judgment, the district court ruled that the injury alleged by Thompson Everett was not of the type and proximate ness that is enforceable under the antitrust laws, citing [Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters](#), [459 U.S. 519, 539-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#) (holding that a combination of indirectness of injury, a non-antitrust type of injury, and speculative damages preclude antitrust enforcement). See [Thompson Everett v. National Cable Advertising](#), [850 F. Supp. 470, 478-79 \(E.D.Va. 1994\)](#). The district court concluded that even though Thompson Everett and others may have considered Thompson Everett to be a competitor of the cable reps, there is no dispute over how Thompson Everett's business actually operates. Focusing on Thompson Everett's actual method of doing business, the district court concluded that Thompson [**11] Everett was not a competitor in the market in which the alleged violations occurred. [Id. at 476-79](#). The district court also found no evidence to support the allegation of a horizontal conspiracy, [id. at 480](#), or the allegation that the vertical exclusive agreements had a substantial anti-competitive effect, [id. at 482](#). The remaining state and common law claims were dismissed for similar reasons. [Id. at 482-83](#).

II

Thompson Everett contends preliminarily that the district court "misapplied the standard required for deciding a motion for summary judgment" and erroneously suggested that summary judgment was especially appropriate in the context of antitrust litigation. Thompson Everett adverts to the district court's statements that "summary judgment is an important tool for dealing with antitrust issues," [850 F. Supp. at 474](#) (quoting [Oksanen v. Page Memorial Hosp.](#), [945 F.2d 696 \(4th Cir. 1991\)](#), cert. denied, 502 U.S. 1074 (1992)), and that 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.), cert. denied, 488 [**12] U.S. 852 (1988)). Additionally,

She also stated that the company does not sign exclusives because it will utilize alternative means, such as placing advertising into other media, if the cable spot time is not well-suited or properly priced for the advertiser's purposes.

Thompson Everett points to the district judge's oral comments at the summary judgment hearing arguably expressing his understanding that this court prefers to resolve complex legal issues through summary judgment. In its brief, however, Thompson Everett states, "While the District Court acknowledged *the proper standard* under [Rule 56\(c\)](#), it ignored facts supporting [Thompson Everett's] claims, decided disputed facts in favor of defendants, and gave defendants the benefit of all inferences from the facts." (Emphasis added). It would thus appear that Thompson Everett does not take issue with the district court's articulation of the applicable legal standard as much as the manner in which the court applied that standard, yielding too readily to the defendants on summary judgment because of a mistaken belief that such preference should be given in antitrust cases.

HN1[] While [Rule 56](#) is to be applied to antitrust cases no differently from how it is applied to other cases, that is not to say that the summary judgment device is not an appropriate and useful tool for resolving antitrust cases. On the contrary, because of the unusual entanglement of legal and [\[*13\]](#) factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for [Rule 56](#) utilization. See [Oksanen, 945 F.2d at 708](#). The summary judgment practice does not become disfavored simply because a case is complex. Rather, it is favored as a mechanism to secure the "just, speedy and inexpensive determination" [\[*1323\]](#) of a case, see [Fed. R. Civ. P. 1](#), when its proper use can avoid the cost of trial. See also [Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). **HN2**[] While it is axiomatic that [Rule 56](#) must be used carefully so as not improperly to foreclose trial on genuinely disputed, material facts, the mere existence of some disputed facts does not require that a case go to trial. The disputed facts must be material to an issue necessary for the proper resolution of the case, and the quality and quantity of the evidence offered to create a question of fact must be adequate to support a jury verdict. See [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). Thus, if the evidence is "merely colorable" or "not significantly probative," it may not be adequate to oppose entry of summary judgment. [Id. at 249-50](#).

HN3[] While we have recognized [\[*14\]](#) generally that when considering a motion for summary judgment, the district court must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion," [Tuck v. Henkel Corp., 973 F.2d 371, 374 \(4th Cir.\), cert. denied, 122 L. Ed. 2d 671, 113 S. Ct. 1276 \(1993\)](#), we hasten to add that those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture. See [Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 817 \(4th Cir. 1995\)](#). Moreover, the inferences which may be drawn vary from one substantive area of the law to another. Thus, **HN4**[] on summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence. See [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#).

At bottom, **HN5**[] the district court must determine whether the party opposing the motion for summary judgment has presented genuinely disputed facts which remain to [\[*15\]](#) be tried. If not, the district court may resolve the legal questions between the parties as a matter of law and enter judgment accordingly. And in reviewing a summary judgment, we apply *de novo* the same standard that the district court was required to apply for granting the motion for summary judgment. See [Sylvia Development, 48 F.3d at 817](#). Accordingly we analyze the record in this case *de novo* and measure the evidence properly presented against the requirements for establishing a violation of antitrust law.

III

The thrust of Thompson Everett's complaint is that it is being denied access to cable companies by the traditional cable reps' concerted activity in insisting on their rights under their exclusive representation contracts with the cable companies. Thompson Everett wants a return to a status quo ante when it was able to purchase air time for advertisers directly from the cable companies and to receive a commission from the cable companies for those sales, notwithstanding the exclusive cable rep contracts. Thompson Everett asserts, therefore, that the competition provided by its bids on behalf of advertisers for cable time has been preempted by concerted activity [\[*16\]](#) and that it has been injured in its business by the loss of commissions.

The district court concluded that Thompson Everett failed to present evidence of a horizontal conspiracy among the traditional cable reps to exclude Thompson Everett from the market of serving cable companies as sales agents.

Thompson Everett made no effort to prove that the traditional cable reps conspired to *enter* into their exclusive rep contracts or to continue their renewal. Rather, it contends that the traditional cable reps conspired to *enforce* such contracts. This claim presents several problems. Absent evidence that any party to an exclusive representation contract was considering abandoning such a contract or not renewing it upon termination, Thompson Everett has the nearly insurmountable task of proving that a party to such a contract who seeks to enforce it, even at the [*1324] urging of a competitor, is pursuing an illegal conspiracy under the antitrust laws. Without more evidence, Thompson Everett cannot prevail upon the court to draw the inference that concerted activity is the cause for contractual enforcement. See [*Matsushita, 475 U.S. at 587-88*](#).

Thompson Everett argues, however, that further [**17] evidence supports its claim of concerted activity. It points to evidence that a trade association in the cable television industry circulated a questionnaire to determine how the cable industry could improve and compete with other media. Responses to the questionnaire, prepared independently by each member of the association, were collected and circulated by the association. While the general conclusion, reached independently by the traditional cable reps, was that the cable industry could best compete with other media through the enforcement of the exclusive rep contracts, there is no evidence that they engaged in any further concerted activity following the circulation of this information. Moreover, unless the exclusive contracts were themselves illegal, any concerted activity was not aimed at achieving an unlawful objective. See [*Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278, 281*](#) (4th Cir.), cert. denied, 479 U.S. 972 (1986). Accordingly, we reach the same conclusion as the district court, that even with evidence of information sharing, pertaining to the benefits of contract enforcement, there is still no evidence that the cable reps embarked on a "conscious commitment [**18] to a common scheme designed to achieve an unlawful objective." See [*Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)*](#) (citation omitted).

Even with this conclusion, we are still left with Thompson Everett's claim that each individual exclusive representation contract illegally denied Thompson Everett the opportunity to compete.

IV

Absent a horizontal agreement among the traditional cable reps to prevent Thompson Everett from serving as a cable rep, the barriers to Thompson Everett's access to the cable companies consist of (1) the exclusivity provisions in the cable rep contracts binding the cable companies to a single sales representative, and (2) Thompson Everett's position in the market as a representative of advertising interests, which precludes it from providing some essential cable rep services to cable companies.

If the cable companies elect to sell their spot air time through exclusive agents, and the terms of those exclusive contracts do not violate the antitrust laws, then Thompson Everett cannot complain that it does not have access to the cable companies if it is unwilling to compete for these exclusive contracts. Because of its position in the [*19] market, Thompson Everett understandably is not in a position to enter into exclusive cable representation contracts with the cable companies, because to do so would be inconsistent with its business of representing advertisers and placing their advertisements in media other than cable television. Even absent the exclusivity requirement of these rep contracts, Thompson Everett's position in representing the advertising side of the transaction to obtain air time at the *least* possible cost raises a barrier to its representation of cable companies. Thompson Everett could not simultaneously perform that function and represent the cable companies who seek to obtain the *greatest* amount of revenue for air time. The inherent conflict of interest would force it to perform one function at the expense of the other.

Thompson Everett nevertheless argues that it should be able to contact the cable companies directly and provide a more efficient service by representing both sides of the transaction for a smaller combined fee. In essence, it would have the market restructured to require cable companies to sell their air time through methods not previously selected by those companies.

Thompson [**20] Everett may surely attempt to persuade the cable companies to alter the method they have selected for doing business. If Thompson Everett were successful, the cable companies could readily refuse to renew their exclusive, relatively short-term contracts with the cable reps, and deal directly [*1325] with Thompson Everett. The barrier to this result is that imposed by the independent decision of the cable company and the cable rep to enter into an exclusive contract. Thus, unless the exclusive representation contracts between the cable companies and the traditional cable reps are by their terms illegal, the only barriers to Thompson Everett's representation of cable companies are (1) enforceable contractual provisions and (2) Thompson Everett's self-selected position in the market. Since neither of these barriers are created by anything illegal under the antitrust laws, Thompson Everett has no basis for asserting an antitrust claim.

Section 4 of the Clayton Act [HN6](#) grants private persons the right to sue for violations of the antitrust laws if the person has been injured in his business or property "by reason of" an antitrust violation. [15 U.S.C. § 15\(a\)](#). A private person may not, however, recover [**21] damages simply by establishing that his injury was "causally linked to an illegal presence in the market." [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#) (quoting [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#)). Rather, the damages sought must flow from *that conduct* which is proscribed by the antitrust laws. See [Brunswick, 429 U.S. at 489](#). [HN7](#) Because the antitrust laws are intended to protect competition, and not simply competitors, only injury caused by damage to the competitive process may form the basis of an antitrust claim. See [Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#). See also [Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734-35 \(9th Cir. 1987\)](#); [Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 540 \(7th Cir. 1986\)](#).

In the circumstances of this case, we agree with the district court that Thompson Everett is not a would-be competitor with the cable reps and is not being denied access to the cable company sales service market by any act in violation of the antitrust laws. See [Associated Gen. Contractors, 459 U.S. at 539-40](#); [Brunswick, 429 U.S. at 488-89](#). Rather, Thompson [**22] Everett is simply seeking to substitute its proposed method of serving cable companies for that selected by the cable companies without demonstrating that the substitution would advance the competitive process. See [Rutman Wine, 829 F.2d at 734-35](#); [Great Escape, 791 F.2d at 540](#).

V

In addition to Thompson Everett's difficulties in establishing antitrust injury, Thompson Everett failed to present any evidence that the exclusive sales rep contracts go beyond the legitimate business purposes for which they were created and thus constitute an unreasonable restraint of trade. See [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-57, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#).

The cable companies are free to choose any method of selling air time so long as the method chosen does not violate the antitrust (or other) laws. Thus, the cable companies could sell time through in-house sales agents, exclusive representatives, non-exclusive representatives, or through some combination of these methods. In this case, Thompson Everett challenges the cable companies' selection of exclusive representation contracts to sell air time.

The exclusive sales rep contracts impose non-price vertical restrictions which [**23] are not per se illegal under the antitrust laws, and such restrictions are not disfavored as long as they do not go beyond the legitimate business purposes for which they are used. See [Continental T.V., supra](#). A contract creating such non-price vertical restrictions, even though temporarily burdening competition for providing a selling service to the cable company, is scrutinized by considering whether that lessening of competition outweighs the benefits such a business arrangement might have in enabling the cable company to compete better with other media for advertising dollars. See [Satellite Television & Assoc. Resources, Inc. v. Continental Cablevision of Va., Inc., 714 F.2d 351, 355 \(4th Cir. 1983\)](#), cert. denied, 465 U.S. 1027 (1984).

[*1326] As we have noted, the exclusive contracts in this case are typically of short duration, usually terminable after a year, and contain performance criteria, which, if not met, may justify earlier termination. Other contracts allow the cable company to terminate without cause upon notice ranging from 30 days to one year. The evidence

shows that these contracts are negotiated in a competitive context, with the various cable reps bidding [**24] on the commission rates that they are willing to receive for their service. The record also reveals that, as a consequence, cable companies have not remained with one cable rep and that the commission rates have steadily declined.

As buyers in the market for sales representation services, the cable companies find the exclusive representation contract advantageous in their efforts to compete with other media to attract advertising dollars. From the buyer's point of view, the exclusive contracts enable each cable company to have a loyal sales staff dedicated to furthering that company's particular interest. The cable companies can establish a relationship with a sales representative and impose sales quotas, which ultimately results in increased "inter-media" competition in the larger market defined by the sale of media time for advertising dollars. The sellers in the market for sales representation services, i.e., the traditional cable reps, similarly find that these exclusive contracts serve their legitimate business interests. They are able to devote resources to market and demographic research, invest in technological innovation, and develop a specially tailored sales staff, all [**25] for the benefit of a particular cable company, with the reasonable expectation of recovering this investment. These mutually beneficial aspects of the exclusive cable representation contract are particularly important to the parties, considering that spot cable advertising is relatively new, and advertisers must be persuaded to move their business from more traditional media to the cable companies. At bottom, the evidence shows that not only does competition exist in the sales representation service market, but it is actually enhanced in the larger, overarching market for advertising dollars.

While the exclusive nature of these cable rep contracts may temporarily preempt competition in providing representation services to a particular cable company, Thompson Everett has failed to establish that this relatively minor restriction outweighs the benefits of increased "inter-media" competition in the larger market for advertising dollars. See [Tampa Electric Co. v. Nashville Coal Co.](#), 365 U.S. 320, 333-35, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961) **HN8**[] (exclusive dealing arrangements are prohibited only if they have "a substantial adverse effect on competition"); [Advanced Health Care Servs. v. Radford Community Hosp.](#), ****261** 910 F.2d 139, 151 (4th Cir. 1990) (same).

For the foregoing reasons, we agree with the district court that Thompson Everett has not advanced evidence that the short-term exclusive contracts between the traditional cable reps and the cable companies have a substantial anti-competitive effect.

VI

Thompson Everett also contends that the traditional cable reps are using the exclusive representation contracts to leverage the lawful monopolies of the cable companies into an unlawful monopoly in the cable company sales representation business. To maintain this argument, Thompson Everett focuses on a market defined only by the selling service provided by traditional reps to cable companies. That analysis, however, fails to take into account the competition existing among the cable reps for exclusive rep contracts and, more importantly, overlooks the realities of that market and the overarching market for advertising dollars. The cable rep service is only an agency service, since the traditional cable reps do not buy air time on their own account. As agents, cable reps act on behalf of cable companies who compete with other media for advertising dollars. Cable television advertising is a [**27] relatively new medium and is not widely accepted by advertisers. To sell cable spot time, therefore, the cable companies are confronted with the task of persuading advertisers that cable spot advertising is an effective method for conveying the advertiser's message to the public. The dimensions ***1327** of the narrowest market in which the cable companies operate, therefore, are measured by the various media which are interchangeable for conveying the advertiser's message to the public in the cable company's geographic area. See [Greenville Pub. Co. v. Daily Reflector, Inc.](#), 496 F.2d 391, 399 (4th Cir. 1974) **HN9**[] (holding that the relevant market is defined by the scope of "reasonable interchangeability").

Evidence supports yet a broader geographical market in some circumstances. Because advertising dollars are limited and many advertising efforts are regional or national, aimed at areas much larger than those served by local cable companies, the cable companies must often pursue regionally and nationally committed advertising dollars

and therefore to compete in those circumstances with other cable companies as well as with other regional and national media.

Fatal to Thompson Everett's monopolization [**28] claim is the absence of any evidence of monopoly power, such as price control or monopoly profits, or threatened monopoly power in any of these markets. On the contrary, the evidence in the record shows that cable advertising is an incipient part of the industry and that the business of providing sales services to cable companies is a service for which commission rates are competitively established and have been dropping. In short, Thompson Everett has been unable to identify any evidence that the cable reps possess monopoly power or threaten to obtain that power in a relevant market. See [*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-03, 86 L. Ed. 2d 467, 105 S. Ct. 2847 \(1985\)](#).

VII

Thompson Everett's common law claim, that the traditional cable reps have interfered with Thompson Everett's business relations through their concerted conduct in enforcing the exclusive cable rep contracts, lacks merit for the same reasons discussed in connection with its antitrust claims. No concerted activity was established and the reps' rights under the exclusive contracts are legally protected interests. In these circumstances, Thompson Everett has failed to establish the essential elements of the tort of [**29] interference with business relations. See [*Restatement \(2d\) of Torts § 773*](#) (any good faith assertion of a legally protected contractual interest is not actionable).

Accordingly, the judgment of the district court is

AFFIRMED.

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Abbott Lab. (Ross Lab. Div.) v. Segura

Supreme Court of Texas

January 19, 1995, Argued ; June 29, 1995, Delivered

No. 94-0514

Reporter

907 S.W.2d 503 *; 1995 Tex. LEXIS 118 **; 38 Tex. Sup. J. 961; 1995-2 Trade Cas. (CCH) P71,251

ABBOTT LABORATORIES, INC. (ROSS LABORATORIES DIVISION); BRISTOL-MYERS SQUIBB COMPANY; MEAD JOHNSON & COMPANY; AND AMERICAN HOME PRODUCTS CORPORATION (WYETH-AYERST LABORATORIES DIVISION), PETITIONERS v. CRYSTAL SEGURA; TERI NORTON; SHERRI CHRETIEN; JANICE KIMLER; TESSIA INNOCENTI; ANGELA CHRISTINE MARONEY; MELISSA WHITTAKER DURAN; AND TRACEY FREEZIA LEUDEMAN, RESPONDENTS

Prior History: [\[**1\]](#) ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS.

Core Terms

Antitrust, purchasers, manufacturers, consumers, unconscionable, indirect, intervenors, plaintiff-intervenors, infant formula, disparity, anti trust law, cause of action, damages, provisions, allegations, cumulative, practices, products, costs, court of appeals, summary judgment, defendants', violator, Shoe, legislative history, trial court, overcharge, deceptive, wholesale, remedies

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

[**HN1**](#) **[] Public Enforcement, State Civil Actions**

The court begins with the Legislature's mandate that Texas [antitrust law](#) be harmonized with federal [antitrust law](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

[**HN2**](#) **[] Public Enforcement, State Civil Actions**

See, [Tex. Bus. & Com. Code Ann. §15.04.](#)

907 S.W.2d 503, *503 1995 Tex. LEXIS 118, **1

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN3 [] **Purchasers, Direct Purchasers**

Some courts reject as a matter of law the defense that indirect, rather than direct purchasers, are the parties injured by the antitrust violation.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN4 [] **Purchasers, Direct Purchasers**

An antitrust violator may not use a pass-on theory defensively to avoid liability against a direct purchaser and an indirect purchaser also may not use a pass-on theory offensively to win damages against an antitrust violator.

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

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN5 [] **Monopolies & Monopolization, Attempts to Monopolize**

The second reason for allowing only direct purchasers to recover in antitrust is that the uncertainties and difficulties in analyzing price and output decisions in the real economic world rather than in an economist's hypothetical model is too complex for efficient judicial resolution. Antitrust suits would become even more complex and burdensome as the courts attempted to determine the proper apportionment of pass-on antitrust charges to each level of indirect purchasers.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN6 [down] **Purchasers, Direct Purchasers**

The third reason for precluding indirect purchasers from recovering on a pass-on theory is that it opens the door to multiple recoveries. Allowing both direct purchasers and consumers to recover overcharge damages would expose antitrust defendants to duplicate damages for the same injury. The Supreme Court has reiterates the importance of policies preventing duplicative recoveries, avoiding claims of speculative damages, and keeping antitrust trials within judicially manageable limits.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN7 [down] **Consumer Protection, Deceptive & Unfair Trade Practices**

The court will not interpret the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). [Tex. Bus. & Com. Code Ann. §§ 17.41-17.63](#) in a manner that rewards creative pleading at the expense of consistent application of legal principles.

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

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

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN8 [down] **Private Actions, Standing**

Our holding is not based on any determination of standing under Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). [Tex. Bus. & Com. Code Ann. §§ 17.41-17.63](#). The court sees which persons have been injured by an illegal overcharge as "analytically distinct" from which persons have sustained injuries too remote to give them standing. The court's holding only forecloses the recovery of damages for seeking a prohibited antitrust recovery under the masquerade of our consumer protection statute.

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For RESPONDENT: Shon, Mr. Michael N., Washington, DC. Maxwell, Mr. Philip K., Labadie, Mr. Tim, Longley & Maxwell, Austin, TX. Brill, Mr. Thomas H., Mission Hills, KS. Parker, Senator Carl A., Parker & Parks, Port Arthur, TX. Kimler, Mr. Rife S., Law Offices of Carl A. Parker, Port Arthur, TX. Ward, Mr. R. Lawrence, Quirk, Mr. William E., Martin, Ms. Ellen, Shugart Thomson & Kilroy, Kansas City, Mo. Granger, Mr. Kenton, C., Dahlberg, Mr. Raymond L., Green, Ms. Angela K., Niewald Waldeck & Brown, Kansas [**2] City, Mo. Reaser, Jr., Mr. Vernon N., Reaser & Wall, Victoria, TX. Hammond, Mr. Wm. Douglas, Fitzgerald Gartner & Follis, Houston, TX. Haight, Ms. Carron L., Houston, TX. Seltzer, Mr. Marc M., Corinblit & Seltzer, Los Angeles, CA.

Judges: CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE HIGHTOWER, JUSTICE HECHT, JUSTICE ENOCH, and JUSTICE OWEN join. JUSTICE CORNYN, concurring. JUSTICE GONZALEZ, concurring. JUSTICE GAMMAGE, joined by JUSTICE SPECTOR, dissenting.

Opinion by: THOMAS R. PHILLIPS

Opinion

[*503] John Cornyn, Justice

In this case, we decide whether the long-standing bar to indirect purchaser recovery in antitrust suits also bars indirect purchasers who primarily allege antitrust conduct, but who sue under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"). [TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63](#) (Vernon 1987). The court of [*504] appeals held that retail buyers of infant formula "stated causes of action for unconscionable price disparity and taking advantage of plaintiffs' lack of capacity, knowledge, and experience to a grossly unfair degree." [873 S.W.2d 399, 408](#). We hold that indirect purchasers cannot recover under the DTPA upon allegations on which recovery would have been [*503] barred if brought under the Texas Free Enterprise and Antitrust Act ("the Antitrust Act"). [TEX. BUS. & COM. CODE ANN. §§ 15.20, 15.21](#) (Vernon 1987). Accordingly, we reverse the judgment of the court of appeals and render judgment that the plaintiff-intervenors take nothing as a matter of law.¹

This case began in September 1991 when the Attorney General of the State of Texas sued Bristol-Myers Squibb Company, its wholly-owned subsidiary Mead Johnson & Company, Abbott Laboratories, Inc., a division of Ross Laboratories Division, and the American Academy of Pediatrics ("AAP"), seeking injunctive relief and damages under [sections 15.20](#) and [15.21](#) of the Antitrust Act. The State alleged that the manufacturers conspired with each other to fix the wholesale price of infant formula and with the AAP to monopolize markets for infant formula and infant [*504] formula advertising. Specifically, the State maintained that the manufacturers' marketing plan created the appearance that pediatricians endorsed particular brands of infant formula, thus creating an illusion of uniqueness which was wholly unwarranted because federal regulations govern quality control and nutritional standards resulting in nearly identical products.

The State sought damages as *parens patriae* on behalf of consumers who purchased the infant formula and on behalf of the Women, Infants, and Children Program, a federally funded food distribution program administered by the Texas Department of Health. [42 U.S.C.A. § 1786 \(1994\)](#); [TEX. AGRIC. CODE ANN. § 15.001-7](#) (Vernon Supp. 1995). The manufacturers and the AAP specially excepted to the Attorney General's pleadings on the grounds that since neither the consumers nor the WIC program were direct purchasers, they lacked standing under the Antitrust Act. See [Illinois Brick Co. v. Illinois](#), [431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#) (forbidding indirect purchasers to recover under federal antitrust laws). Moreover, since the State sues as *parens patriae* on behalf of its consumers to recover damages caused by an antitrust violation, it [*505] has no greater right to recovery than the consumers it represents. [Kansas & Mo. v. Utilicorp United](#), [497 U.S. 199, 219, 111 L. Ed. 2d 169, 110 S. Ct. 2807 \(1990\)](#). Therefore, the manufacturers argued, the State's derivative claim on the indirect purchasers behalf was also barred for the same reason. The trial court sustained the special exceptions and dismissed the damages claim, but left the State's injunction claim pending.

Crystal Segura and other infant formula consumers intervened in the State's ongoing enforcement action, adding American Home Products Corporation as an additional manufacturer-defendant but omitting the AAP. The intervenors brought claims for damages against the manufacturers for the same conduct alleged by the State under the Antitrust Act. The intervenors, however, alleged that the conduct violates the Texas DTPA's prohibition against unconscionable conduct. [TEX. BUS. & COM. CODE ANN. § 17.50 \(a\) \(3\)](#) (Vernon 1987). The manufacturers filed a

¹ The plaintiff-intervenor class will be referred to collectively as "intervenors," and the defendant infant formula manufacturers will be referred to as "manufacturers."

plea to the jurisdiction and specially excepted to the intervenors' pleadings on the grounds that the intervenors' "classic antitrust claims" of price-fixing and monopolization are not cognizable under the DTPA.

The trial court sustained the manufacturers' **[**6]** special exceptions and allowed the intervenors thirty days to replead. The intervenors made only slight changes, retaining their core allegations that the manufacturers violated the DTPA by attempting to monopolize the infant formula market and creating barriers to entry by these methods: 1) creating the illusion that infant formula products are somehow unique and nutritionally different, when all brands are nutritionally identical; 2) creating and maintaining dedicated franchise relationships with physicians and hospitals that endorse the purchasing of a **[*505]** particular brand name while Texas consumers are kept ignorant of the monies and lavish promotional resources which these physicians and hospitals receive for these endorsements; 3) giving free samples through franchise physicians and hospitals during the first months of infants' lives, thereby creating an endorsement of the manufacturers' products and later grossly overcharging Texas consumers in the retail market for baby formula products; 4) using market dominance to prevent other companies from selling baby formula products to consumers through direct consumer advertising that could inform Texas consumers about the generic nature **[**7]** of these products and permit informed buying decisions based upon price and nutritional information; and 5) implementing nearly identical price increases. These allegations are also nearly identical to the allegations made by the antitrust plaintiffs, all of whom are direct purchasers and retailers of formula, in a multi-district consolidation currently pending in the Northern District of Florida. See *In Re Infant Formula Antitrust Litigation*, MDL Docket No. 878 (N.D.Fla.).

The manufacturers moved for summary judgment, arguing that (1) the intervenors' claims are cognizable only under the Antitrust Act, under which the intervenors, as indirect purchasers, lack standing, and (2) alternatively, even if DATE = 1/1990 DATE = 1/1990 of the intervenors' claims are DTPA claims, the intervenors have no standing because the DTPA and the Antitrust Act must be harmonized and the Antitrust Act bars suits by indirect purchasers. By response, the intervenors conceded that their claim would be barred under the Antitrust Act, but maintained that their pleadings were sufficient to state a cause of action under the DTPA for "unconscionable action or course of action." TEX. BUS. & COM. CODE ANN. § 17.45 (5).

The trial court **[**8]** granted summary judgment for the manufacturers against the intervenors, severing that part of the case from the State's enforcement action. The court of appeals reversed and remanded for trial on the merits. We granted the manufacturers' writ of error.

The manufacturers moved for summary judgment on two closely related grounds, neither of which specifically addressed unconscionability, but both of which assert that the bar to indirect purchaser recovery in antitrust controls the outcome of this action.² In reviewing the judgment of the court of appeals, we therefore do not consider whether the manufacturers established by their summary judgment proof that the alleged conduct was not unconscionable as a matter of law under the DTPA.

² The specific grounds found in the defendants' motion for summary judgment are as follows:

- A. The claims asserted by plaintiff-intervenors, although couched in the language of the Texas Deceptive Trade Practices Act ("DTPA"), are cognizable only under the Texas Free Enterprise and Antitrust Act (the "TFEAA"); plaintiff-intervenors, as indirect purchasers of infant formula, have no standing under the TFEAA to bring such claims.
- B. In the alternative, even if plaintiff-intervenors' claims are cognizable as DTPA claims, plaintiff-intervenors still have no standing because the later-enacted TFEAA, which specifically addresses the claims asserted by plaintiff-intervenors, bars suits by indirect purchasers.

The concurrence focuses on only the first half of the first ground and determines that the intervenors' claims have no merit as DTPA claims. This is an issue we need not decide because even if the motion for summary judgment could be read as raising an issue on unconscionability, we choose to dispose of this case on the primary grounds argued by the parties in both the trial court and on appeal.

[**9] [HN1](#)[↑] We begin with the Legislature's mandate that Texas antitrust law be harmonized with federal antitrust law. [TEX. BUS. & COM. CODE ANN. § 15.04](#);³ see [Caller-Times Pub. Co. v. Triad Communications Inc., 826 S.W.2d 576, 580 \(Tex. 1992\)](#). Allowing the intervenors to sue under the DTPA on allegations that are virtually identical to the antitrust allegations made by both the Texas [\[*506\]](#) Attorney General and the multi-district litigation plaintiffs in Florida would essentially permit an end run around the policies allowing only direct purchasers to recover under the Antitrust Act.

[**10] The legal reasoning behind the prohibition on indirect purchaser recovery in antitrust has three principal bases, each of which the Supreme Court discussed at some length in *Illinois Brick*. First, the prohibition on indirect purchaser recovery had its genesis in [Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)](#). That case involved an antitrust treble-damages action brought under section 4 of the Clayton Act against a manufacturer of shoe machinery by one of its customers, a manufacturer and wholesaler of shoes (a *direct purchaser*). In defense of allegations of monopolistic pricing, the shoe machinery manufacturer sought to show that the plaintiff-wholesaler had not been injured in its business as required by section 4 because it had passed on the claimed illegal overcharge to those who bought shoes from it, namely retailers and ultimately consumers. In *Hanover Shoe*, the [HN3](#)[↑] Court rejected as a matter of law the defense that indirect, rather than direct purchasers, were the parties injured by the antitrust violation. See [Hanover Shoe, 392 U.S. 481 at 487 at 487-94, 20 L. Ed. 2d 1231, 88 S. Ct. 2224](#); see also [Illinois Brick, 431 U.S. 720 at 728 at 728-36, 52 L. Ed. 2d 707, 97 S. Ct. 2061](#).

Then, in 1977, in *Illinois Brick*, the Court [\[*11\]](#) held that if an [HN4](#)[↑] antitrust violator may not use a pass-on theory defensively to avoid liability against a direct purchaser as it had held in *Hanover Shoe*, an indirect purchaser also may not use a pass-on theory offensively to win damages against an antitrust violator. The Court stated: "We are left, then, with two alternatives: either we must overrule *Hanover Shoe* (or at least narrowly confine it to its facts), or we must preclude [indirect purchasers] from seeking to recover on their pass-on theory. We choose the latter course." [Id. at 736](#).

[HN5](#)[↑] The second reason for allowing only direct purchasers to recover in antitrust is that "the uncertainties and difficulties in analyzing price and output decisions in the real economic world rather than in an economist's hypothetical model" is too complex for efficient judicial resolution. [Illinois Brick, 431 U.S. at 732](#). Antitrust suits would become even more complex and burdensome as the courts attempted to determine the proper apportionment of pass-on antitrust charges to each level of indirect purchasers.⁴ We are persuaded by the reasoning of *Illinois Brick*:

³ [Section 15.04](#) provides:

[HN2](#)[↑] The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and *shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes* to the extent consistent with this purpose. (emphasis added).

⁴ It is possible, with sufficient simplifying assumptions, to determine a formula for calculating how the overcharge is to be distributed between the direct purchaser and the indirect purchasers. The formula would assume that the market for the direct purchaser's product is perfectly competitive, the overcharge is imposed equally on all indirect purchasers, and that the direct purchaser maximizes its profits. If this is the case, the ratio of the shares of the overcharge borne by the direct purchaser and the indirect purchaser will equal the ratio of the elasticities of supply and demand in the market for the direct purchaser's product. [Illinois Brick 431 U.S. at 741](#); see also Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L. Rev. 883 (1975). This analysis further relies on the assumption that the proper elasticities can be determined by an already overburdened judicial system.

[**12]

Permitting the use of pass-on theories under § 4 [of the Clayton Act] essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

Id. at 737. In both *Hanover Shoe* and *Illinois Brick*, the Court expressed "concern for the reduction in the effectiveness of [antitrust] suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge." *Illinois Brick*, 431 U.S. at 745. *HN6*[¹⁵] The third reason for precluding indirect purchasers from recovering on a pass-on theory is that it opens the door to multiple recoveries. See *Illinois Brick*, 431 U.S. at [*507] 730. Allowing both direct purchasers and consumers to recover overcharge damages would expose antitrust defendants to duplicate damages for the same injury. 2 AREEDA [**13] & HOVENKAMP, *ANTITRUST LAW*, P 371c, at 257-58 (rev. ed. 1995). The Supreme Court has reiterated the importance of policies preventing duplicative recoveries, avoiding claims of speculative damages, and keeping antitrust trials within judicially manageable limits. See *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983).

This same reasoning applies to plaintiffs suing under the DTPA on allegations that are in essence antitrust claims. Assuming, *arguendo*, that price fixing or other anticompetitive conduct is recoverable under the DTPA, indirect purchasers would face the same proof problems as they would have faced had an antitrust cause of action been recognized. *HN7*[¹⁶] We will not interpret the DTPA in a manner that rewards creative pleading at the expense of consistent application of legal principles.

HN8[¹⁷] Our holding is not based on any determination of standing under the DTPA. As Areeda and Hovenkamp have noted, the Court in *Illinois Brick* saw "which persons have been injured by an illegal overcharge" as "analytically distinct" from "which persons have sustained injuries too remote to give them standing. . ." [**14] *Illinois Brick*, 431 U.S. at 728 n.7; AREEDA & HOVENKAMP, *supra*, P 371c, at 259. Our holding today only forecloses the recovery of damages for seeking a prohibited antitrust recovery under the masquerade of our consumer protection statute.

For these reasons, we hold that the conduct alleged by the intervenors is not actionable under the DTPA. We therefore reverse the judgment of the court of appeals and render judgment that plaintiffs take nothing as a matter of law.

Thomas R. Phillips

Chief Justice

Opinion Delivered: June 29, 1995

Concur by: JOHN CORNYN; RAUL A. GONZALEZ

Concur

The Court today establishes a broad rule that bars DTPA claims by indirect purchasers when their claims are based upon unconscionable acts that could also constitute anti-competitive acts prohibited under the Texas Free Enterprise and Antitrust Act (the Antitrust Act). Although I agree that the plaintiffs in this case cannot prevail on their DTPA claims, I think it is unnecessary to reach the question of whether the Antitrust Act has such preemptive force

¹ because the plaintiffs' DTPA claims are without merit. Accordingly, I concur in the Court's judgment, but I cannot join in its opinion.

[**15] I. Preservation of Error

Rule 166a mandates that a motion for summary judgment "shall state the specific grounds therefor" and that "issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). In applying this rule, the Court adopts the view that the defendants' motion for summary judgment raised only issues dependent upon the construction of the Antitrust Act, and that the motion did not challenge the existence of a plausible DTPA claim if the Antitrust Act was found not to override the DTPA in this case. ___ S.W.2d at ___ ("We therefore do not consider whether the manufacturers established by their summary judgment proof that the alleged conduct was not unconscionable as a matter of law under the DTPA."). My reading of the motion for summary judgment leads me to the conclusion that the defendants preserved error on their challenge to the merits of the DTPA claim, without regard to the potential impact of a proper construction of the Antitrust Act.

The defendants' motion for summary judgment included the following statement:

[*508] The claims asserted [**16] by plaintiff-intervenors, *although couched in the language of the Texas Deceptive Trade Practices Act ("DTPA"), are cognizable only under the [Antitrust Act];* plaintiff-intervenors, as indirect purchasers of infant formula, have no standing under the [Antitrust Act] to bring such claims.

Tr. at 711 (emphasis added). In my view, when one argues that a claim is *not cognizable* under a particular statute, this is sufficient to challenge whether a claim has been stated under that statute. See McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 340 (Tex. 1993) ("Grounds may be stated concisely, without detail and argument." (quoting *Roberts v. Southwest Tex. Methodist Hosp.*, 811 S.W.2d 141, 146 (Tex. App.--San Antonio 1991, writ denied))).

In this case, the plaintiff-intervenors brought only a DTPA claim, so the defendants' motion for summary judgment must dispose of that DTPA claim. Therefore, the only reasonable interpretation of the motion is that it challenges the validity of the DTPA claim. Thus, the first ground listed in the motion, as quoted above, must be read as arguing that: (1) the facts as alleged do not state a DTPA claim; (2) the facts as [**17] alleged do state an antitrust claim; and (3) the court cannot treat the pleadings as an antitrust claim because the plaintiff-intervenors do not have standing under antitrust law.

This interpretation is further borne out by the joint brief filed by the defendants in support of its plea to the jurisdiction and certain special exceptions, which was incorporated by reference in the motion for summary judgment: "Plaintiff-intervenors . . . have failed to state a claim under the [DTPA] The DTPA is not designed to address and does not address such antitrust violations." Tr. at 793. The brief also explains: "No provision in the DTPA, fairly construed, covers the antitrust violations alleged here." Tr. at 798-99. The brief then analyzes both prongs of the DTPA's definition of unconscionability and concludes that neither prong could be interpreted as encompassing the alleged misconduct.

These same arguments were reiterated in the briefs before the court of appeals. In the defendants' initial brief before that court, they argued, "Section 17.45 of the DTPA has never been construed to cover anti-competitive actions of the sort alleged by intervenors. Nor is there anything in the legislative [**18] history that would indicate that this section was intended to apply to price-fixing or other similar violations of the antitrust laws." Brief of

¹ The Court does not frame its analysis as one of preemption in the traditional sense, but instead concludes that in order to harmonize the provisions of the DTPA and the Antitrust Act, we must consistently apply the limitation on suits by indirect purchasers. While the indirect purchaser rule may be consistent with the policies and goals of antitrust law, I am not convinced that the policies and goals of the DTPA are sufficiently similar to warrant the incorporation of this rule in DTPA law.

Appellees, at 10. Similarly, in their motion for rehearing in the court of appeals, the defendants argued, "There is no case, no bit of DTPA legislative history, and no hint by any commentator that the DTPA ever was intended or assumed to encompass price fixing or monopolization." Appellee's Motion for Rehearing, at 7-8.

Given these clear and unambiguous arguments on the merits of the DTPA claims in this case, I cannot join with the Court's discussion of the relationship between the Antitrust Act and the DTPA, when that issue is unnecessary to resolve the case before us.

II. The Merits of the DTPA Claim

Under the DTPA, an unconscionable action or course of action is one which:

- (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.

TEX. BUS. & COM. CODE § 17.45(5).

"To obtain summary judgment, a movant [**19] must either negate at least one element of the plaintiff's theory of recovery or plead and conclusively establish each element of an affirmative defense." *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (citations omitted). In determining whether the plaintiff-intervenors have stated a viable claim under either definition, we must take the allegations of fact alleged in their petition as true. *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985). However, mere conclusory statements do not constitute effective summary judgment proof and need not be given the same presumptive force in this analysis. See *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 382 (Tex. 1978).

[*509] Under the first prong of unconscionability, the plaintiff-intervenors essentially argue that only the defendants and the physicians who they recruited as surrogate salespeople had the knowledge, ability, and experience to fairly evaluate the nutritional value of infant formula. This is true, they claim, even though the defendants' products are sold through "grocery stores, supermarkets, drug stores, discount merchandisers and other retail outlets." They allege that by banding [**20] together to refrain from direct-to-consumer advertising and using the doctors to create an illusion of uniqueness or nutritional superiority, the defendants took advantage of consumers' lack of knowledge to a grossly unfair degree.

This argument fails on two counts. First, the plaintiff-intervenors assume in making these largely conclusory allegations that consumers lack the knowledge, ability, or experience to fairly evaluate the desirability of infant formula marketed by the defendants. But, certainly, consumers cannot be presumed to lack a sufficient level of knowledge to assess many factors relevant to choosing a nutritional program for their infants: the emotional and developmental advantages of breast feeding, the occasional inconveniences of breast feeding, the cost of alternatives such as breast feeding or cow's milk, and the convenience and extended shelf life of powdered infant formula. Furthermore, judicial notice may be taken of the availability of advice on every facet of child-rearing (including this one) from a burgeoning market of magazines, books, consultants, relatives, friends, public service brochures, and health care agencies. Given this general level of readily [**21] available information, the plaintiff-intervenors basic assumption that the public lacks basic information with which to evaluate the defendants' marketing techniques is simply a bald, unsupported conclusion. Whatever advantage their cumulative knowledge gave them in this market, the defendant's conduct simply cannot reasonably be construed as meeting the requisite standard of "a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated." *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985).

Second, the plaintiff-intervenors assume that the defendants' advantage is somehow different from that held by any manufacturer. Such comparison between manufacturers is relevant because, as we stated in *Chastain*, the standard against which a seller's conduct is judged is an objective one. *Chastain*, 700 S.W.2d at 583. In applying

this standard, the court must determine whether the seller's attempts to tout the superiority of its products rose above mere "puffing." See *Dowling v. NADW Marketing, Inc.*, 631 S.W.2d 726, 728-29 (Tex. 1982); see also *Shaw Equip. Co. v. Hoople Jordan Constr. Co.*, 428 S.W.2d 835, 838-39 (Tex. Civ. App.--Dallas [**22] 1968, no writ). Without such an objective standard, the trial court is left in the untenable position of assessing the relative value of competing products. As one amicus in this case argued:

A courtroom . . . is the wrong place to determine whether Pepsi tastes better than Coke, Old Spice smells better than Brut, Colgate whitens teeth better than Crest, Gillette shaves closer than Schick, Bayer works faster than Anacin, MCI is better than AT&T, Nike is better for slam dunking than Converse, Hewlett Packard calculators do more things than Texas Instrument calculators, and so on. Many of these "superiority" claims involve matters of opinion, taste, and preference rather than matters subject to factual verification. Robust competition--not lawsuits under the DTPA--must resolve these questions.

Amici Curiae Brief of Texas Ass'n of Bus. & Nat'l Fed. of Indep. Bus., at 11.

Instead, an unconscionability claim must establish that the seller, armed with superior knowledge, ability, or experience to discern the impropriety of a particular transaction, nonetheless employed high-pressure tactics, preyed upon a consumer's vulnerability, or used misleading inducements to convince [**23] the consumer to purchase inappropriate goods. See, e.g., *Bennett v. Bailey*, 597 S.W.2d 532, 535 (Tex. Civ. App.--Eastland 1980, writ ref'd n.r.e.) (holding a dance studio liable for an unconscionable act in its inducement of a vulnerable widow to pay \$ 30,000 for dance lessons). Importantly, these unconscionable [*510] acts must be directed at the consumers who lack the knowledge and ability to make an informed decision.

Because the plaintiff-intervenors allegations, taken as true, do not establish either a significant absence of knowledge and ability on behalf of consumers in our free-market, information-saturated society or an objectively determinable abusive course of action in the defendants' dealings with consumers, the claims under the first prong of unconscionability must fail.

To establish a viable claim under the second prong of unconscionability, the plaintiff-intervenors must establish that there was a gross disparity between the value received and the consideration paid. This gross disparity test has typically been applied when the product received is something other than what the buyer sought or when the product is virtually worthless, at least in comparison to [**24] the good sought. See, e.g., *Teague v. Bandy*, 793 S.W.2d 50, 56 (Tex. App.--Austin 1990, writ denied) (finding a gross disparity in value when a cow purchased as an embryo donor proved to be infertile). The disparity in value must be "complete and unmitigated." *Chastain*, 700 S.W.2d at 583.

In this case, the plaintiff-intervenors allege that there was a gross disparity in value because the manufacturing costs of the defendants' infant formula were far below the wholesale price. Between 1978 and 1990, the total manufacturing cost of a 13-ounce can of formula ranged from 20 to 32 cents. During the same period, the wholesale price ranged from 54 cents to \$ 1.73. The plaintiff-intervenors argue that this differential between sales price and wholesale cost constitutes a gross disparity in value.

I disagree with this argument for two reasons. First, the plaintiff-intervenors have compared the wholesale price to manufacturing costs rather than the value received. While manufacturing costs certainly affect the value of a specific good, the two measures are distinct. Manufacturing costs include only the costs of raw materials and processing costs. This measure does not include the [**25] manufacturers' research costs, sales expenses, administrative costs, or profit. When these other factors are added to manufacturing costs, the resulting total, when allocated to the individual units produced, is one measure of the market value. But value is also dependent upon other considerations, such as the supply and demand in the market.

Every other reported gross disparity case under the DTPA compares the sales price to the market value. See, e.g., *Sun Power, Inc. v. Adams*, 751 S.W.2d 689, 694-95 (Tex. App.--Ft. Worth 1988, no writ); *Poe v. Hutchins*, 737 S.W.2d 574, 585 (Tex. App.--Dallas 1987, writ ref'd n.r.e.); *Bel-Go Assocs. v. Vitale*, 723 S.W.2d 182, 189 (Tex. App. Houston [1st Dist.] 1986, no writ); *Vick v. George*, 671 S.W.2d 541, 550 (Tex. App.--San Antonio 1983), rev'd

in part on other grounds, [686 S.W.2d 99 \(Tex. 1984\)](#). The plaintiff-intervenors cite no cases, and we can find none, where a disparity in value is determined by reference to manufacturing costs alone.

Second, a sales price ranging from two-and-a-half to five-and-a-half times the manufacturing cost is not a gross disparity in value. Were this degree of price differential sufficient [**26] to state a claim under the DTPA, every consumer who pays \$ 1.00 for a cup of coffee or \$ 1.50 for french fries would have a claim of unconscionability. To hold otherwise would require courts to determine what constitutes a "fair" price. As our case law reveals, courts have refrained from making such determinations and have refused to find a gross disparity in value unless the goods received are virtually worthless. See, e.g., [Dwight's Discount Vacuum Cleaner City, Inc. v. Scott Fetzer Co., 860 F.2d 646, 650-51 \(5th Cir. 1988\)](#), cert. denied, 490 U.S. 1108, 104 L. Ed. 2d 1024, 109 S. Ct. 3161 (1989) ("The 'gross disparity' test obviously mirrors a fraud-type measure of recovery, in which a consumer receives a product inferior in quality to that which he intended to buy or, alternatively, when the consumer is defrauded out of his money entirely."); [Wyatt v. Petrila, 752 S.W.2d 683, 685](#) (Tex. App.--Corpus Christi 1988, writ denied) ("In DTPA actions based on unconscionability, we look to gross disparity, not merely arguable unfairness.").

[*511] Because the plaintiff-intervenors have not claimed that there was a gross disparity between the value received and the consideration paid, and because the disparity between [**27] the manufacturing costs and the consideration paid was not a gross disparity, the summary judgment on the claims based on the second prong of unconscionability was proper.

IV. Conclusion

I agree with the Court that the summary judgment rendered by the trial court was proper. However, I base my decision on an evaluation of the merits of the DTPA claims, a point which I conclude was before the trial court and thus preserved. Because the facts alleged, even if taken as true, do not constitute unconscionable acts under either prong of the unconscionability definition in the DTPA, I would reverse the judgment of the court of appeals and render judgment in favor of the defendants.

John Cornyn

Justice

OPINION DELIVERED: June 29, 1995

Raul A. Gonzalez, Justice

I concur with the Court's opinion and judgment. I write separately to articulate additional reasons why I believe the judgment is correct. The court of appeals held that the retail buyers of infant formula stated "causes of action for unconscionable price disparity and taking advantage of plaintiff's lack of capacity, knowledge, and experience to a grossly unfair degree." [873 S.W.2d 399, 408](#). However, [**28] the intervenors' allegations are primarily antitrust claims, which are not cognizable under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), [TEX. BUS. & COM. CODE §§ 17.41-17.63](#).

In 1973, due in large part to the leadership of then Attorney General John L. Hill, the Texas Legislature passed the DTPA. The Act's stated purpose is to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."

Id. [§ 17.44](#).

A decade later, the Legislature modified existing state antitrust laws when it enacted the Texas Free Enterprise and Antitrust Act of 1983. *Id.* §§ 15.01-15.40. In subsections 15.05(a)-(e) of the Antitrust Act, the Legislature largely incorporated federal anti-monopoly and anti-combination language from sections 1 and 2 of the Sherman Antitrust Trust Act and from sections 3, 6, and 7 of the Clayton Act. TEX. BUS. & COM. CODE § 15.05(a)-(e); see 15 U.S.C. §§ 1, 2, 14, 17, 18. In passing the new Antitrust Act, the Legislature stated that its purpose was to "maintain and promote economic competition in [**29] trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state." TEX. BUS. & COM. CODE § 15.04. This section further provides, "The provisions of this Act shall be construed to accomplish this purpose and *shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes* to the extent consistent with this purpose." *Id.* (emphasis added). Therefore, the Legislature's mandate that Texas antitrust law be harmonized with federal antitrust law necessarily constrains this Court. See Caller-Times Publishing Co. v. Triad Communications, Inc., 826 S.W.2d 576, 580-81 (Tex. 1992).

In determining whether the intervenors may maintain a DTPA cause of action for the same conduct that would not be actionable under the antitrust laws, we look to federal case law and policy for guidance. I conclude that to allow the intervenors to pursue a cause of action under the DTPA on grounds which would not support a claim under the Antitrust Act is to create a loophole. Allowing a claim under the DTPA that state and federal antitrust law would bar can only subvert legislative [**30] intent.

In Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977), the United States Supreme Court noted that *direct purchasers* alone have standing to maintain causes of action for injuries caused by violators of federal antitrust laws. Only direct purchasers may enforce antitrust laws and collect damages to the full extent of their injuries. *Id. at 746* (reiterating the rule of Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)). A direct purchaser [*512] 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). On the other hand, an *indirect purchaser* is one who purchases goods or services from a seller or provider who is down the marketing chain from the antitrust violator. See Illinois Brick, 431 U.S. at 746-47. The principal reason for allowing only direct purchasers to recover in antitrust is that "the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than in an economist's hypothetical model'" are too complex for most courts to tackle efficiently. 431 U.S. at 732 (quoting [**31] Hanover Shoe, 392 U.S. at 493). This policy rationale for allowing only direct purchasers to assert causes of action applies with equal force to the state antitrust laws.

As with any statute, our primary emphasis in construing the state antitrust laws is to determine the Legislature's intent. See Pennington v. Singleton, 606 S.W.2d 682, 686 (Tex. 1980). When determining legislative intent, we "look to the language of the statute, legislative history, the nature and object to be obtained, and the consequences that would follow from alternate constructions." Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 280 (Tex. 1994). The purpose and legislative history of Texas's antitrust laws support the conclusion that the intervenors' claims are remediable only within the scheme of the Antitrust Act. The intervenors, who were indirect purchasers down the marketing chain from the alleged antitrust violator, cannot use the DTPA as a "back door" to assert a claim against one they did not deal with directly.

When the Legislature passed the Antitrust Act in 1983, it intended to create a remedy for private parties, including consumers, where none had previously existed. When then [**32] Senator Lloyd Doggett introduced the bill later enacted as the Antitrust Act to the Texas Senate, he explained that no private remedy existed at the time to remedy the harms which the Antitrust Act intended to provide. He stated:

There is under the Texas existing law *no private remedy*. As you know, under the federal Sherman Act and under the Clayton Act, there is a private remedy so that we do not rely on government . . . entirely for cleaning up the market place where there is price fixing and other illegal antitrust conspiracies . . . One of the most important changes is to provide for a private cause of action.

State Bar of Texas Antitrust and Business Litigation Section, *Monograph: Texas Antitrust and Related Statutes*, at III-58 (1991) (transcript of Senate Floor Debate, May 17, 1983) (emphasis added). It stands to reason that Senator

Doggett would not have stated that there was "no private remedy" if in fact the DTPA was already providing a cause of action for antitrust violations at the time the Antitrust Act was being debated. Also, then Attorney General Jim Mattox was among those urging a treble damages clause in the Antitrust Act. He argued:

I [**33] think it's very important . . . that today even under these bid-rigging cases . . . we're having some difficulty in recovery, because if we move under federal law there are certain damage provisions, what we call treble damages that are available to us.

Those provisions are not available to us when it is a bid-rigging situation where it is not involved in interstate commerce.

....

.... That's basically what we're overall asking you to do, is to in effect cover the entire spectrum of business activity . . . the single business, monopolistic-type practices, and then give us the power to enforce the law through bringing Texas into this area of improvement in our damages provisions, and in the penalties that can be assessed.

Monograph, supra, at III-3 (transcript of Hearing of Senate Jurisprudence Committee, Feb. 15, 1983).

When the Antitrust Act was passed, the version of the DTPA then in effect provided authority for treble damages. It also had the same unconscionability provision as it has today. See TEX. BUS. & COM. CODE §§ 17.45(5), 17.50(a)(3). We have long recognized a presumption [*513] that the Legislature enacted a statute "with [**34] 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). Furthermore, the Legislature is not presumed to have done a useless act. Webb County Appraisal Dist. v. New Laredo Hotel, Inc., 792 S.W.2d 952, 954 (Tex. 1990); Hunter v. Fort Worth Capital Corp., 620 S.W.2d 547, 551 (Tex. 1981). Had the conduct proscribed under the Antitrust Act already been covered by the provisions of the DTPA, as the intervenors argue, the Antitrust Act would have been unnecessary. Its treble remedies provision would have been redundant. I conclude that the Legislature did not commit a useless act in enacting the Antitrust Act in 1983. It provides causes of action and remedies not previously available.

Furthermore, no amendment to the DTPA since 1983 indicates any subsequent legislative intent to expand the DTPA to encompass price-fixing and monopoly claims. (Of course, there would be no need to do so, since the Antitrust Act serves this purpose.) No prior case by any court has held that price fixing and monopolization claims are proscribed by the DTPA; nor has any commentator suggested that they should be.

The intervenors [**35] and the dissenting opinion point to the cumulative remedy provisions of both the DTPA and the Antitrust Act as evidence that the DTPA may encompass the conduct alleged in this case. The cumulative remedy provision of the DTPA provides:

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 . . . An act or practice that is a violation 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 or is declared by such other law to be actionable under this subchapter*.

TEX. BUS. & COM. CODE § 17.43 (emphasis added). According to section 17.43, therefore, either the DTPA must make conduct illegal or another statute must, and refer to the DTPA as the source for a cause of action to remedy it. In short, there are two methods by which a DTPA cause of action can be reached. The Antitrust Act's cumulative remedy provision states:

The provisions of this Act are cumulative of each other and of any other provisions of law of this state *in effect* [**36] *relating to the same subject*.

Id. § 15.02 (emphasis added). The Antitrust Act is cumulative if another statute provides a remedy "in effect relating to the same subject." Unless at least one of these conditions is met, the DTPA and the Antitrust Act are not cumulative.

Under the foregoing provisions, may the intervenors maintain a DTPA cause of action? I think not. First, the DTPA itself does not cover, by its own terms, the conduct the intervenors alleged. The direct avenue to DTPA recovery is unavailable. Second, the Antitrust Act does not expressly declare that the conduct it proscribes is actionable under the DTPA. Thus, a plaintiff cannot reach a DTPA claim via the Antitrust Act's reference to it. There is no such cross-reference. The legislative history quoted above does not indicate an intent for the DTPA to provide the remedy for the subjects the Antitrust Act was intended to address. Moreover, the Antitrust Act contains its own remedy provisions for those entitled to make a claim for relief.

The dissent also argues that since the Antitrust Act is not expressly exempted from the DTPA, it must be cumulative with the DTPA. This argument fails because of a false [**37] premise, namely that the DTPA initially would have addressed conduct covered by the Antitrust Act. The legislative history of the Antitrust Act establishes that because the DTPA did not initially cover claims sounding in antitrust, there was no need for an exemption.

For these reasons, the conduct alleged by the intervenors is not actionable under the DTPA.

Raul A. Gonzalez

Justice

OPINION DELIVERED: June 29, 1995

Dissent by: BOB GAMMAGE

Dissent

The dispositive issue here is whether the Texas Free Enterprise and Antitrust Act ("Antitrust Act") precludes plaintiffs as indirect [*514] purchasers from bringing suit for misrepresentation, fraud, price-fixing, and market monopolization against infant formula manufacturers under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"). Because the Antitrust Act is not the exclusive remedy for these practices and does not preclude consumers from bringing suit under the DTPA, I respectfully dissent.

I.

The majority concludes that any action barred by [Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#), should similarly be barred even if the claimants assert a DTPA and not an antitrust claim. It reasons that under [**38] *Illinois Brick* federal antitrust law prohibits suits by indirect purchasers, and that, because the Texas antitrust statute is identical to the federal statute, Texas antitrust law also prohibits suits by indirect purchasers. The majority contends that if the DTPA allows indirect purchasers to sue for monopolistic practices, then it irreconcilably conflicts with the Antitrust Act. It does not suggest that any particular provision of the Antitrust Act conflicts with the DTPA, arguing instead that the legislature intended the Antitrust Act to be consistent with federal statutes.

The Antitrust Act by its own terms does not conflict with the DTPA, and the majority's argument that the Antitrust Act is the exclusive remedy for allegations which may sound in both antitrust and DTPA conflicts with the cumulative remedy provisions of both the Antitrust Act and the DTPA. The Antitrust Act provides that "the provisions of this Act are *cumulative* of each other and of *any other provision of law* of this state in effect *relating to the same subject*." [TEX. BUS. & COM. CODE § 15.02 \(a\)](#) (emphasis added). The DTPA also provides: "The provisions of this subchapter are *not exclusive* [**39] . The remedies provided in this subchapter are *in addition* to any other procedures or remedies provided for in *any other law*." *Id.* [§ 17.43](#) (emphasis added).

Had the legislature intended that all anti-competitive conduct be actionable exclusively under the Antitrust Act it would have said so with specific language. Instead, the statute provides just the opposite. The intent that the

Antitrust Act not be exclusive even when in conflict with another law is demonstrated by its legislative history. As originally introduced, Senate Bill 397, which enacted the state's antitrust act, provided that "whenever the application of any provision of this Act conflicts with the application of any other law of this State, the provisions of this Act shall prevail." The legislature deleted this language before final passage. "The deletion of a provision in a pending bill discloses the legislative intent to reject the proposal." *Camacho v. Samaniego*, 831 S.W.2d 804, 814 (Tex. 1992) (quoting *Smith v. Baldwin*, 611 S.W.2d 611, 616, 617 (Tex. 1980)). Not only did the legislature reject the provision, it went even further to adopt an alternative provision expressly making the Antitrust [**40] Act cumulative. Moreover, had the legislature intended to exclude DTPA coverage for conduct potentially violating the state antitrust act, it would have done so under the "exemptions" provision of the DTPA, which states the conduct and class of defendants exempted by the DTPA. *TEX. BUS. & COM. CODE § 17.49*. The majority circumvents clear legislative purpose and intent under the guise of statutory construction. This Court has denounced such practices:

[Courts] are not free to rewrite the statutes to reach a result [they] might consider more desirable, in the name of statutory construction. A court may not write special exceptions into a statute so as to make it inapplicable under certain circumstances not mentioned in the statute.

Public Utility Comm'n v. Cofer, 754 S.W.2d 121, 124 (Tex. 1988) (citations omitted). Courts are admonished to "take statutes as they find them . . . giving full effect to all of its terms." *Republicbank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985). Here, the majority misconstrues the intent of the DTPA contrary to its previous interpretations.¹ The DTPA should be "liberally" [*515] construed and applied to promote [**41] its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty." *TEX. BUS. & COM. CODE § 17.44*.

[**42] The majority's analysis suffers from the misconception that only one cause of action arises from any particular conduct, and consequently it concludes that plaintiff-intervenors cannot have a DTPA cause of action because the conduct is also proscribed by the Antitrust Act. But numerous legal theories premised upon the same conduct may overlap, and the legislature may create a number of remedies for that conduct without conflict. For example, a sale of stock may give rise to liability under the Blue Sky Law, *TEX. REV. CIV. STAT. ANN. arts. 581.1 - 581.41*, as well as the DTPA, among other statutory causes. Moreover, an insurer's failure to pay a claim absent a reasonable basis may give rise to a claim under the insurance code, the DTPA, and common law bad faith, all based on the same conduct. At least one set of commentators notes that state deceptive practices statutes and antitrust laws are ordinarily cumulative:

Numerous states have enacted Unfair and Deceptive Practices Acts, sometimes generically called UDPA or unfair competition acts. Typically, these acts proscribe unfair, unlawful, or deceptive trade practices, and are roughly analogous to § 5 of the Federal Trade [**43] Commission Act. *15 U.S.C. § 45*. A violation of state antitrust law can also be a violation of these acts which can trigger substantial civil penalties in addition to penalties provided by state antitrust law.

Thomas Greene, et al., *State Antitrust Law and Enforcement*, in 32ND ANNUAL ANTITRUST LAW INSTITUTE 1991, at 617 (PLI Corp. Law & Practice Course Handbook Series No. B4-6965, 1991) (emphasis added). Likewise, California recognizes its state deceptive trade practices act includes price-fixing violations. See *People v. National Ass'n of Realtors*, 120 Cal. App. 3d 459, 174 Cal. Rptr. 728 (Cal. Ct. App. 1981). That court held that California's

¹ See, e.g., *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 368 (Tex. 1987) (refusing to limit statute to recovery for affirmative deceptive acts, practices, or representations and refusing to find DTPA exemption for health care liability for claims arising before enactment of express exemption); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352 (Tex. 1987) (refusing to require actual payment to establish "consumer" standing); *Mayo v. John Hancock Mutual Life Insurance Co.*, 711 S.W.2d 5, 6 (Tex. 1986) (rejecting argument that insured's recovery of penalties under Article 3.62 precluded suit under Article 21.21); *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 132, 135 (Tex. 1985) (holding that recovery under an insurance contract does not preclude statutory recovery, and that the legislature did not intend to exempt insurers from DTPA liability); *Big H Auto Auction, Inc. v. Saenz Motors*, 665 S.W.2d 756, 758 (Tex. 1984) (refusing to exclude purchasers who bought goods for resale from the definition of "consumer").

unfair trade practices act provision for treble damages could apply to a state antitrust action, because if the legislature intended to exclude an antitrust violation from the act's provision such an exclusion would have been expressly included in the act itself. *Id. at 475.*

II.

Plaintiff-intervenors pleaded a cause of action exclusively under the DTPA, alleging that defendants violated sections 17.45 (5) (A) and (B), which provide:

- (5) "Unconscionable action or course of action" means an act or practice which, to **[**44]** a person's detriment:
(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.

TEX. BUS. & COM CODE §§ 17.45 (A) & (B). The plaintiff-intervenors allege the defendant-infant formula manufacturers capitalized on the vulnerability and inferior knowledge and bargaining position of consumers by using physicians, nurses, and other hospital staff to indoctrinate parents to use their particular brands of infant formula. These parents were deceived by implicit misrepresentations that the proffered infant formula contained properties different or unique from other, less expensive brands. But federal regulations mandate that all formulas contain the same essential ingredients and nutritional value, and, knowing that parents are susceptible **[*516]** to the recommendations of physicians and nurses, the defendants used those professionals as a virtual secondary sales force to influence and defraud consumers into purchasing their products.² These allegations state classic DTPA violations. **[**45]**

The DTPA generally requires only that a purchaser or prospective purchaser be "connected with" the transaction, and no privity of contract is necessary. Kennedy v. Sale, 689 S.W.2d 890, 892-93 (Tex. 1985); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540-41 (Tex. 1981). The class which may recover encompasses everyone who seeks to enjoy the benefits of the transaction. Cameron, 618 S.W.2d at 541. Indirect purchasers who are "consumers" **[**46]** have always been allowed to bring DTPA claims without a privity requirement. The majority now conjures the new question whether all DTPA claims will be henceforth subject to a privity requirement which overrules this Courts' consistent precedents, see Kennedy, 689 S.W.2d at 892-93; Flenniken, 661 S.W.2d at 707; Cameron, 618 S.W.2d at 540-41, and it does so under the chimera of an antitrust analysis to avoid confronting a huge body of established Texas DTPA law.

For the foregoing reasons, I dissent. I would affirm the judgment of the court of appeals that the plaintiff-intervenors stated a viable cause of action for unconscionability under the DTPA.

BOB GAMMAGE

JUSTICE

OPINION DELIVERED: June 29, 1995

End of Document

² A Ross Laboratories Training Manual emphasized the importance of the hospital staff:

Ross Hospital Feeding System is designed to provide an early and convenient means of getting infants started on Similac . . . and ultimately sent home with instructions that they continue to use Similac.

Never underestimate the importance of nurses. If they are sold and serviced properly, they can be strong allies. A nurse who supports Ross is like an extra salesperson.



Community Publrs. v. Donrey Corp.

United States District Court for the Western District of Arkansas, Fayetteville Division

June 30, 1995, Decided ; June 30, 1995, FILED

Civil No. 95-5026, Civil No. 95-5048

Reporter

892 F. Supp. 1146 *; 1995 U.S. Dist. LEXIS 9514 **; 1995-1 Trade Cas. (CCH) P71,049

COMMUNITY PUBLISHERS, INC.; and SHEARIN INC. d/b/a SHEARIN & COMPANY REALTORS, PLAINTIFFS v. DONREY CORP. d/b/a DONREY MEDIA GROUP; NAT, L.C.; THOMSON NEWSPAPERS, INC.; and THE NORTHWEST ARKANSAS TIMES, DEFENDANTS; UNITED STATES OF AMERICA, PLAINTIFF v. NAT, L.C. and D.R. PARTNERS d/b/a DONREY MEDIA GROUP, DEFENDANTS

Core Terms

advertising, Morning, newspaper, merger, acquisition, antitrust, Northwest, daily newspaper, competitor, rescission, Clayton Act, regional, compete, divestiture, circulation, media, Sherman Act, papers, private plaintiff, ownership, anti trust law, cross-elasticity, cases, anticompetitive, relevant market, prices, stock, geographic, entities, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > General Overview

HN1[] Antitrust & Trade Law, Clayton Act

Section 7 of the Clayton Act, 15 U.S.C.S. § 18 forbids a stock or asset acquisition if it may substantially lessen competition in the relevant market.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN2[] Antitrust & Trade Law, Clayton Act

The first step in [Section 7, 15 U.S.C.S. § 18](#), analysis is the definition of the relevant market. The burden of defining the market rests with the plaintiff. Once the relevant market is established, plaintiff must then show that the acquisition may substantially lessen competition.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

[HN3](#) **Regulated Practices, Market Definition**

In order to have standing to bring an antitrust suit, private plaintiffs must demonstrate what is called antitrust injury. Antitrust injury is a technical concept that requires knowledge of economics and the functioning of the relevant market. Antitrust injury is a prerequisite to bringing a private suit.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

[HN4](#) **Antitrust & Trade Law, Clayton Act**

Products belong in the same market when they are reasonably interchangeable for the same uses and thus exhibit a high cross-elasticity of demand. Cross-elasticity of demand refers to whether consumers will shift from one product to the other in response to changes in their relative costs. When products have high cross-elasticity, it means that small changes in the price or quality of one product has dramatic effects on the sales of the other. When products have low cross-elasticity, it means that price and quality changes in one product causes little or no change in the sales of the other. Stated more simply, 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.

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

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

[HN5](#) **Antitrust Statutes, Clayton Act**

892 F. Supp. 1146, *1146 1995 U.S. Dist. LEXIS 9514, **9514

To say that two products are in the same market means that they constrain each other's ability to exercise market power by raising prices and lowering quality for fear that consumers will switch to the competitor's product. It is a primary purpose of [Section 7](#) of the Clayton Act, [15 U.S.C.S. § 18](#), to preserve this constraining effect on the exercise of market power. Merger Guidelines § 0.1.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

[**HN6**](#) [down] **Antitrust & Trade Law, Clayton Act**

In evaluating reasonable substitutability and measuring cross-elasticity of demand, it is appropriate to consider a wide range of evidentiary sources. The boundaries of an antitrust market may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

Practical indicia are described as evidentiary proxies for direct proof of substitutability.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

[**HN8**](#) [down] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

See the Antitrust Merger Guidelines § 1.11.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

[**HN9**](#) [down] **Regulated Practices, Market Definition**

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The approaches to market definition endorsed by the Merger Guidelines and the case law are essentially consistent. This approach acknowledges that cross-elasticity of demand is nearly impossible to measure numerically in all cases and relies on a broad array of evidence and practical indicia to establish cross-elasticity. The 1984 Merger Guidelines made the same point when they explained that the five-to-ten percent test is an analytical tool with which to analyze traditional types of probative evidence. That is, the five-to-ten percent test is not a rigid requirement that cross-elasticity be measured numerically.

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Mergers & Acquisitions Law > Antitrust > Market Definition

HN10 [blue icon] **Regulated Practices, Market Definition**

The purpose of Section 7 of the Clayton Act, 15 U.S.C.S. § 18, is to prevent the undue aggregation of market power. Market definition is merely a tool in that quest, not the goal. It is initially important to keep in mind that "market definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether market power exists."

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN11 [blue icon] **Regulated Practices, Market Definition**

The determination of a relevant market is essentially one of fact, turning on the unique market situation of each case. The notion that market definition is a pragmatic, factual exercise is a theme that runs throughout the cases.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN12 [blue icon] **Regulated Practices, Market Definition**

Similarities of product are extremely important in defining the market, and thus both papers should be included in the product market because both papers are poised to become truly regional papers. Thus, there is a great deal of so-called cross-elasticity of supply among local daily newspapers in the subject area. High cross-elasticity of supply exists when existing companies have the ability to alter their facilities to produce the defendant's product in response to monopolistic price increases or quality reductions. The courts, the Department of Justice, the Federal Trade Commission, and economists, accept using cross-elasticity of supply to enlarge the product market generally.

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

892 F. Supp. 1146, *1146 1995 U.S. Dist. LEXIS 9514, **9514

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > General Overview

HN13 [blue icon] Private Actions, Remedies

In order to show a threat of antitrust injury, a competitor plaintiff must show that the challenged acquisition threatens to cause injury or loss of profits from practices forbidden by the antitrust laws.

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

HN14 [blue icon] Private Actions, Remedies

No violation of the antitrust laws, even if per se or presumptive, can ever create a presumption of antitrust injury.

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

HN15 [blue icon] Private Actions, Standing

Because protecting consumers from monopoly prices is the central concern of antitrust law, consumers have usually been the preferred plaintiff in private antitrust litigation.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN16 [blue icon] Antitrust & Trade Law, Clayton Act

A combination is presumed to violate Section 7 of the Clayton Act, 15 U.S.C.S. § 18, if the market is sufficiently concentrated and the challenged acquisition would significantly enhance concentration.

Antitrust & Trade Law > Clayton Act > Scope

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

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN17 [blue icon] Antitrust & Trade Law, Clayton Act

Section 7 of the Clayton Act, 15 U.S.C.S. § 18, is the principal antitrust statute applicable to mergers and acquisitions. However, Sections 1 and 2 of the Sherman Act, 15 U.S.C.S. §§ 1,2, are applicable as well.

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

Mergers & Acquisitions Law > Mergers > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN18 [] **Regulated Practices, Price Fixing & Restraints of Trade**

With regard to Section 1 of the Sherman Act, 15 U.S.C.S. § 1, anticompetitive acquisitions can violate that section, presumably as a combination in restraint of trade. There is not a great deal of merger and acquisition litigation under Section 1 of the Sherman Act, but it appears clear that mergers challenged under Section 1 should be evaluated by the same substantive standards as those applied under Section 7 of the Clayton Act, 15 U.S.C.S. § 18.

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

HN19 [] **US Department of Justice Actions, Civil Actions**

The relief in an antitrust case must be "effective to redress the violations" and "to restore competition." Moreover, it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor. The courts are clothed with large discretion to fit the decree to the special needs of the individual case.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

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

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Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

HN20 [down] Civil Actions, Divestiture

Permanent injunctive relief for private plaintiffs is available under Section 16 of the Clayton Act, [15 U.S.C.S. § 26](#), and to the government under Section 15 of the Clayton Act, [15 U.S.C.S. § 25](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > 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

HN21 [down] US Department of Justice Actions, Civil Actions

Section 16 of the Clayton Act, [15 U.S.C.S. § 26](#), was enacted not merely to provide private relief but to serve as well the high purpose of enforcing the antitrust laws. Section 16 should therefore be applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN22 [down] Clayton Act, Remedies

Both divestiture and rescission require the dispossession of the specific interest that created the unlawful monopoly or market power. The relief authorized by the Clayton Act does not end with dispossession of the unlawful interest but may include other measures designed to undo what was achieved through the unlawful acts.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN23 [down] Antitrust & Trade Law, Clayton Act

The court need not resort to either rescission or divestiture if some other equitable relief suffices to provide an effective means of eliminating the illegal effects of an acquisition and is in the public interest. The court's equitable powers are to be exercised to restore as nearly as possible the competitive situation that existed before an asset acquisition. However, it is clear from the case law that divestiture is regarded as the preferred remedy.

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Judges: H. Franklin Waters, United States District Judge

Opinion by: H. Franklin Waters

Opinion

[*1149] MEMORANDUM OPINION

This is a consolidated antitrust case in which the United States and private plaintiffs are challenging the purchase of a local daily newspaper, **[**2]** the *Northwest Arkansas Times* ("the *Times*"), by NAT, L.C. Both the government and private plaintiffs contend that this purchase may substantially lessen competition, since NAT, L.C. ("NAT"), has significant shareholders in common with defendant D.R. Partners d/b/a Donrey Media Group ("Donrey"), which owns a competing local daily newspaper, the *Morning News of Northwest Arkansas* ("Morning News").

Private plaintiffs and the government both claim that the acquisition violates [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), and [Section 7](#) of the Clayton Act, [15 U.S.C. § 18](#). Private plaintiffs seek injunctive relief under Section 16 of the Clayton Act, [15 U.S.C. § 26](#); while the government seeks such relief under Section 15 of the Clayton Act, [15 U.S.C. § 25](#). Private plaintiffs alone bring claims alleging that: (1) NAT's acquisition of the *Times* violates [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), which prohibits monopolization and attempts to monopolize; (2) NAT and Donrey have interlocking directorates in violation of Section 8 of the Clayton Act, [15 U.S.C. § 19](#); (3) NAT and Donrey violated the notice provisions of the Hart-Scott-Rodino Act, Section 7a of the Clayton **[**3]** Act, [15 U.S.C. § 18a](#), which requires government notification of certain acquisitions, which was not done in this case.

As will be explained below, the court will find that the challenged acquisition violates [Section 7](#) of the Clayton Act, and it will be unnecessary to judge the transaction under [Sections 1](#) and [2](#) of the Sherman Act. It will also be unnecessary to reach private plaintiffs' claims arising under Section 7a of the Clayton Act concerning Hart-Scott-Rodino notification and Section 8 of the Clayton Act concerning interlocking boards and directorates.

I. THE PARTIES AND OTHER INTERESTED BYSTANDERS

Thomson Newspapers, Inc. ("Thomson") owned the *Northwest Arkansas Times* ("the *Times*"), a local daily newspaper that competes in the Northwest Arkansas market, until February 6, 1995, when it sold the property to NAT.

NAT, L.C. ("NAT") is a limited liability company formed to acquire the *Times* from Thomson.¹ Various Stephens family trusts own ninety-five percent (95%) of NAT's stock, and Jack Stephens is NAT's chairman. The Stephens family business began with the partnership of two brothers, Jack Stephens and Witt Stephens, who went on to build the **[**4]** largest investment banking firm off Wall Street. Stephens family assets are now dispersed among Jack

¹ The court was notified per letter dated March 20, 1995, that NAT, L.C., has been renamed Northwest Arkansas Times, L.C.

Stephens, his son (Warren Stephens), his brother Witt Stephen's widow (Bess Stephens), and her three children (W.R. Stephens, Jr., Pamela Stephens Rose and Elizabeth Ann Stephens Campbell).

D.R. Partners d/b/a Donrey Media Group ("Donrey") is a general partnership which owns the *Morning News of Northwest Arkansas* ("the *Morning News*"), which competes in the same local daily newspaper market as the *Times*.

Stephens Group, Inc. ("SGI") owns ninety-nine percent (99%) of Donrey's stock, and the additional one percent is held by Stephens Holding, Inc. SGI is owned entirely by Stephens [*1150] family trusts. Jack Stephens is chairman of both Donrey and SGI.

Community Publishers, Inc ("CPI") publishes the *Benton County Daily Record* ("the *Daily Record*"), which also competes [**5] in the local daily newspaper market of Northwest Arkansas. CPI is owned by Jim Walton, the son of Sam Walton, founder of Wal-Mart Stores, the country's largest and most successful retailer.² CPI also sought to purchase the *Times* from Thomson in partnership with WEHCO Media. WEHCO Media is owned by Walter Hussman, and it publishes the *Arkansas Democrat-Gazette*, a statewide newspaper out of Little Rock. It is the only Arkansas daily newspaper with statewide circulation. The *Arkansas Democrat-Gazette* is a merger of two formerly competing statewide newspapers, the *Arkansas Democrat* and the *Arkansas Gazette*, which conducted a newspaper war to the death in the 1980's. At that time the *Gazette* was owned by Gannett, a large nationwide newspaper chain which publishes *USA Today* along with numerous other newspapers spread across the United States.

Shearin, Inc. d/b/a Shearin & Company Realtors ("Shearin") [**6] is a real estate brokerage firm with its principal office in Rogers and a branch office in Bentonville. It advertises regularly in both the *Morning News* and the *Daily Record*.

II. NAT'S ACQUISITION OF THE TIMES

The court will begin by outlining the events leading up to NAT's acquisition of the *Times*, because it is useful in showing the noncompetitive manner in which the Stephens family does business together and the relationship between their companies, NAT and Donrey. The acquisition history is also useful in explaining the role of Thomson in closing the deal despite the existence of substantial antitrust questions, which will be relevant to the way the court shapes its remedy.

Donrey had historically expressed interest in acquiring the *Times*.³ In September 1994, Emmett Jones, Donrey's President and Chief Operating Officer, met with Robert Daleo, Thomson's Chief Financial Officer, at the Dallas-Fort Worth Airport. Daleo asked Jones whether Donrey would sell the *Morning News*; while Jones asked Daleo whether Thomson would sell the *Times*. Both parties were ready to buy, but neither party was willing to sell. Apparently each party wanted the operational [**7] synergies and obvious competitive advantages that would accompany owning all three daily local newspapers in Northwest Arkansas.

In November 1994, Donrey was again involved in negotiations where it sought to acquire the *Times* from Thomson. The deal involved a three-way exchange, whereby Donrey would convey a certain media property to a third party, which would then convey other media properties to Thomson, which would then convey the *Times* to Donrey. The deal fell through when the third party backed out.

In January 1995, Donrey made its final attempt to acquire the *Times*. On January 19th, Thomson publicly announced its intention to sell the *Times*. Thomson also announced its intention to sell twenty-four other United

² Steve Trollinger and Mike Brown own a small percentage of the stock in CPI.

³ Plaintiff CPI has also desired to purchase the *Times*. Steve Trollinger, the President of CPI and the publisher of the *Daily Record*, has sent a number of letters over the years to Thomson about purchasing the *Times*.

States newspapers in a package deal. Thomson did [**8] not include the *Times* in the package of twenty-four newspapers as it felt that the *Times* was more valuable and because various entities had already expressed interest in it, including Donrey and CPI. Thomson stated bids for the *Times* should be received by February 8, 1995, but Thomson reserved the right to sell the *Times* before that date.

On January 19 or 20, 1995, Jones called Daleo to get the bid package and to set up a Donrey-Thomson meeting. With regard to the purchase price, Daleo told Jones that Thomson wanted approximately fifteen times earnings or twenty million dollars for the *Times*. The twenty million dollar figure was [*1151] based on in-house financial analyses performed by Thomson which assumed that the purchaser would combine the *Times* with one or more newspapers and achieve "operational synergies."⁴ A much lower purchase price resulted from Thomson's "stand-alone" analysis, which projected the value of the paper as though it would be owned and operated as an independent entity. Jones, who likely presumed operational synergies for Donrey, testified that he would have valued the *Times* at between twenty and thirty million dollars.

[**9] Soon after Thomson put the *Times* up for sale, Jack Stephens and his executive assistant, Scott Ford, who is also a vice-president of Donrey, became directly involved. On January 23 and 24, 1995, there were meetings with attorneys in which they discussed legal aspects of purchasing the *Times* "a good bit," to quote the testimony of Jack Stephens. Over the course of these meetings, Jack Stephens decided that he would purchase the *Times* through NAT rather than through Donrey. However, Donrey officials were not consulted or apprised of the decision when it was made.

According to Jack Stephens, he decided on a NAT purchase of the *Times* primarily due to his interest in the Fayetteville community and his desire for a more hands-on opportunity for members of his family and high level SGI officers. He stated further that a Donrey purchase would not have accomplished this goal, because Donrey's management and operations structure was already in place when purchased by the Stephens family in August 1993. Thus, a Donrey purchase would not have allowed Stephens family members and personnel to be as involved in the daily operation of the *Times* as Jack Stephens wanted them to [**10] be.

On January 24, 1995, there was a luncheon meeting in Fort Smith, Arkansas, between Donrey's senior management personnel and several SGI representatives. Present at the meeting were Jack Stephens, his son (Warren Stephens), Ford, Jones, Darrell Lofton (Donrey's Chief Financial Officer), and other Donrey personnel.

In preparation for that meeting, Jones had told Lofton, to perform additional price analysis on the *Times*. However, this additional analysis was never discussed at the January 24 meeting because Ford told Jones, upon disembarking from Jack Stephens' plane, that the Stephens family was going to buy the *Times* directly and that there was no longer any need for Donrey to be involved.

Jones was disappointed and Lofton surprised, as Donrey had been trying to acquire the *Times* as part of its competitive strategy for a long time. Still, due to the ownership structure of the Stephens-Donrey organization, Donrey promptly gave up pursuit of the *Times* and did not compete with NAT to acquire it.

As a general matter, the Hart-Scott-Rodino notice provisions of the antitrust law were not an infrequent topic of discussion. At the January 24 lunch in Fort Smith, Lofton [**11] asked Ford if he needed any help with Hart-Scott-Rodino compliance, to which Ford said no. Jones also knew that any acquisition by Donrey would require a Hart-Scott-Rodino filing, a matter which he says he discussed with various people including Lofton, Ford, Jack Stephens and others. In fact, when Jones learned that NAT was going to purchase the *Times*, he admits that the thought passed through his mind that perhaps NAT was purchasing the *Times* to avoid the need to comply with Hart-Scott-Rodino.

On January 26, 1995, Jack Stephens discussed the *Times* purchase over lunch with his sister-in-law (Bess Stephens), his nephew (W.R. Stephens, Jr.), and his niece (Elizabeth Ann Stephens Campbell). At the meeting,

⁴ "Operational synergies" is a term used in the newspaper industry to refer to the economies of scale that can be achieved by combining functions or departments, including accounting, administration, press rooms, and composing departments.

there was no determination of the percentages that would be owned by each family member as that would be determined later by the accountants. In general, the exact breakdown of ownership is not considered to be a matter of great importance to the Stephens family.

On January 27, 1995, Jack Stephens and Ford met with Richard Harrington, Thomson's President and Chief Executive Officer, [*1152] and Robert Daleo, Thomson's Chief Financial Officer, at Thomson's headquarters in Stamford, [***12] Connecticut. The meeting had been arranged at Jack Stephens' request by a friend or associate in the banking business who also did business with the Thomson chain.⁵ Jack Stephens started the meeting by immediately telling Harrington that he understood that Thomson wanted 15 times cash flow--that's twenty million dollars and that he was there to pay it. Harrington asked to be excused and left with Daleo to discuss the offer. When they returned, Harrington asked for a 10% preemptive bid premium of two million dollars, to which Jack Stephens "gulped" and said "okay." The twenty million dollar figure was the one that Thomson based on operational synergies, without any adjustment for the supposed stand-alone nature of a NAT purchase. In fact, there was not any indication in the negotiations that anyone at SGI, Donrey, or Thomson, ever took account of the recognized fact that the *Times* was worth less as a stand-alone venture. The fact that the party purchasing the property was NAT rather than Donrey did not seem to make a difference.

[**13] To finance the deal, SGI paid a dividend to the various family trusts that were investing in NAT. These trusts then transferred the dividend to NAT and received NAT stock in return. Jack Stephens and Bess Stephens also provided two bridge loans to NAT totalling thirteen million dollars. The promissory notes reflecting these bridge loans were not only unsecured, but also apparently unsigned.

The sale was consummated on February 6, 1995. According to defendants, the closing was originally scheduled for February 3rd, but it was delayed until February 6th because Daleo and Harrington were out of town and because there was some trouble calculating the value of the net current assets of the *Times*.

Prior to consummating the sale, Thomson insisted that the asset purchase agreement include an indemnification provision, whereby NAT agreed to indemnify Thomson for the costs of defending any investigation, suit or proceeding in connection with any failure to comply with Hart-Scott-Rodino or any violation of the antitrust laws. The genesis of this indemnity provision was at the January 27, 1995, meeting between Harrington and Jack Stephens, when Thomson's in-house attorney, a Mr. Harris, [***14] was called into the meeting. The indemnity provision continued to be discussed and negotiated by Thomson attorney Kenneth Carson and NAT attorney Rick Massey, who exchanged various drafts of the asset purchase agreement on January 30 and February 1. Thomson's insistence on an indemnity provision was further cemented by a threatening phone call on February 2nd from Walter Hussman of WEHCO Media, in which Walter Hussman discussed the possibility of antitrust liability with a Donrey purchase. The February 5, 1995, filing of this lawsuit and the scheduling of a February 6, 1995, preliminary injunction hearing could only have reinforced Thomson's desire for such an indemnity provision.

According to Ford, the key people for Stephens had been all through the antitrust liability issue with three different law firms prior to consummating the sale, and they were convinced that competitor plaintiffs such as CPI, Walter Hussman and Jim Walton had no standing to bring such a lawsuit. Ford did not indicate whether the lawyers discussed the possibility of a government antitrust suit and the possible need to win the case on its merits rather than on standing.

III. SECTION 7 OF THE CLAYTON ACT

[**15] Section 7 HN1[] forbids a stock or asset acquisition if it may substantially lessen competition in the relevant market. 15 U.S.C. § 18. Thus, HN2[] the first step in Section 7 analysis is the definition of the relevant market. The burden of defining the market rests with the plaintiff. H.J., Inc. v. Internat'l Tel. & Tel. Corp., 867 F.2d

⁵ This clearly more effective way of doing business contrasted with the manner in which other prospective bidders were required to negotiate and bid. They were relegated to dealing through and with a Thomson employee much further down the chain-of-command than the CEO. That is also the manner in which the CPI-WEHCO unsuccessful bid was made.

1531, 1537 (8th Cir. 1989) (Section 2 of the Sherman Act) (citations [*1153] omitted).⁶ Once the relevant market is established, plaintiff must then show that the acquisition may substantially lessen competition. *Id.*

[**16] The court also notes that HN3[[↑]] in order to have standing to bring this suit, private plaintiffs must demonstrate what is called antitrust injury. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). Antitrust injury is a technical concept that requires knowledge of economics and the functioning of the relevant market. Therefore, the court will discuss it after setting forth the nature of the relevant market, although antitrust injury is a prerequisite to bringing a private suit.

IV. GENERAL PRINCIPLES OF MARKET DEFINITION

The Supreme Court has stated that HN4[[↑]] products belong in the same market when they are "reasonably interchangeable" for the same uses and thus exhibit a high "cross-elasticity of demand."⁷ As the Eighth Circuit more simply put it, "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.'" General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 805 (8th Cir. 1987) quoting SmithKline Corp. v. Eli Lilly & [**17] Co., 575 F.2d 1056, 1063 (3d Cir.), cert. denied, 439 U.S. 838, 99 S. Ct. 123, 58 L. Ed. 2d 134 (1978).

HN5[[↑]] To say that two products are in the same market means that they constrain each other's ability to exercise market power by raising prices and lowering quality for fear that consumers will switch to the competitor's product.⁸ It is a primary purpose of Section 7 of the Clayton Act to preserve this constraining effect on the exercise of market power. Merger [*18] Guidelines § 0.1. See also, United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988) ("The lawfulness of an acquisition turns on the purchaser's potential for creating, enhancing, or facilitating the exercise of market power--the ability of one or more firms to raise prices above competitive levels for a significant period of time.") (citation omitted), *cert. denied, 493 U.S. 809, 110 S. Ct. 51, 107 L. Ed. 2d 20 (1989)*; Merger Guidelines § 0.1 ("the unifying theme . . . is that mergers should not be permitted to create or enhance market power or to facilitate its exercise").

[**19] HN6[[↑]] In evaluating reasonable substitutability and measuring cross-elasticity of demand, the case law states that it is appropriate to consider a wide range of evidentiary sources.

⁶ In setting forth the standards that govern market definition, the court will utilize case law and the 1992 horizontal merger enforcement guidelines ("Merger Guidelines") issued jointly by the two agencies with antitrust enforcement authority, the Justice Department and the Federal Trade Commission. 4Trade Reg. Rep. (CCH) P 13,104. It is well-recognized that the Merger Guidelines do not have the force of law, see e.g. Olin Corp. v. FTC, 986 F.2d 1295, 1300 (9th Cir. 1993), *cert. denied, ___ U.S. ___, 114 S. Ct. 1051, 127 L. Ed. 2d 373 (1994)*, but many courts still cite them, and the expert testimony in this case shows that they represent mainstream economic thinking.

⁷ Cross-elasticity of demand refers to "whether consumers will shift from one product to the other in response to changes in their relative costs." SuperTurf, Inc. v. Monsanto Co., 660 F.2d 1275, 1278 (8th Cir. 1981) (citations omitted). When products have "high cross-elasticity, it means that small changes in the price or quality of one product has dramatic effects on the sales of the other. When products have "low" cross-elasticity, it means that price and quality changes in one product causes little or no change in the sales of the other.

⁸ There can be no doubt as a matter of case law, the Merger Guidelines, and economic theory, that market constraints work not only to limit one's ability to raise prices above a competitive level, but also to limit one's ability to reduce quality or service below competitive levels. United States V. Philadelphia Nat'l Bank, 374 U.S. 321, 368-69, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963) (recognizing that competition can exist at many levels other than price); Merger Guidelines § 0.1, n. 6 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation."); *Id.* § 1.11 (agency will consider buyer and seller "response to relative changes in price or other competitive variables") (emphasis added).

[The boundaries of an antitrust market] may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate [*1154] economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

[Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 1524, 8 L. Ed. 2d 510 \(1962\)](#) (footnote omitted). The Eighth Circuit simply treats the "practical indicia" identified by *Brown Shoe* as types of evidence that establish a relevant market for antitrust purposes.

The [HN7](#) "practical indicia" identified in *Brown Shoe* have been described as "evidentiary proxies for direct proof of substitutability." [Rothery Storage & Van Co. V. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 218 \(D.C. Cir. 1986\)](#).

[H.J., Inc., 867 F.2d at 1540.](#)⁹

[**20] In the same vein, the Merger Guidelines state that the following evidence may be considered in defining the product market and evaluating cross-elasticity of demand and substitutability.

[HN8](#) In considering the, likely reaction of buyers to a price increase, the Agency will take into account **all relevant evidence**, including, **but not limited to**, the following:

(1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price **or other competitive variables**;

(2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price **or other competitive variables**.

Merger Guidelines § 1.11. (emphasis added). The Merger Guidelines also note that evidence "may be derived from the documents and statements of both the merging firms and other sources." Merger Guidelines § 0.1.

Upon evaluating the evidence, the cases do not specify numerically how "high" the cross-elasticity of demand between two products must be before they can be included in the same market for antitrust purposes. In any case, it is usually impossible [**21] to reliably quantify cross-elasticity of demand, which is why the Supreme Court allows reliance on "practical indicia." See e.g. [U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 995 \(11th Cir. 1993\)](#), cert. denied, U.S. 114 S. Ct. 2710, 129 L. Ed. 2d 837 (1994).

In a typically vague statement of the cross-elasticity threshold, the Eighth Circuit states that "the cross-elasticity of demand must be sufficiently high to statistically reflect consumers' perception that the two products are reasonably interchangeable." [Archer-Daniels, 866 F.2d at 248](#). Under the Merger Guidelines, two products are in the same market if the seller of one product is constrained by the presence of the other, and thus, cannot profitably impose a "small but significant and nontransitory" increase in price without fear of significant consumer switching to a

⁹ In *Brown Shoe*, the practical indicia were meant to define a so-called "submarket," which is to be contrasted with the "broad product market." But the emerging consensus of antitrust scholars and case law seems to be that the term "submarket" is unnecessary. Whether you call it a submarket or a broad product market, it is still the relevant market for antitrust purposes and must be marked by reasonable interchangeability and cross-elasticity of demand.

One approach, adopted by the Eighth Circuit, and described above, would simply do away with the term "submarket" and treat the "practical indicia" of *Brown Shoe* as types of evidence that establish the relevant market, whether it be a submarket or a broad product market. [H.J., Inc. v. Internat'l Tel. & Tel. Corp., 867 F.2d 1531, 1540 \(8th Cir. 1989\)](#) ("the same proof which establishes the existence of a relevant product market also shows (or . . . fails to show) the existence of a product submarket") (citing Areeda & Hovenkamp, [Antitrust Law](#) P 518.1 at 311-15 (1987 Supp.)); accord Ila Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, [Antitrust Law](#) P 533a-g (1995).

competing product.¹⁰ Merger Guidelines § 1.0. Cf. *Archer-Daniels, 866 F.2d at 248 n. 1* (cross-elasticity to be measured with regard to "slight" price increases).

[**22] [*1155] With regard to defining the geographic market, the same basic principles apply, and the court need not discuss them in detail. Also, the geographic market is not a significant issue in this case. Determination of the product market will for all intents and purposes determine the geographic market, because the relevant product market consists of local daily newspapers. Thus, the product market has a built-in geographic component. If two daily newspapers are considered local by the consumers, then they belong in the same geographic market. Defendants' own expert, Thomas Overstreet, testified that if the *Times* and the *Morning News* are in the same product market, then "as a matter of logic," they are in the same geographic market.

V. THE RELEVANT MARKET: LOCAL DAILY NEWSPAPERS

In this case, the relevant product market for antitrust purposes is the local daily newspaper. This market is in fact two markets: one for readers and one for advertisers. As the Supreme Court stated in *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 610, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*, "every newspaper is a dual trader in separate though interdependent markets; it sells [**23] the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space." Each market will be analyzed in turn.

a. The Readership Market

The court will begin by describing, in a qualitative manner, the peculiar characteristics and uses of the daily newspaper. The court will then contrast these with the uses and characteristics of the most likely candidates for inclusion in the product market: television, radio, national and state newspapers, shoppers, and weekly newspapers.

The local daily newspaper provides a unique package of information to its readers. Foremost, it provides national, state and local news. Many of the stories, such as those on high school sports and city council meetings, are of purely local interest. Readers also value other features of a local nature, including calendars of local events and meetings, movie and TV listings, classified advertisements, other local advertising, legal notices, and obituaries. The format of the newspaper allows its message to be timely and detailed. Moreover, a newspaper is portable and allows readers access to information at their own convenience.

The peculiar [**24] characteristics and uses of other media outlets are completely different. National and state newspapers have a similar format to local papers, but they contain no local news or advertising, which is a critical factor in the acceptance and success of a local daily. For instance, even though the *Democrat-Gazette* and the *Tulsa World* are quality papers, they have, limited circulation in Northwest Arkansas. On the other hand, weekly papers offer purely local news, and as weeklies, they offer virtually no time sensitivity. Radio news and television news are also poor substitutes for local papers. Television and radio are primarily dedicated to entertainment, and to the extent that they offer news and information, they lack breadth and depth of coverage. Also, they are not portable and convenient like newspapers.

As for the perspective of the industry, it is clear that it sees local daily newspapers as a separate product from other media. Industry people gave direct testimony excluding various media outlets from the market occupied by local dailies. More compelling, however, were the contemporaneous, prelitigation records of the various newspaper organizations and personnel involved [**25] in the case. For instance, George Smith, Publisher of the *Times*, made frequent comparisons between the *Times* and the *Morning News*; but he did not make comparisons between the *Times* and any other media outlet. By negative inference, Smith, Thomson, and the other industry people involved in this case did not perceive local daily newspapers to be in close competition with media outlets other than local daily newspapers.

¹⁰ A slight increase is usually referred to as five or ten percent. All parties to the suit use the five to ten percent figure, but it should be noted that this figure does not appear in the Merger Guidelines.

As for expert opinion, the two experts with the most experience in newspaper economics testified that a market limited to local daily newspapers was the proper one. One was the expert for the private plaintiffs, Robert Picard, a communications Ph.D. who may be [*1156] one of the foremost experts on newspaper economics in the country. He has, among other things, published and edited numerous books and articles on the subject and has testified before the legislatures of various countries. The other expert, Kenneth Baseman, testified for the government. Baseman is an economist who has spent many years doing antitrust work for the government and private parties, including a stint at the antitrust division where he worked extensively on the agency's challenge to the [*26] joint operating agreement between the *Detroit Free Press* and the *Detroit News*. Even defendants' own expert, Thomas Overstreet, limited the market to local daily newspapers. As such, defendants should not be heard to complain that the government and private plaintiffs have failed to carry their burden of proof in excluding other media from the relevant market.¹¹

b. The Advertising Market

The local daily newspaper offers advertisers a unique set of opportunities. They are able to reach a broad cross-section of consumers in a specific geographic circulation. They also allow a detailed message to be delivered in a timely manner.

The peculiar characteristics and uses of other advertising media are very [*27] different. National and state newspapers do not carry any local advertising. Given the limited circulation of such papers in Northwest Arkansas, and their high per reader advertising cost, local and regional advertisers do not see them as substitutes for local daily newspapers. As for weekly newspapers, the main problems are that advertising messages are not delivered in a timely manner and that weeklies do not reach the number of readers that dailies do. With regard to "shoppers," they do not provide the high quality demographics that newspapers provide. They also do not meet the needs of advertisers who wish to convey an elite product message. They are also not timely.

As for radio and television, the main problem with such media is that the advertising message conveyed is transitory. It is nearly impossible to provide price detail, and so newspapers are especially critical for grocery stores, department stores, furniture outlets, hardware stores, car dealers, etc. Television and radio do not provide a guaranteed audience and the expense of producing radio and television spots can be prohibitive. Many advertisers use radio and television to complement, but not replace, their use [*28] of print advertising, often for the purpose of "image advertising." As for circulars and direct mail, these are often considered nuisances and junk mail and are often thrown away.

While businesses do divide their advertising budget among various advertising media, the portion of the so-called "media mix" that is dedicated to any one particular media, such as local daily newspapers, tends to stay fixed over time. As a result, local daily newspapers compete against each other, not the other media, which are not reasonably interchangeable for the same purposes.

This view of advertising competition is accepted by industry personnel, advertising consultants, newspaper economics experts and the advertisers themselves. Also, in making decisions, including pricing decisions, the contemporaneous, prelitigation records of the various newspaper organizations and personnel involved in the case show a complete lack of interest in other advertising media, but a great deal of concern with other local daily newspapers, which by negative inference shows that other media are not part of the market.

c. Case precedent on newspaper markets

The weight of case authority confirms the court's [*29] almost intuitively correct definition of the market. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953) (Sections 1 and 2 of the Sherman Act); *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982), different results reached on

¹¹ Defendants argue that there is no proof "that the Court should exclude local television, radio, weekly newspapers, etc, from the relevant market for readers." As the government notes, it is curious for defendants to suggest that television and radio are in "the relevant market for readers."

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reh'g, [727 F.2d 692 \[*1157\] \(8th Cir. 1984\)](#), cert. denied, 469 U.S. 872, 105 S. Ct. 222, 83 L. Ed. 2d 152 (1984) ([Section 2](#) of the Sherman Act); [Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383 \(8th Cir. 1974\)](#), cert. denied, 419 U.S. 836, 95 S. Ct. 64, 42 L. Ed. 2d 63 (1974) ([Section 2](#) of the Sherman Act); [Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc. 441 F. Supp. 628 \(W.D.N.Y. 1977\)](#), rev'd on other grounds, [601 F.2d 48 \(2nd Cir. 1969\)](#) ([Section 2](#) of the Sherman Act); [United States v. Citizen Publishing Co., 280 F. Supp. 978 \(D. Ariz. 1968\)](#), aff'd, [394 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 2d 148 \(1969\)](#) ([Section 7](#) of the Clayton Act); [United States v. Times Mirror Co., 274 F. Supp. 606 \(C.D. Cal. 1967\)](#), aff'd, 390 U.S. 712, 88 S. Ct. 1411, 20 L. Ed. 2d 252 (1968) ([Section 7](#) of the Clayton Act).

Although this court has made its own findings of fact, [\[**30\]](#) it believes that the vast weight of authority and the method of analysis utilized in the cited cases supports the market definition in this case. In [Bowen v. New York News, Inc., 366 F. Supp. 651, 675 n. 56 \(S.D.N.Y. 1973\)](#), aff'd in part and rev'd in part, [522 F.2d 1242 \(2d Cir. 1975\)](#) cert. denied, 425 U.S. 936, 96 S. Ct. 1667, 48 L. Ed. 2d 177 (1976), the court did not find it necessary to make its own findings of fact, since "it is now well settled that the daily newspaper is a distinct line of commerce." But in [Knutson v. Daily Review, Inc., 383 F. Supp. 1346 \(N.D. Cal. 1974\)](#), aff'd in part and rev'd in part, [548 F.2d 795 \(9th Cir. 1976\)](#), cert. denied, 433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977), the court expressly rejected *Bowen's* approach on the grounds that determination of the relevant market is a factual, not a legal, determination. Although *Knutson* is probably correct, the court notes that, in the future, it would probably make little sense for any party to relitigate this issue, given the amount of resources spent on an issue that has been resolved the same way by every court that has addressed it in any depth.

VI. THE NORTHWEST [\[31\]](#) ARKANSAS NEWSPAPER MARKET**

The court has discussed why the local daily newspaper is a separate product as a general matter. This still leaves the critical question of which daily newspapers are considered "local" by readers and advertisers in Northwest Arkansas.

Perhaps, it is appropriate to define what the court means when it speaks of "Northwest Arkansas." When one familiar with this area speaks of "Northwest Arkansas" it is not intended to merely describe a geographic location. Instead, that term has come to denote an increasingly integrated economic, social and political unit which just happens to be located in the northwest corner of the state.

It is generally considered that "Northwest Arkansas" encompasses Washington and Benton Counties, and is an area that is not only blessed with beautiful Ozark mountain countryside, but also progressive and aggressive people with an outstanding work ethic. It is this area of the country where, among other things, the nation's top poultry producer and one of its top food companies had its genesis and is located, and where Sam Walton started, barely 30 years ago, what became the nation's top retailer and second largest private employer. [\[**32\]](#) The area is also the home of the University of Arkansas which exerts a tremendous economic and cultural influence on the area.

There are numerous successful businesses in the area which provide jobs to a great number of employees. In recent years, the area has become increasingly multi-cultural and multi-lingual because of the influx of large numbers of Mexican nationals who have come to the area to take advantage of the extremely low unemployment rate in the area which regularly runs less than 3%, even in times when other areas of the country are experiencing high unemployment.

The major cities in the two county area are Fayetteville, Springdale, Rogers, and Bentonville. Tremendous population increases over the last several years have resulted in the two-county area having a population, according to evidence at the trial, of an excess of 233,000 people, a large portion of whom live in one of the cities listed above. Until the last few years, these cities were not only separate political entities, but separate and highly parochial social units. Now, with the increase in population, those cities have [\[*1158\]](#) "grown together" and only imaginary boundary lines separate them. As one drives [\[**33\]](#) across the area, it is impossible for even natives in most cases to determine when they leave one of the towns and enter the next.

Not only has the area "grown together" geographically and in respect to population, it has also increasingly become one economic and social unit. The area is presently engaged in the building of a large regional airport, and there are other examples of the citizens of the entire area working together for a common goal. Without exception, the "experts" who testified lauded the outstanding economic climate present in the entire area, and predicted a bright future.

In short, it was not too many years ago that Fayetteville, Springdale, Rogers, and Bentonville were distinct and separate towns with distinct and separate citizens that viewed themselves as such. That has changed and is changing. That fact has been evidenced graphically by recent changes in the newspaper industry in the area. Until recently, each of the towns had "their own newspaper" but, in November 1994, Donrey Media, the common owner of the *Springdale Morning News* and the *Northwest Arkansas Morning News* based in Rogers, merged the papers, and named the combined newspaper *The Morning* [**34] *News of Northwest Arkansas*. That newspaper intends to be and has advertised itself to be the paper for all of Northwest Arkansas, a recognition that the area has become or is fast becoming a cohesive economic, social and cultural area.

The court will conclude that the *Times* and the *Morning News* strongly compete against each other for readers and advertisers in Washington County. The court will also conclude that the *Daily Record* and the *Morning News* compete against each other in Benton County. Finally, although the *Times* and the *Daily Record* do not currently appear to compete for readers and compete only weakly for advertisers, this court will conclude that they belong in the same market as well--the Northwest Arkansas market.

a. Readership competition between the *Times* and the *Morning News*

The record is absolutely replete with evidence that the *Morning News* and the *Times* compete in the same product market and that they both serve the same locale. Specifically, they are competing for readers in the Washington County area which is comprised mainly of the towns of Fayetteville and Springdale.

Both papers offer products with very similar [**35] characteristics. Both papers cover news of regional interest such as the proposed regional airport now under construction, the University of Arkansas, Washington County government and courts, meetings of the governing bodies of the area's major hospitals, the federal courts, Fayetteville and Springdale city council meetings, and high school sports, and provide classifieds and local merchant advertising.

The *Morning News* has offices with customer service and editorial staffs in both Fayetteville and Springdale, the locations of which are listed in two separate parts of the paper every day. In its Fayetteville office, the *Morning News* has four reporters who cover county government, county court, federal court, the University of Arkansas, and city affairs. Tom Stallbaumer, the publisher of the *Morning News*, does not feel that his paper yet matches the *Times* in its coverage of Fayetteville, but he admits that his paper aspires to do so. As for the *Times*, it also provides extensive coverage of newsworthy events in Fayetteville, and, to a somewhat lesser extent, in Springdale and Benton County. It is currently engaged in a news-sharing agreement with the *Daily Record*, [**36] so that the *Times* may better cover Benton County and better compete with the coverage of the *Morning News*.

Not surprisingly, there is substantial circulation overlap, with the *Times* reaching 2,184 readers in Springdale and the *Morning News* reaching 4,424 daily readers and 4,821 Sunday readers in Fayetteville. In fact, with a switch of approximately 1,800 readers, the *Morning News* would overtake the *Times* as the circulation leader in Fayetteville. Currently, the *Morning News* and *Times* both sample readers, telemarket, have sales racks [*1159] and home delivery routes throughout Washington County.

The numerous business documents in this case also constitute a detailed contemporaneous record of the competitive actions and reactions that the papers have undertaken in direct response to each other. For instance, the *Times* was, until the last few years, an afternoon paper until the *Springdale Morning News* switched to a morning paper and made significant circulation gains in Fayetteville, at which point the *Times* became a morning paper.

At one time, the *Morning News* did not publish on certain holidays, on which days the *Times* would sample (throw **[**37]** free papers) the readers of the *Morning News* along with a flyer that remarked on the *Morning News* not being an every day paper. The *Morning News* now publishes 365 days a year.

Both papers exhibit an ongoing concern over who scoops whom which is largely motivated by circulation concerns. At one point, the *Morning News* reviewed its staff assignments and improved its police coverage because it was an area where the *Times* sometimes prevailed. Competition over local sports coverage was particularly intense, with the *Times* and the *Morning News* engaged in a public back and forth battle over the number of reporters covering events, the number of photos and stories, and the extent of coverage, including women's volleyball and soccer.

The *Times* began using color so that it could compete more effectively, and the *Morning News* responded in kind. The two papers also compete for readers by producing features and special interest sections. In one case, the *Morning News* began a travel page soon after the *Times* started one. These are the equivalent of competitive responses to what the Merger Guidelines call "small but significant and nontransitory" increases **[**38]** in price or decreases in quality.

In addition to these concrete actions and reactions, the internal memoranda of the *Times* and the *Morning News* show a consistent obsession with each other as "the competition." These are too numerous to discuss further.

b. Advertiser Competition between the *Times* and the *Morning News*

In this case, there is only a small amount of evidence that the two local daily newspapers compete "directly" for advertisers. That is, no advertiser decides he will advertise either in the *Times* or in the *Morning News*, depending on who offers the better deal. Even the government's own expert, Kenneth Baseman, did not find any evidence of this sort of competition.¹² The primary reason that such direct competition is absent is that no regional advertiser who has customers throughout Northwest Arkansas, such as a car dealer, can reach all of Washington County without using both newspapers. Also, no purely local advertiser, such as a grocery store, can reach the majority of reader households in Fayetteville without using the *Times* or reach the majority of households in Springdale without using the *Morning News*.

[39]** Still, there is a great deal of evidence that these two papers compete "indirectly" for advertisers by means of what was called by some of the witnesses a "negative feedback loop," for want of a better term. The competition, although "indirect," is effective and pervasive. The "negative feedback loop" begins with the premise that local advertising is a critical part of what sells a local newspaper, just like the coverage of local sports or any other local news event. Apparently, many people buy newspapers to have access to advertisements and advertiser's promotions which they provide. If a paper is deficient in local advertising it will eventually lose readers. A loss of advertising revenue will also lead to a decline in the paper's ability to maintain its quality, which will also lead to a loss of readership. With the loss of readers, the paper will lose more advertisers, and then more readers, and so on until its demise. This is a "negative feedback loop."

[*1160] Therefore, both the *Morning News* and the *Times* have an incentive to keep the price of advertising low enough so that advertisers do not drop their ads, decrease their size, or decrease their frequency. Of course, this **[**40]** incentive would exist even in the absence of a competitive market, but the existence of a competitor means that a decline in advertising content due to high rates is much more likely to lead to a loss in readership to the competing paper. The loss of readership will then result in a further loss of advertising, and the negative feedback loop, which is often irreversible, has begun.

Another way in which competition exists between the *Times* and the *Morning News* is through the process of "benchmarking," whereby local advertisers compare the relative advertising value provided by each paper. Thus, the papers try to provide equal value to some extent, since neither paper wants to lose the good will and business of their advertisers by looking like a "rip off" in comparison to the other. The dynamic of benchmarking can exist

¹² However, the government did present solid evidence that the two papers competed directly for legal advertising on at least one occasion.

between products that are not in the same market, but the high degree of benchmarking that clearly exists in this market results from the close competitive relationship between the *Times* and the *Morning News*, which is so universally recognized in the local community.

There is one final avenue of advertising competition with respect to regional advertisers [**41] that merits discussion. While no regional advertisers can completely forego advertising in either the *Times* or the *Morning News*, they can place more of their limited advertising budget into the one newspaper that they feel gives them the better value.

Thus, in 1992, the *Times* was very concerned about losing regional advertisers because its prices were not competitive with the Springdale/Rogers combo buy.¹³ The *Times* also displayed a continuous concern over losing automobile advertising, and even offered a lower auto rate in 1994 to try to entice dealers; to use the *Times* rather than the *Morning News*. George Smith, the publisher of the *Times*, expressed concern to a fellow publisher that he had to win back his "rightful share" of advertising from one particular regional dealer, Lewis Auto. The owner of Lewis Auto, Tom Lewis, testified that he felt his dealership had benefitted from the advertising competition between the two papers.

[**42] Although the dynamics just described are somewhat theoretical, they do not strike the court as being particularly controversial, at least not from the testimony provided by those familiar with the industry. Moreover, these theories explain the high degree of time and energy that the *Times* and the *Morning News* put into monitoring and responding to the advertising efforts of each other. For instance, the *Times* was concerned that it got less Springdale ads than the *Morning News* got Fayetteville ads. The *Times* routinely compared its advertising rates and revenue with those of the *Morning News*. The *Morning News* also monitored the number of national ads that the *Times* received to make sure it did not get "scooped" on any national ads.

In 1993, when the *Times* learned that a Donrey paper in Fort Smith, Arkansas, was offering a coupon book of volume discounts for advertisers, it offered its own version in anticipation that the *Morning News* would follow suit. Two weeks later, when the *Times* perceived that advertisers preferred the coupons offered by the *Morning News*, it redesigned its own.

In 1992, the *Times* had its advertising staff contact [**43] local businesses that had placed ads in the *Morning News* to offer them a special "pick-up" rate to run the same ad in the *Times*. In 1994, the *Times* considered using the same strategy with regard to classified ads run in the *Morning News*.

If the "negative feedback loop," "benchmarking," and "rightful share" theories do not explain the above competitive conduct, then the alternative explanation would be that the *Times* and the *Morning News* were completely deluded about being in competition for advertising and that the efforts spent [*1161] monitoring this nonexistent competition were the futile and inefficient gestures of ignorant businessmen who did not even know their own market. The court considers this alternative unacceptable. Thus, the court is convinced that the two newspapers, do compete for advertising even though it may be difficult to quantify the competition statistically.

c. Numerical measurement of cross-elasticity of demand

In the face of this evidence, defendants contend that they decisively proved there is no cross-elasticity of demand between the *Times* and the *Morning News*, and, therefore, the products do not belong in the same market. [**44] They supposedly prove their point by having their expert, Thomas Overstreet, measure the amount of switching from one paper to another when one paper increases its rack prices or subscription rates. As the amount of the price increase was greater than five to ten percent, and as the degree of switching caused by the increase did not render the increase unprofitable, defendants conclude that there is no cross-elasticity of demand under the Merger Guidelines.

¹³ Prior to November 1994, the *Morning News* was actually two newspapers: the *Northwest Arkansas Morning News* based in Rogers and the *Springdale Morning News* based in Springdale. Both were owned by Donrey, which merged them.

While defendants correctly contend that courts do not usually allow the government to take positions that are inconsistent with the Merger Guidelines, the court does not believe the government has done so in this case. Steven A. Newborn & Virginia L. Snider, *The Growing Judicial Acceptance of the Merger Guidelines*, 60 Antitrust L.J. 849, 852 (1992). As explained above, the court believes that [HN9](#)¹⁴ the approaches to market definition endorsed by the Merger Guidelines and the case law are essentially consistent.¹⁴ This approach acknowledges that cross-elasticity of demand is nearly impossible to measure numerically in all cases and relies on a broad array of evidence and "practical indicia" to establish cross-elasticity. See e.g. [\[**45\] U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 995, \(11th Cir. 1993\)](#), cert. denied, U.S. __, 114 S. Ct. 2710, 129 L. Ed. 2d 837 (1994). The 1984 Merger Guidelines made the same point when they explained that the 5-10% test "is an analytical tool with which to analyze traditional types of probative evidence." 4Trade Reg. Rep. (CCH) P 13,103 at 20,552 (June 14, 1984). That is, the 5-10% test is not a rigid requirement that cross-elasticity be measured numerically.

Analyzing the independent probative value of Dr. Overstreet's calculation [\[**46\]](#) of the relationship, or the lack thereof, between price and consumer switching, the court concludes that this calculation fails to controvert the overwhelming evidence that cross-elasticity of demand exists. [United States v. Continental Can Co., 378 U.S. 441, 455, 84 S. Ct. 1738, 12 L. Ed. 2d 953 \(1964\)](#) ("that the demand for one [product] is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue"). Dr. Overstreet's approach was to attempt to apply the Merger Guidelines with blinders on which were designed to prevent him from seeing anything other than the reaction of the market to a slight price increase--if that didn't show a shift in customers, then there was simply no competition present. His calculation only applied that part of the Merger Guidelines, and he failed, refused or neglected to control for all sorts of other important variables.

He failed to measure or even consider the loss of advertising profits that will be caused by the loss of readership. He failed to measure the fact that price increases were offset by quality increases. He failed to take into account the expert [\[**47\]](#) testimony that price, as long as it is in the range one expects to pay for newspapers, is an almost insignificant factor in one's choice of newspaper. See [Times Mirror, 274 F. Supp. at 615](#) (placing newspapers in same market although "differences between the price raises of the Times and the Sun did not produce a significant change in circulation") (*citing* [Continental Can, supra](#)). Also, defendants' expert has no special experience in the newspaper industry [\[*1162\]](#) or in Northwest Arkansas. The court could just as easily have performed Dr. Overstreet's simplistic calculations.

During questioning by the court, Dr. Overstreet seemed to agree that if his approach had been used in the famous and infamous, in Arkansas at least, *Democrat vs. Gazette* newspaper war that destroyed the then Gannett owned *Gazette* which advertised that it was the oldest newspaper west of the Mississippi, it would have shown that these newspapers were not competitors, at least until some point shortly before the *Gazette* was forced out of business. That was true because, until that time each paper had a loyal group of readers and advertisers who wouldn't switch until the *Democrat* succeeded in driving [\[**48\]](#) the *Gazette* out of business. He seemed to agree with the court's statement that, like the bumblebee that can't fly, Walter Hussman didn't know that he wasn't a competitor so he kept competing until he was competing-- and won.

Finally, defendants' theory leaves unexplained why everyone involved with these newspapers thought they were competing and made numerous business decisions and took innumerable competitive actions as if they were.

d. Competition between the *Daily Record* and the *Morning News*

Much of the evidence that indicates active competition between the *Times* and the *Morning News* in Washington County shows the same active competition, perhaps to a slightly lesser degree, between the *Daily Record* and the *Morning News* in Benton County. The *Daily Record*'s daily circulation in Benton County is 9,696; while the *Morning*

¹⁴ It is obviously good public policy that the guidelines be interpreted as consistently as possible with the case law which is binding. Steven A. Newborn & Virginia L. Snider, *The Growing Judicial Acceptance of the Merger Guidelines*, 60 Antitrust L.J. 849, 851 (1992) ("if the Guidelines and the bench diverge, merger law would be forced into a morass of nonmerger analysis--a possibility as attractive as becoming involved in a land war in Asia").

News has daily circulation in Benton County of 17,350. In the interest of brevity, the court will not detail the remaining evidence.

e. The *Times* and the *Daily Record* belong in the same market

The evidence clearly shows strong competition for readers and advertisers in Washington County between the **[**49]** *Times* and the *Morning News*, and also between the *Daily Record* and the *Morning News* in Benton County. However, this leaves the question of whether the *Times* and the *Daily Record* belong in the same market given the fact that they have scarce competition for readership and only limited competition for advertisers, as even Dr. Picard, private plaintiffs' own expert, recognized. Still, the court concludes that the *Times* and the *Daily Record* belong in the Northwest Arkansas daily newspaper market, along with the *Morning News*.

It may seem strange that the *Times* and the *Daily Record* are in the same market even though they do not vigorously compete, but the fact remains that, as a practical matter, the common ownership of the *Times* and the *Morning News* would greatly affect competitive forces over the entire two-county area. It must be remembered that **HN10**[↑] the purpose of Section 7 of the Clayton Act is to prevent the undue aggregation of market power. Market definition is merely a tool in that quest, not the goal.

It is initially important to keep in mind that "market definition is not a jurisdictional prerequisite, or an issue having its own **[**50]** significance under the statute; it is merely an aid for determining whether market power exists." L. Sullivan, *Antitrust* 41 (1977).

General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 805 (8th Cir. 1987); Merger Guidelines § 0.2.

Equally important, **HN11**[↑] "the determination [of a relevant market] is essentially one of fact, turning on the unique market situation of each case." H. J., Inc. v. International Telephone & Telegraph Corp., 867 F.2d 1531, 1537 (8th Cir. 1989). (citations omitted). The notion that market definition is a pragmatic, factual exercise is a theme that runs throughout the cases. See e.g. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 2082, 119 L. Ed. 2d 265 (1992) ("In determining the existence of market power . . . , this Court has examined closely the economic reality of the market at issue."); Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) (courts should take a "pragmatic, factual approach to the definition **[**51]** of the relevant market and not a formal, legalistic one" so that the definition of the relevant market will "correspond to the commercial realities" of the industry and be economically significant") (citations omitted); General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 805 (8th Cir. 1987) ("In defining the relevant part of commerce for any product, the reality of the marketplace must serve as the lodestar") (citation omitted). Similarly, the Merger Guidelines provide that since "it is not possible to remove the exercise of judgment from the evaluation of mergers . . . the Agency will apply the standards of the Merger Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger." Merger Guidelines § 0.

The fact is that this acquisition would affect market power over the entire two-county area. As will be explained, it would effect the viability of the *Daily Record*. It would alter pricing and strategy decisions over the two-county area. It would deter one potential competitor from entering the market. These are practical realities involving market power and competition, no matter how one characterizes the current relationship between the *Times* and the *Daily Record*. It makes no sense to say, as a matter of law, that the market does not include both counties.

The **[**52]** court begins with the indisputable fact that Northwest Arkansas is increasingly integrated--socially, politically and economically. More than any other product market, a local daily newspaper market reflects the, underlying socioeconomic base of its geographic market. For this reason, the traditional indices of a newspaper market include the Metropolitan Statistical Area (MSA), Audit Bureau of Circulations Retail Trading Zone, County, ABC City Zone, and Newspaper Designated Market Area. MSA's, which are officially designated by the U.S. Office of Management and Budget, are economic and social regions in which a nucleus city or cities and adjacent communities have achieved a significant degree of economic and social integration. ABC Retail Trading Zones, which are determined jointly by local newspapers and by the Audit Bureau of Circulations, are the area over which businesses in the local commercial center draw customers from outlying areas. County lines are politically defined

and only sometimes useful in defining the newspaper market. ABC City Zones, which are done by the Audit Bureau of Circulations, include the central portion of a city and its contiguous suburbs. Finally, the [**53] Newspaper Market Designated Area is the geographic market area defined by a newspaper when its market does not correspond to any of the traditional measures. It is defined as the primary commercial and residential region in which the newspaper operates.

These measures may be more or less useful in a particular case, depending on the circumstances of the market. The court does not exclusively rely on any one of them. They are listed simply to make the point that the local daily newspaper market tends to reflect the underlying social, economic and political development of the locale. As such, it makes a great deal of sense to refer to a Northwest Arkansas market. Moreover, the fact is undisputed that the social, economic and political integration of the Northwest Arkansas region will continue apace. United States v. General Dynamics Corp., 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974), quoting, Brown Shoe, 370 U.S. at 322 n. 38 ("only a further examination of the particular market--its structure, history and probable future--can provide the appropriate setting for judging the probable anticompetitive effect of the merger") (emphasis supplied).

The court now [**54] turns to the fact that every newspaper company involved in Northwest Arkansas viewed the local daily newspaper market as consisting of Washington and Benton Counties. Donrey and the *Morning News* clearly viewed the market that way and developed a product that vigorously competed for readership in every town in the two-county area. As is clear from the paper's own masthead, it is the *Morning News of Northwest Arkansas*.

The same goes for the *Northwest Arkansas Times*. Thomson viewed the two-county area as a single market that could be dominated by a single paper, which was its stated goal. To achieve that goal, Thomson considered [*1164] purchasing the *Morning News* and the *Daily Record*. It also conceived a six month program to extend its circulation in Rogers, Arkansas, in Benton County. The plan was abandoned after a few weeks due to a lack of success, but a failure to succeed at competing does not mean that competition does not exist.

CPI also recognizes that the *Daily Record* operates in a two-county market, although its main circulation appeal is in Benton County, as reflected by its masthead, the *Benton County Daily Record*. CPI realized it [**55] operated in a two-county market and thus also coveted acquiring a second paper in that market, i.e., the *Times*.

Finally, WEHCO and the *Arkansas Democrat-Gazette*, the statewide paper published in Little Rock, is strongly considering a zoned edition of the paper for twelve counties in Northwest Arkansas aimed primarily at the two-county market encompassed by Washington and Benton Counties. WEHCO clearly conceives of the market as primarily a two-county market, and has spent a great deal of time and money laying the groundwork for a possible zoned edition. The undisputed testimony is that, if NAT'S purchase of the *Times* is allowed to stand, WEHCO is much more unlikely to enter the market.

In addition to the clear views of the market participants, the nature of the readership market is such that a local daily paper can be targeted to a single county (the *Daily Record*) or to both counties (the *Morning News*), but the success of all three remaining local newspapers will be affected by their ability to provide regional coverage that satisfies the regional interests of a regional audience, no matter what section of that audience is targeted. In recognition of this [**56] fact, the *Times* and the *Daily Record* have a news and advertising sharing agreement, whereby the *Times* provides the *Daily Record* with Washington County news and advertising, and the *Daily Record* does the same for the *Times* with Benton County.

HN12[] This similarity of product is extremely important in defining the market, and thus the *Times* and the *Daily Record* should both be included in the product market because both papers are poised to become truly regional papers. Thus, there is a great deal of so-called "cross-elasticity of supply" among local daily newspapers in Northwest Arkansas. High cross-elasticity of supply exists when existing companies have the ability to alter their facilities to produce the defendant's product in response to monopolistic price increases or quality reductions. 3 Julian O. von Kalinowski, *Antitrust Laws & Trade Regulation* § 18.02[1](c) (1994). Using cross-elasticity of supply to enlarge the product market is accepted by the courts, the Department of Justice, the Federal Trade Commission, and economists generally. *Id.* at n. 59.

In this case, all three local daily papers are poised to become increasingly regional should **[**57]** the competition falter, and so long as the market does not become too concentrated. See also [Jim Walter Corp. v. Federal Trade Comm'n, 625 F.2d 676, 682-83 \(5th Cir. 1980\)](#) (geographic market can be expanded to include regions that do not currently have sales in each other's area, if "regional markets are so interrelated that what happens in one has a direct effect in the others and none is so separate that the buyers and sellers are not concerned with prices and supply and demand in the others") quoting [United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 600 \(S.D.N.Y. 1958\)](#); [RSR Corp. v. FTC, 602 F.2d 1317, 1322-24 \(9th Cir. 1979\), cert. denied, 445 U.S. 927, 100 S. Ct. 1313, 63 L. Ed. 2d 760 \(1980\); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 596 \(S.D.N.Y. 1958\).](#)

Turning to the advertising market, there is already some competition between the *Times* and the *Daily Record* in the market for regional advertisers, such as automobile dealers, furniture stores, mall stores, and department stores. Even if the *Times* and the *Daily Record* do not compete for the same readers, the fact remains that they compete for the same regional advertisers^[.] **[**58]** and that an advertiser will spend more money in the newspaper that provides it with the better value.

This regional advertising market, which is crucial to all three papers' successes, would undoubtedly be affected by any combination **[*1165]** of the *Times* and the *Morning News*. Such a combination would have a dominant market share and would become a "must buy" for regional advertisers. Thus, any monopolistic increase in the combination's advertising rates would soak up all the available advertising revenue and leave the *Daily Record* with less.

The existence of the "must buy" phenomenon was testified to by a range of experts and industry personnel, including Walter E. Hussman, the owner of the *Democrat-Gazette* who testified at length about the Little Rock newspaper war between the *Democrat* and the *Gazette*. He explained that, at one point, the *Gazette*, which had a dominant market share, raised its advertising prices. The *Democrat* expected to get more advertising as a result, but just the opposite occurred. Because of the circumstances and the respective circulations of the two papers at the time, advertisers at least thought that they had no choice but to advertise **[**59]** in the *Gazette*, and, since that took more of the advertisers' dollars, there were fewer dollars left to spend on advertising in the *Democrat*.

Moreover, the evidence established that the parties to this suit recognize the existence of a "must buy" phenomenon. The advertising managers at the *Morning News*, after the November 1, 1994, merger, decided to keep advertising rates below other similarly sized newspapers in order "to get the product established as the main advertising buy in Northwest Arkansas." Then, "when we raise rates, we want our advertisers to cut their lineage in the *Times* and the *Daily Record*, not the *News*." (Pl. Ex. 44 at DONR-10702). See [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 600, 73 S. Ct. 872, 97 L. Ed. 1277 \(1953\)](#) (since plaintiff's competitor was "the 'dominant' newspaper in New Orleans; insertions in that paper were deemed essential by advertisers desiring to cover the local market.").

With less regional advertising, the *Daily Record* loses revenue and becomes a less attractive newspaper. Thus, common ownership of the *Times* and the *Morning News* would undoubtedly impact this regional advertising market, which is **[**60]** clearly a critical part of newspaper revenue.

For all these reasons, the court considers the local daily newspaper market to be Northwest Arkansas.¹⁵ Having set out the boundaries of the relevant market, the court will now explain why it believes that both private plaintiffs

¹⁵ Even if it were to be found that the relevant geographic market was the Fayetteville Metropolitan Area, as the government defines it, there would still clearly be a violation of [Section 7](#) because the *Times* and the *Morning News* compete in that area, without question. Thus, the result would be the same with the possible exception of available remedies. If such a finding resulted in the remedy of rescission not being available, the court would employ what it believes to be the second best remedy under the facts of this case--divestiture. However, as Shearin is an advertiser in the *Morning News*, it is a consumer in the Fayetteville market and rescission would still be available on the basis of its standing in that market. See a discussion of these issues under Section X of this opinion.

have demonstrated a threat of antitrust injury, after which the court will consider the merits of whether this acquisition may substantially lessen competition in the relevant market.

[**61]

VII. ANTITRUST INJURY

To have standing to challenge NAT's acquisition of the *Times*, private plaintiffs must demonstrate that the acquisition threatens to injure them, and that this injury would be 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, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977) (emphasis in original). The court concludes that both private plaintiffs have demonstrated a threat of antitrust injury.

a. CPI's Antitrust Injury

HN13 [↑] In order to show a threat of antitrust injury, a competitor plaintiff must show that the challenged acquisition threatens to cause injury or "loss of profits from practices forbidden by the antitrust laws." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S. Ct. 484, 485, 93 L. Ed. 2d 427 (1986), 107 S. Ct. at 492; *Pacific Express, [*1166] Inc. v. United Airlines, Inc.*, 959 F.2d 814, 818 (9th Cir. 1992) ("In order to demonstrate that it suffered antitrust injury, [a competitor plaintiff] must show that its injury was caused [**62] by anticompetitive or predatory aspects of [defendant's] conduct") cert. denied, ___ U.S. ___, 113 S. Ct. 814, 121 L. Ed. 2d 686 (1992); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100-102 (5th Cir. 1988) (competitor plaintiff lacks standing to challenge an acquisition unless it can prove a threat of anticompetitive or "predatory behavior"), cert. denied, 486 U.S. 1023, 108 S. Ct. 1996, 100 L. Ed. 2d 228 (1988).

As the Fifth Circuit noted in *Phototron, supra*, the antitrust injury requirement as phrased in "Cargill" has imposed significant barriers to competitor attempts to enjoin merger transactions." *842 F.2d at 102*. These barriers to competitor plaintiffs were not raised by accident. Many mergers have valuable pro-competitive effects, and a rival has every incentive to challenge such pro-competitive mergers simply because they are pro-competitive. Competitors are threatened by legitimate competition, and thus have an incentive to believe that rivals are violating antitrust laws and to use an antitrust suit to delay or moderate competition. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S. Ct. 1884, 1895, 109 L. Ed. I^{**631} 2d 333 (1990) (ARCO); William H. Page and Roger D. Blair, *Controlling the Competitor plaintiff in Antitrust Litigation*, 91 Mich. L. Rev. 111 (1992); II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* P 373 (rev. ed. 1995). In fact, the risk posed by competitor suits is so great that in *Cargill*, the Department of Justice argued, that the court should adopt a *per se* rule against competitor standing to enjoin the merger of rivals. *Cargill*, 107 S. Ct. at 495. The court declined to take such a radical step, but its final ruling did not leave competitor plaintiffs a very good chance of having standing to enjoin mergers. However, this is one of those rare cases where the court believes that a competitor plaintiff has successfully proved a threat of antitrust injury.

In this case, there are various threats to CPI's profits that are caused by anticompetitive aspects of the transaction. The court has already described the "must buy" phenomenon, whereby the *Times* and the *Morning News* will have such a dominant market share that any monopolistic increase in the combination's advertising rates would soak up all the available advertising revenue. This "must buy" phenomenon, [*^{**64}] under which a price increase can actually injure competitors, is something which does not exist in most industries. While always harmful to consumers, monopolistic price increases usually benefit surviving competitors, who are able to expand their market share. Thus, in the typical situation, a price increase by the dominant market firm does not cause an antitrust injury. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585, n. 8, 106 S. Ct. 1348, 1355, n. 8, 89 L. Ed. 2d 538 (1986) (horizontal price-fixing agreement can never harm a non-participating rival, who should actually benefit from the increased prices).

But the unique circumstances of the newspaper industry requires a different analysis. A monopolistic price increase by the *Morning News* and the *Times* would harm not only readers and advertisers, but also competitors like the

Daily Record. That harm to the *Daily Record* would not be caused by increased efficiency due to the acquisition, but rather due to its monopolistic practices made possible by the acquisition. Cf. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S. Ct. 484, 495, 93 L. Ed. 2d 427 (1986) [**65] (no antitrust injury to competitor plaintiff who was threatened by lost profits due to lower product prices allowed by the challenged merger).

A second source of antitrust injury concerns the possible termination of a news and advertising sharing agreement that is currently in effect between the *Times* and the *Daily Record*. The agreement was reached in 1993 for the purpose of making the *Times* and the *Daily Record* more competitive against the Donrey papers in Springdale and Rogers, which were already sharing news and advertising prior to their merger into the *Morning News*. But if the *Times* and the *Morning News* come under common ownership, the *Times* will no longer have any [*1167] incentive to help, the *Daily Record* compete against the *Morning News*. The *Times* will thus have an anticompetitive incentive to terminate its arrangement with the *Daily Record*, even if the *Times* becomes less competitive with the *Morning News* as a result. The court realizes that this news and ad sharing agreement is terminable-at-will, but the fact remains that NAT's acquisition of the *Times* creates an anticompetitive reason to terminate the agreement where none [**66] existed before. This creates the requisite threat of antitrust injury both to newspaper readers throughout Northwest Arkansas and to the *Daily Record*.

Before leaving the subject of CPI's antitrust injury, the court specifically rejects CPI's argument that it is entitled to a presumption of antitrust injury simply because the challenged acquisition is presumptively illegal using market share data. CPI argued that the court may make this presumption under [R. C. Bigelow, Inc. v. Unilever, 867 F.2d 102, 111 \(2d Cir.\)](#), cert. denied, 493 U.S. 815, 110 S. Ct. 64, 107 L. Ed. 2d 31 (1989). To the extent that *Bigelow* stands for this proposition, it is rejected as contrary to Supreme Court precedent.

HN14 [↑] No violation of the antitrust laws, even if *per se* or presumptive, can ever create a presumption of antitrust injury. This point was made clear by the Supreme Court in [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 \(1990\)](#) (ARCO). In ARCO, the Court held that even a retail price maintenance scheme, which is a *per se* violation of the antitrust laws, does not create any kind of presumption of antitrust injury to competitors. [**67] Of particular relevance to CPI's contentions in this case, the Court expressly cited *Cargill* for the proposition that even when a merger is assumed to be illegal based on market share data, that merger does not create a presumption of antitrust injury to competitors. ARCO, 110 S. Ct. at 1892, *citing Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986).¹⁶

[**68] b. Shearin's antitrust injury

HN15 [↑] Because protecting consumers from monopoly prices is the central concern of **antitrust law**, consumers have usually been the preferred plaintiff in private antitrust litigation. See II Phillip E. Areeda & Herbert Hovenkamp, **Antitrust Law** P 370 (rev. ed. 1995). In this case, plaintiff Shearin alleges in the complaint that a possible combination of the *Times* and the *Morning News* will raise advertising rates as a result of their dominant market position. Thus, Shearin alleges that it faces a threat of monopoly prices for advertising in the *Morning News*. The reality of this threat is that advertising rates are much lower in Northwest Arkansas than in comparably sized local

¹⁶ Actually, this court believes that even *Bigelow* required some proof that there was a threat of predatory or anticompetitive conduct. In *Bigelow*, a merger was presumptively illegal based on market share data, but on summary judgment, the district court held there was no evidence of a threat of antitrust injury "absent some evidence of past instances of predatory pricing or present intent to engage in predatory behavior following the merger...." [Bigelow, 867 F.2d at 105](#). The court of appeals reversed since Lipton's 84% post-merger market share "threatened to be decisive," giving Lipton the ability to engage in predatory conduct and "eliminate competition in that market by, *inter alia*, reducing [plaintiff's] access to supermarket shelf space for its products." [Id. at 111](#). *Bigelow* has been criticized for holding that a threat of predation may be uncritically presumed from market share data. Facts other than market share must be known before a market can realistically be judged susceptible to predation. II Phillip E. Areeda & Herbert Hovenkamp **Antitrust Law** P 373d2, 373d4 (Rev. ed. 1995); William H. Page and Roger D. Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, [91 Mich. L. Rev. 111 \(1992\)](#). *Cargill*, 107 S. Ct. at 494 n. 15 required a realistic threat of predation, and the court finds that facts indicating such a realistic threat are present in this case.

daily newspaper markets. As the threat of raised prices due to market power is primary concern of [Section 7](#), the court believes that Shearin has demonstrated antitrust injury.

II. COMPETITION MAY BE SUBSTANTIALLY LESSENED

HN16[¹⁶] A combination is presumed to violate [Section 7](#) if the market is sufficiently concentrated and the challenged acquisition would significantly enhance concentration. The seminal case on this matter is [United States v. Philadelphia Nat'l Bank](#), 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963), where the Court adopted a presumptive standard of illegality for horizontal mergers based on concentration ratios and market shares.

Intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. . . . Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect....

Id., 374 U.S. at 363. In *Philadelphia Nat'l Bank*, the Supreme Court held presumptively illegal a merger resulting in a single firm controlling 30% of a market in which four firms had 78% of the sales. In [Times Mirror](#), 274 F. Supp. at [I**701](#) 622, the court found a prima facie violation of the Clayton Act where the acquiring newspaper's share of total weekday circulation climbed from 10.6% to 54.8%. The exact numerical threshold that creates the presumption is a subject of debate. For a table of cases, and the market data involved in each case, see IV Phillip E. Areeda & Donald F. Turner, [Antitrust Law](#) P 909 pp. 31-51 (1980), and 3 Julian O. von Kalinowski, [Antitrust Laws & Trade Regulation](#) §§ 26.02[2] n. 62, 26.02[3] n. 111 (1994).

A review of the case law reveals that the market shares, concentration ratios, and Herfindahl-Hirschman Indexes are so high in this case that the acquisition is clearly presumptively anticompetitive. Based on circulation figures, the *Morning News* has 59% of the market, the *Times* has 25.4%, and the *Daily Record* has 15.7%. Based on advertising revenues, the *Morning News* has 57% of the market, the *Times* has 31%, and the *Daily Record* has 13%. Thus, the combination of Stephens-owned newspapers in Northwest Arkansas will have in excess of 84% of circulation and 88% of advertising revenue.¹⁷ Even if the *Democrat-Gazette* came out with a zoned edition, and achieved [**71](#) the circulation and advertising goals considered realistic in internal prelitigation memorandum, the market would still be extremely concentrated.

[**72](#) At this point, defendants have an opportunity to show why the acquisition will not be anticompetitive and why the presumption of anticompetitive effects should not apply. [United States v. Baker Hughes, Inc.](#), 285 U.S. App. D.C. 222, 908 F.2d 981, 982-83 (D.C. Cir. 1990). Defendants commonly argue, as they have in this case, that the barriers to entry in a certain market are so low, that if a market participant behaves monopolistically by raising prices or reducing output, new competitors will enter the market, and the market will correct itself. [908 F.2d at 987](#). While normally a valid argument, this contention is specious in the context of the local daily newspaper industry. The barriers to entry are universally recognized as formidable, as is supported by the fact that in the entire nation

¹⁷ While the court was impressed with the sincerity and honesty of Mr. Jack Stephens and every other witness from his organization who testified, the court is still left with the gnawing feeling that it is inevitable that someday, maybe sooner rather than later, the newspapers will be operated as one and the *Northwest Arkansas Times* will disappear from the scene just as two other venerable hometown papers, the *Springdale News* and the *Rogers Daily News* have disappeared under the Stephens family ownership. It simply makes economic sense, and humans, being the type of animal they are, almost always act in their own best interests. There appears to be little dispute but that the *Times* simply was not worth, as a stand-alone newspaper, what Jack Stephens paid for it. It is worth more if it is operated in conjunction with other Stephens owned papers in the area, so the court is certain that, sooner or later, that will happen irrespective of how sincere Mr. Stephens' present protestations to the contrary are.

every major city newspaper market is a monopoly except for approximately eight. Only WEHCO faces reasonably low barriers to entry with a zoned edition of the *Democrat-Gazette*, and as the court explained above, the market is so concentrated that WEHCO's entry would not significantly dilute the market. [*1169] Moreover, entry by WEHCO becomes extremely unlikely if this acquisition is allowed to stand [**73] because one combination of newspapers will have a dominant market share in the region.

Defendants also argue that it is improper to aggregate the market shares of the *Times and the Morning News*, because NAT and Donrey are separate entities and do not share a common parent. The court does not consider this argument to be tenable.

In the first place, both NAT and Donrey have virtually complete overlap of ownership by various members of the Stephens family. Donrey is ninety-nine percent (99%) owned by Stephens Group, Inc. (SGI), and SGI is owned entirely by Stephens family trusts.¹⁸ The same Stephens family trusts also own ninety-five percent (95%) of NAT's

¹⁸ The Class A Common Stock of SGI, which is the voting stock, is owned by four Stephens family trusts as follows.

49.5%

J.T. Stephens Trust One

49.5%

Bess Stephens Trust

0.5%

Warren A. Stephens Trust

0.5%

W.R. Stephens Trust

The Class B. Common Stock of SGI, which is non-voting stock, is also owned by a number of Stephens Family trusts as follows.

40.0%

J.T. Stephens Trust One

39.1%

Bess Stephens Trust

0.9%

Bess Stephens Individually

9.975%

Warren A. Stephens Trust

0.025%

Warren A. Stephens Trust One

3.33%

W.R. Stephens, Jr. Rev. Trust

3.33%

Pamela Stephens Rose Trust One

stock.¹⁹ **[**75]** At the current time, Jack Stephens is chairman of the board of SGI, Donrey and NAT, and his executive assistant, Scott Ford, is NAT's president. NAT has submitted proposed changes in ownership and management for the express purpose of persuading the court to let the Stephens family retain ownership of the Times with a slightly different structure. Under this proposal, various members of the Stephens family would still own ninety-five percent (95%) of NAT's stock, but these same family members would only own 20% of **[**74]** SGI and Donrey.²⁰ In addition, Warren A. Stephens would replace his father, Jack Stephens, as NAT's chairman, and George Smith, the current publisher of the *Times*, would replace Scott Ford as president.

3.33%

Elizabeth Ann Stephens Campbell Rev. Trust One

¹⁹ NAT is a limited liability corporation. Thus, there is only one class of NAT stock, and it is voting stock.

12.075%

J.T. Stephens Trust One

12.075%

Bess Stephens Trust

36.675%

Warren A. Stephens Trust

11.892%

W.R. Stephens, Jr. Rev. Trust

11.892%

Pamela Stephens Rose Trust One

11.892%

Elizabeth Ann Stephens Campbell Rev. Trust

²⁰ The proposed ownership structure of NAT is as follows:

47%

Warren A. Stephens Trust

Even with the proposed changes, the Stephens family members have little, if any, incentive to compete aggressively against themselves. It is apparent to the court, and the Stephens can be proud, that the bonds of filial loyalty are well developed in this family which regularly makes joint investments together amounting to millions upon millions of dollars. As Warren Stephens testified at trial, the Stephens' family investment philosophy is to take a long term approach and to "think in terms of generations . . . in terms of building value for--for our family."

The Stephens family investing is marked by a cooperative and trusting spirit that one would not expect to find in a competitive business situation, as one can see from the way in which NAT acquired the *Times*. SGI dividends were used by the Stephens family to purchase NAT. The exact proportions of NAT ownership [**76] was a trifling matter that was to be determined by accountants. Jack Stephens and his sister, Bess Stephens, provided NAT with thirteen million dollars in loans, which were reflected in promissory notes that were both unsigned and unsecured. With regard to the family trusts themselves, members of the Stephens family serve on each other's trusts as trustees and vote each other's stock in the event of an incapacity.

Not only the bonds of filial affection and loyalty, but also clear economic self-interest, [*1170] will deter Warren A. Stephens and his cousins, the 95% owners of NAT, from vigorously competing with the *Morning News*, *Donrey*, and *SGI*.²¹ In addition to the 20% of SGI non-voting stock held by Warren A. Stephens and his cousins, the Stephens children know they will one day inherit the rest of the stock of SGI from their parents, Jack Stephens and Bess Stephens. In fact, the elder Stephens, for tax reasons, have a clear intent to pass assets from themselves to their children while they are still alive.

[**77] Thus, the Stephens children, as owners of the *Times*, will have little, if any, economic incentive to cause the *Times* to compete in the market place at the expense of their current and future asset, the *Morning News*. Both newspapers are part of the family's "investment body" and human nature is such, and the motive of self preservation is so strong, that one doesn't allow one part of that body to harm another part, at least not for long.

In a competitive situation, the *Times* might attempt to take readers away from the *Morning News* by, for example, hiring more experienced reporters at higher salaries or spending more money on color printing. The payoff would be an increase in the *Times*' circulation and value. In the current non-competitive situation, these investments would never be made, as SGI and the Stephens family would bear not only the cost of improving the *Times*, but also the decrease in the *Morning News*' value. The corresponding increase in the value of the *Times* would no longer be such an attractive payoff.

Conversely, in a competitive situation, the *Morning News* would have incentive to make gains at the expense of the *Times*, but [**78] in the current situation, the elder Stephens, as owners of the *Donrey* paper, would have little incentive to take money from the pockets of their children, which they will inherit in any case. This situation will

16%

W.R. Stephens, Jr. Rev. Trust

16%

Pamela Stephens Rose Trust One

16%

Elizabeth Ann Stephens Campbell Rev. Trust

²¹ The remaining 5% of the *Times* is owned by members of a "special investments group" comprised of SGI employees hand-picked by Jackson Stephens to participate in the investment.

certainly not be helped any by the thirteen million dollars in unsecured loans to NAT which should reduce the elder Stephens' desire to see the *Times* go out of business, something a competitor would normally desire.

Even to the extent that the Stephens family does not directly interfere with management decisions or share information, the fact remains that the employees of Donrey and NAT know who their "bosses" are, and, again, it is simply human nature to try to please the persons who have control over the employees' fate. In that respect, after having seen and heard Jack Stephens testify, and after hearing and seeing evidence in respect to how the Stephens family does business, and apparently always has, the court is convinced that everyone in that exceptionally well run organization with wide ranging business interests knows who's "boss." In fact, the court suspects that Jack Stephens is such a strong personality that his wishes are usually carried out without the [**79] necessity of direct orders from him. "They" just intuitively know what he wants and they do it.

If the responsible person in any of the separate and supposedly independent family businesses get the message, in whatever form, as to his desire in respect to that business, it's done, as evidenced by Donrey's dropping the *Times* acquisition like a hot potato simply because one of Stephens' employees, as he exited the airplane in Fort Smith, told a Donrey officer that the family, not Donrey, would buy the *Times*. The word was that Stephens wanted it that way, so that's the way it would be.

Even in the time since the litigation commenced, George Smith, the publisher of the *Times*, has testified that, despite public proclamations to the contrary, he did not really intend to become the dominant newspaper in Northwest Arkansas. Rather, he had decided that the best business decision would be to focus exclusively on his "home turf" in Fayetteville. All it would take is a similar realization by the publishers at the *Morning News*, that they should give up their regional aspirations and focus on their "home turf" in Springdale and Rogers, and you effectively have a market division [**80] agreement.

In sum, it is clear to the court that the various members of the Stephens family do [*1171] not pursue separate interests or compete against each other in any way. NAT and Donrey may as a technical matter be separate legal entities, but in practical effect, NAT's acquisition of the *Times* may substantially lessen competition between the *Times* and the *Morning News* and in the Northwest Arkansas local daily newspaper market. This, is all that is required to find violation of [Section 7](#).

In a previous ruling, the court framed the issue slightly differently. In [*Community Publishers, Inc. v. Donrey Corp., 882 F. Supp. 138 \(W.D. Ark. 1995\)*](#), the court held that the question was whether Donrey indirectly acquired the *Times* when it was purchased by NAT. While the court still believes the reasoning and precedent cited in support of that holding applies to this case, it seems more elegant to simply ask whether NAT's acquisition of the *Times* may substantially lessen competition, which is all that is required under [Section 7](#). As explained above, the answer is "yes." The court also finds that Donrey indirectly acquired the *Times*.

Although NAT and Donrey are technically [**81] separate entities, the court previously examined cases where, "in varying contexts, the courts have refused to take a formalistic approach to corporate structures in order to effectively implement the antitrust laws." [*Id. at 140-41*](#). In the subsequent-course of litigation, the parties have brought the court's attention to further cases that support its prior ruling, and the court will discuss these cases given the novel nature of this question.

Defendants argue that, as a matter of law, Donrey has not indirectly acquired the *Times*, and NAT'S acquisition will not substantially lessen competition, because NAT and Donrey are not owned by a common parent or some single person or firm. The court considers [*Julius Nasso Concrete Corp. v. DIC Concrete Corp., 467 F. Supp. 1016 \(S.D.N.Y. 1979\)*](#) to be directly contrary to this argument. In *Julius Nasso*, a construction materials firm was acquired by a joint venture of three construction companies and/or by "individuals said to be in control of the joint venture." [*Id. at 1018*](#). In either case, the court found that the case was cognizable under [Section 7](#) and denied a motion to dismiss. As in this case, if the ownership was traced [**82] back far enough, a cluster of non-competing shareholders, none with majority status, would be found.

Defendants also argue that there is no precedent for aggregating the shares of stock held by the Stephens family, and yet in [American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 392 \(S.D.N.Y. 1957\)](#), aff'd, [259 F.2d 524 \(2d Cir. 1958\)](#), the court clearly thought it appropriate to do so. In *American Crystal*, the court found it necessary in a [Section 7](#) action to calculate defendant's percentage of stock ownership in a competitor, and so included shares owned by defendant's chairman of the board and his "immediate family and other persons likely to accept his advice." *Id.* at 392.

There is also a group of cases arising under [Section 1](#) of the Sherman Act, where the court determined that two or more legally separate and distinct entities are not distinct for purposes of [antitrust law](#) if they are not "independent sources of economic power . . . pursuing separate interests." [Copperweld v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 \(1984\)](#). While the specific holding of *Copperweld* is that a parent cannot conspire with [**83](#) a subsidiary, "the thrust of the holding is that economic reality, not corporate form, should control the decision of whether related entities can conspire." [City of Mt. Pleasant, Iowa v. Associated Elec. Co-op, 838 F.2d 268, 275 \(8th Cir. 1988\)](#). Moreover, "the logic of *Copperweld* reaches beyond its bare result, and it is the reasoning of the Court, not just the particular facts before it, that must guide our determination." [Id. at 274](#).

In *Mount Pleasant*, the Eighth Circuit held that the individual cooperatives making up a rural electric cooperative association could not have conspired under [Section 1](#), as a matter of law. In words that could just as easily apply to this case, the court held that "the cooperative organization is a single enterprise pursuing a common goal" and that "there is no evidence that any defendant has ever pursued interests antithetical to those of [*1172](#) the cooperative as a whole." [Id. at 276](#). The court also commented that "even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent* sources of that power." [Id. at 277](#) (emphasis in original). [**84](#) As in this case, the Stephens family is a cooperative venture where the individual members never pursue antithetical interests, and where the spoils of economic power may be divided up this way and that, but where it cannot reasonably be said they are independent sources of power.

Similarly, the Court of Appeals for the Fifth Circuit disregarded corporate formalities in [Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316, 1317 \(5th Cir. 1984\)](#), where the court described the two defendant corporations as follows:

Production Specialties and Gas Lift were separately incorporated and commonly owned by three men, two of whom owned 30 percent of each corporation and one of whom owned the remaining 40 percent of each corporation. All three men served as directors and officers of each corporation.

As in this case, no single shareholder had majority status in even one corporation, and yet both corporations were found to be under common control such that they could not legally conspire.

Finally, the parties have briefed in detail a line of cases where it is held that when a single firm is a minority stockholder in a competitor, it may substantially lessen [**85](#) competition under [Section 7](#). See e.g. [United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057 \(1957\)](#); [American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 392 \(S.D.N.Y. 1957\)](#), aff'd, [259 F.2d 524 \(2d Cir. 1958\)](#). In such cases, a single entity has control over at least one firm and then substantial minority ownership of a competitor. Such cases differ dramatically from the facts of this case, where no single member of the Stephens family has control over either NAT or Donrey. However, to the extent that these minority ownership cases provide guidance in this case, it is that a firm need not exercise technical, legal control over a corporate competitor in order to lessen competition. Evidence that the minority stock ownership allows one firm to control the other and may substantially reduce competition will suffice. Usually, this will be evidence of actual control or intent to control by the minority shareholder.

In this case, to the extent that it is analogous to the minority ownership cases, the evidence that the overlapping minority ownership of NAT and Donrey may substantially reduce competition is the evidence [**86](#) of familial and economic ties that forever and irrevocably bind the Stephens family.

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This case provides a perfect example of the fluidity of corporate forms and the potential dangers they present. Donrey and NAT essentially share a common genetic imprint, i.e., ownership by various Stephens family trusts. Such a corporate "cloning" procedure should not be allowed to create large loopholes in [Section 7](#).

[Community Publishers, 882 F. Supp. at 140.](#)

IX. REMAINING CAUSES OF ACTION

As the court believes NAT's acquisition of the *Times*, and Donrey's indirect acquisition, violate [Section 7](#) of the Clayton Act, it will be unnecessary to consider the claims arising under [Section 1](#) of the Sherman Act involving contracts in restraint of trade and [Section 2](#) of the Sherman Act involving monopolization and attempts to monopolize.

HN17 [↑] [Section 7](#) of the Clayton Act is the principal antitrust statute applicable to mergers and acquisitions. 3 Julian O. von Kalinowski, Antitrust Laws & Trade Regulation § 23.01 (1994). However, [Sections 1](#) and [2](#) of the Sherman Act are applicable as well. *Id.* at § 23.01[1],[2].

HN18 [↑] With regard to [Section 1](#) of the Sherman Act, anticompetitive [**87] acquisitions can violate that section, presumably as a combination in restraint of trade. [United States v. First Nat'l Bank & Trust Co.](#) 376 U.S. 665, 671-72, 84 S. Ct. 1033, 12 L. Ed. 2d 1 (1964) ("where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, [*1173] itself constitutes a violation of [§ 1](#) of the Sherman Act.").

There is not a great deal of merger and acquisition litigation under [Section 1](#) of the Sherman Act, but it appears clear that mergers challenged under [Section 1](#) should be evaluated by the same substantive standards as those applied under [Section 7](#) of the Clayton Act. For instance, in [United States v. Rockford Memorial Corp.](#), 898 F.2d 1278 (7th Cir. 1990), cert. denied, 498 U.S. 920, 111 S. Ct. 295, 112 L. Ed. 2d 249 (1990), the court stated,

We doubt whether there is a substantive difference today between the standard for judging the lawfulness of a merger challenged under [section 1](#) of the Sherman Act and the standard for judging the same merger challenged under [section 7](#) of the Clayton Act. It is true that the operational language of the two provisions [**88] is different and that some of the old decisions (old by antitrust standards anyway) speak as if that should make a difference. [citations omitted] A transaction violates [section 1](#) of the Sherman Act if it restrains trade; it violates the Clayton Act if its effect may be substantially to lessen competition. But both statutory formulas require, and have received, judicial interpretation; and the interpretations have, after three quarters of a century, converged. 2 Areeda & Turner, [Antitrust Law](#), P 304 (1978); 4 *id.*, P 906, at p. 22.

[Rockford, 898 F.2d at 1281-82](#). See also [McCaw Personal Communications v. Pacific Telesis Group](#), 645 F. Supp. 1166, 1173 (N.D. Cal. 1986) ("the standard . . . under the Sherman Act is similar, if not identical, to that under the Clayton Act").

Given this convergence of legal standards, according to Areeda and Turner, "as a practical matter, Sherman Act § 1 is now largely superfluous in merger litigation, except for some regulated firms or pre-1980 mergers." IV Phillip E. Areeda & Donald F. Turner, [Antitrust Law](#), P 906 (1994 Supp.) (footnotes omitted).

Rather than decide whether [Section 1](#) is superfluous in the context of mergers and acquisitions, [**89] this court will hold that it is unnecessary to reach the [Section 1](#) claim, since it is voiding the challenged acquisition under [Section 7](#). This very route was taken by the Supreme Court in the case of [United States v. Philadelphia Nat'l Bank](#), 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963), where the Court held that a challenged merger violated [Section 7](#) of the Clayton Act and that, as a consequence, "we need not, and therefore do not, reach the further

question of alleged violation of § 1 of the Sherman Act." *Id.*, 374 U.S. at 324. For the same reasons, it is not necessary to reach the alleged violation of Section 2 of the Sherman Act.²²

It will also be unnecessary to reach private plaintiffs' claims arising under Section 8 of the Clayton Act involving interlocking directorates, and Section 7a of the Clayton [**90] Act involving government notification under the Hart-Scott-Rodino Amendments, because any possible relief that might be available under these provisions has already been awarded.

X. REMEDY

Having concluded that Section 7 has been violated, we must now determine the appropriate remedy. *HN19*[↑] "The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" *Ford Motor Company v. United States, 405 U.S. 562, 573, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)* (citations omitted). Moreover, "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E. I. Du Pont de Nemours & Co., 366 U.S. 316, 334, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961)*. The court is "clothed with 'large discretion' to fit the decree to the special needs of the individual case." *Ford Motor, 405 U.S. at 573* (citations omitted).

All plaintiffs ask for *HN20*[↑] permanent injunctive relief: the private plaintiffs under Section 16 of the Clayton Act, 15 U.S.C. § 26, and the [*1174] government under Section 15 of the Clayton Act, 15 U.S.C. § 1[*91] 25. Private plaintiffs ask for relief in the form of divestiture or rescission. The government initially sought only divestiture but has filed a post-trial motion to amend its complaint to name Thomson as a defendant and seek the alternative relief of rescission.

Thomson contends that rescission is not an available remedy in a private suit and objects to any request on the part of the government for an order of rescission. It points out that the government did not name it as a defendant prior to trial and did not seek the remedy of rescission. It therefore contends it would be prejudiced by a post-trial amendment since it did not defend against the case presented by the government.

Thomson initially raised in a motion to dismiss the issue of the availability of rescission as a remedy in a suit brought by a private party.²³ We rejected this argument finding that we had the authority to order rescission if the court found such a remedy was warranted.

[**92] Our holding was in large part based on the Supreme Court's opinion in *California v. American Stores Co., 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*. While that case dealt with the remedy of divestiture rather than rescission in the context of a private action brought under the Clayton Act, we find its reasoning persuasive and equally applicable to the 'equitable remedy of rescission.'

In *American Stores*, the Supreme Court reviewed the holding of the Ninth Circuit Court of Appeals that divestiture was not an available remedy in private actions under Section 16 of the Clayton Act. The Court reviewed both the statutory language and the legislative history and concluded that the "plain text of § 16 authorizes divestiture decrees [*1175] to remedy § 7 violations." *American Stores, 110 S. Ct. at 1859*.

²² It appears that Section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize, has been applied even less frequently than Section 1 to mergers and acquisitions.

²³ Thomson also argued that Section 7 did not reach the conduct of a seller. We held it was appropriate to grant relief against sellers if necessary to eliminate the effects of an unlawful acquisition. See *United States v. Coca-Cola Bottling Co. 575 F.2d 222, 227 (9th Cir. 1978)*, cert. denied, *439 U.S. 959, 99 S. Ct. 362, 58 L. Ed. 2d 351 (1978)*. See also *United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326-31, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961)*.

The Court concluded that Section 16's simple grant of authority to "have injunctive relief" would seem to encompass the remedy of "divestiture just as plainly as the comparable language in § 15." *Id. at 1859*. Indeed, it noted a plausible argument could be made that the language of Section 16 was more expansive. *Id.* The Court quoted with approval the following [**93] language from *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., 754 F.2d 404, 416 (1st Cir. 1985)*: "[§ 16] states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order . . . Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." *Id., 110 S. Ct. at 1859*. It concluded that "section 16, construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger." *Id., 110 S. Ct. at 1861*.

Section 16 [HN21](#)[] was enacted "not merely to provide private relief but . . . to serve as well the high purpose of enforcing the antitrust laws." *Id., 110 S. Ct. at 1860*, quoting, *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-131, 89 S. Ct. 1562, 1579-1581, 23 L. Ed. 2d 129 (1969)*. Section 16 should therefore be applied "with this purpose in mind, and with the knowledge that the [**94] remedy it affords, like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Id.* (internal quotation omitted). The Court cautioned that its holding did not "mean that such power should be exercised in every situation in which the Government would be entitled to such relief under § 15. In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief." *Id., 110 S. Ct. at 1866*.

Thomson points out that not one party has cited a case in which rescission was authorized against a private party or in which rescission was utilized as a form of permanent injunctive relief. While this may be true, it is also true that no case cited by any of the parties or found by the court indicates that rescission is not an available remedy under Section 16. In fact, as we pointed out in ruling on the motion to dismiss, other courts have specifically held that rescission is an available antitrust remedy in a private antitrust suit. See e.g., *Arnett v. Gerber Scientific, Inc., 575 F. Supp. 770, 771 (S.D. N.Y. 1983)*. [**95] Still others have mentioned the availability of rescission without any discussion of its applicability to a private action. See e.g., *State of New York v. Kraft General Foods, Inc., 862 F. Supp. 1030, 1034 n.3 (S.D. N.Y. 1993)* (a court should not order rescission unless the seller's return to the industry is feasible under the circumstances and the remedy is the most effective way to cure the antitrust violation), *aff'd. without op.*, 14 F.3d 590 (2d Cir. 1993).

The seller's awareness that an antitrust challenge will be made to the pending merger or acquisition has also been said to be relevant to the possibility of involving the seller in the order of relief. *United States v. Reed Roller Bit Co., 274 F. Supp. 573, 592 (W.D. Okla. 1967)*. It is well established that "where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." *Porter v. Lee, 328 U.S. 246, 251, 66 S. Ct. 1096, 90 L. Ed. 1199 (1956)*. (citation omitted).

As the parties are aware, the court is concerned that the parties acted with such speed in closing this transaction despite their knowledge of the private [**96] plaintiffs' complaint seeking injunctive relief and despite their knowledge that a hearing had already been set on the motion for temporary restraining order.

A Thomson representative was served with a complaint and a motion for temporary restraining order or preliminary injunction on February 5, 1995, and was advised the request for injunctive relief would be heard by the court on February 7, 1995. The sale was closed during the afternoon of February 6, 1995. As private plaintiffs point out, had the court's schedule allowed it to hold the hearing the morning of February 6, 1995, the court could have enjoined the sale holding the parties in status quo. However Thomson, with knowledge of the pending motion for preliminary injunction, chose to consummate the sale and now suggests that the court has no authority to rescind the transaction in question.

The court believes that is fair to say that Thomson executives went into this transaction "with their eyes wide open." They were paid handsomely to gamble that this hurried up transaction would withstand antitrust scrutiny. They took the gamble they were paid to take.

HN22 Both divestiture and rescission require the dispossession of the specific [**97] interest that created the unlawful monopoly or market power. The relief authorized by the Clayton Act does not end with dispossession of the unlawful interest but may include other measures designed to undo what was achieved through the unlawful acts. *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586, 607, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957) (relief must be directed to that which is necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute); *United States v. Paramount Pictures*, 334 U.S. 131, 171, 68 S. Ct. 915, 92 L. Ed. 1260 (1948). The court's exercise of its equitable powers is not designed to be punitive and the decree should be no harsher than necessary to accomplish effective relief. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603, 71 S. Ct. 971, 95 L. Ed. 1199 (1951) (concurring opinion).

HN23 The court need not resort to either rescission or divestiture if some other equitable relief suffices to provide an effective means of eliminating the illegal effects of the acquisition and is in the public interest. The court's equitable powers are to be exercised to restore as nearly as possible [**98] the competitive situation that existed before the asset [*1176] acquisition. However, it is clear from the case law that divestiture is regarded as the preferred remedy.

"Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *United States v. E. I. Du Pont de Nemours & Co.*, 366 U.S. 316, 330-31, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961). Divestiture serves several functions: (1) it puts an end to the combination, conspiracy, or acquisition that was in itself unlawful; (2) it deprives the antitrust defendants of the benefits of their actions; and (3) "it is designed to break up or render impotent the monopoly power which violates the Act." *Schine Chain Theatres v. United States*, 334 U.S. 110, 128-29, 68 S. Ct. 947, 92 L. Ed. 1245 (1948). Further, the Supreme Court has said that "complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." *Ford Motor*, 405 U.S. at 573.

Both private plaintiffs and the government contend that a complete remedy will only be afforded [**99] if the *Times* is placed in the hands of owners who are completely independent of NAT and Donrey. It is suggested that this can be accomplished in one of three ways: (1) sale by an independent trustee; (2) rescission; or (3) sale by NAT, L.C. Plaintiffs contend that divestiture through an independent trustee is the most effective remedy. They suggest an independent trustee who is given the power and incentive to maintain the value and competitive ability of the *Times* could be directed to sell the assets to a person who is competitively suitable and capable of managing the *Times* effectively, and who is not affiliated with the Stephens family or Donrey. In plaintiffs' opinion this would ensure the *Times* remains an independent entity, competing against Donrey, and it would remove much of the suspicion that would surround a sale by one of the parties.

According to the private plaintiffs, allowing NAT to sell the *Times* itself would be the least satisfactory of the three possible remedies. In their view, if NAT is allowed to sell the *Times*, the owners of Donrey will have the opportunity to choose Donrey's competitor in the market. This would allow Donrey's owners to [**100] sell to someone who in their view would be a weak competitor, someone against whom the *Morning News* would ultimately prevail. Furthermore, it is suggested that NAT's owners might drag their feet in the sale and possibly permit the *Times* to deteriorate in the meantime.

NAT suggests either no remedy is needed or if the court believes some type of relief is warranted, then the court is urged to adopt some type of permanent hold separate order or other equitable remedy short of divestiture or rescission. NAT points out that the court has broad equitable powers and that injunctive relief is not mandated by the finding of a violation of the antitrust laws.

NAT reminds the court that it has expressed a strong desire to own and independently operate the *Times* and has demonstrated a commitment to making significant capital investments. According to NAT, its

investors have promised to keep the *Times* independent and nurture it into the best possible newspaper of its size anywhere. Many times such statements might ring hollow. Yet, considering the reputations of those who made the promises, they could have been carved in stone. Consideration of all of these facts should lead [**101] to the conclusion that if NAT's ownership of the *Times* results in anticompetitive consequences,

harm to the public interest will not be remedied by the creation of a situation where more anticompetitive consequences arise in a different form.

A similar argument was rejected by the Supreme Court in *Ford Motor Co. v. United States, 405 U.S. 562, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)*. In that case Ford Motor Company had purchased certain assets of Electric Autolite Co., an independent manufacturer of spark plugs and other automotive parts. The government challenged the acquisition. The lower court ordered the divestiture of the Autolite plant, the Autolite trade name and additional ancillary relief. Ford argued that under its ownership Autolite became a more effective competitor against other spark plug manufacturers than [*1177] it had been as an independent and that there were other benefits resulting from the acquisition. The Supreme Court rejected the argument that any asserted beneficial effect of the acquisition somehow alleviated the need for a remedy. The court stated:

It is argued, however, that the acquisition had some beneficial effect in making Autolite a more vigorous [**102] and effective competitor against Champion and General Motors than Autolite had been as an independent. But what we said in *United States v. Philadelphia National Bank, supra*, disposes of that argument. A merger is not saved from illegality under § 7, we said,

because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and malignant alike, fully aware, we must assume, that some price might be paid.

Id., 405 U.S. at 569-70, quoting *United States v. Philadelphia National Bank, 374 U.S. 321, 371, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*.

Under the circumstances of this case, we believe no effective remedy can be devised that would allow NAT or its owners to retain an interest in the *Times*. To allow NAT to continue operating the *Times* under either the present ownership structure or the proposed structure [**103] would only serve to perpetuate the anticompetitive effects of the acquisition. Under either ownership structure, the economic interests of NAT'S owners, converge with the economic interests of Donrey's owners. In fact, as we pointed out earlier the ownership, of the entities is substantially identical.

As the court has earlier indicated, it feels a great burden in attempting to do "the right thing" for all concerned. In spite of the violation of law that it has found, the court has no desire to punish anyone. The law doesn't provide for or allow that. Instead, it is this court's fervent hope that what it does in this case does not provide a cure that is worse than the disease, something that the court has recognized throughout these proceedings might be the outcome of all of this. It is the court's desire and intention that what it does will result in giving the *Times* its best chance to survive and provide the readers of Northwest Arkansas a fine newspaper for many years to come.

The court recognizes that divestiture is the preferred remedy in cases such as this, but the court has a great deal of concern about whether that is best for either the parties or the citizens of Northwest [**104] Arkansas under the particular circumstances of this case.

One method to accomplish divestiture is to allow NAT to sell the paper. However, the court is convinced that allowing NAT to sell the paper within a prescribed time is not a viable alternative or the right one. As plaintiffs point out, that gives NAT's present owners too much control over the ultimate fate of the *Times*. If they were of a mind to do so, they could make certain that the *Times* came out of all of this less able to compete with their other very powerful and very valuable newspaper properties in this area.

As we noted above, if divestiture is ordered both the private plaintiffs and the government Suggest that this should be accomplished by appointing an independent trustee. The court agrees. The *Times* has already been under common ownership with the *Morning News* since February. As the government points out, the public interest is injured each day that competition is prevented under this arrangement. A number of witnesses testified at trial that

the competition between the *Times* and the *Morning News* has, in their view, already lessened in a number of almost imperceptible ways.

The government [**105] points out that the trustee could be directed to ensure that the *Times* is operated as an ongoing independent newspaper, limiting, to the extent possible, the transfer of confidential financial and other information to Donrey, Stephens family members, or their representatives and agents. It is suggested that a period of [*1178] three months should be sufficient to sell the assets of the *Times*.

The court's concern with divestiture through a independent trustee is that such a procedure would create a prolonged period of uncertainty in the market and would be expensive. It would also seem that this method would be least likely to insure that the *Times* would be sold for anything approaching fair market value. If potential purchasers knew that the trustee was required to sell the paper in a prescribed time, it is not likely that an offer would be received that would even come close to what would be paid for the paper in an arms length transaction. The sale would be a "fire sale."

Additionally, the court is concerned with the amount of disruption that would occur in the actual operation of the *Times*. The trustee would almost certainly be someone who is not associated currently with [**106] the *Times*, was unaware of its current operations, and would have to familiarize himself or herself with the newspaper market in this area before being able to successfully undertake the operation of the *Times* and attempting to sell the newspaper. Obviously, any trustee that the court could name could not, in the short period of time allowed by such method, come into this complex and highly competitive newspaper market and effectively compete with the capable "pros" already here. All of this process would be disruptive and might make it difficult for the paper to retain officers and other employees vital to its successful operation.

In short, the court firmly believes that the divestiture remedy would likely be a cure worse than the disease. The court has a great deal of fear that divestiture through a trustee would insure that the *Times* would come out of this litigation so weakened that it could not survive, to the detriment of all concerned, and especially its readers.

On the other hand, the remedy of rescission has a great deal of appeal. In light of the preliminary injunction order which has been in place since two days after the transfer of the *Times*, the court would [**107] not be faced with the difficulties often encountered in attempting to rescind mergers or asset acquisitions. That is, there should be no difficulty in separating the assets and requiring the rescission of the asset purchase agreement.

Thomson is also obviously quite capable of re-entering the market. Thomson, of course, operated the *Times* for a number of years and is still in the newspaper business and knows how to run a newspaper in this competitive climate. They did it for years. Additionally, there have been few changes in personnel at the *Times*. Most of the officers and other employees at the paper were hired and placed there by Thomson. They know their "bosses" at Thomson, and know what is expected of them. Thus, one of the uncertainties that might otherwise cause high employee turnover would be removed. Presumably Thomson could virtually step in and continue where they left off before the sale.

One of the difficulties with this remedy lies in the fact that Thomson does not desire to operate or retain for any length of time the *Times*. Thus, the remedy of rescission would merely operate to transfer the *Times* back to Thomson who would apparently once again place [**108] the newspaper on the market. However, Thomson would naturally have a financial interest in once again obtaining top dollar for the newspaper and in operating it profitably and competitively in the interim.²⁴

²⁴ Thomson argues that it would be punished if rescission is ordered because the current market conditions including the chilling effects of this lawsuit on the potential sale of the *Times* would result in it being unable to obtain fair market value in its attempt to sell the *Times* to another interested party. The court notes that this difficulty, if it is a difficulty, was created at least in part by Thomson's decision to speedily close a transaction which it knew was being challenged under the antitrust laws.

There is no evidence that there would be a lack of interested buyers in the event the sale was rescinded.²⁵ In view of the preliminary [*1179] injunction order, rescission would be a simple, quick, and efficient method of restoring the competitive market as it existed prior to the challenged transaction. [**109] Until February of this year Thomson successfully ran the *Times* and is in the newspaper business. If Thomson once again desires to sell the *Times*, it clearly has the knowledge, business expertise, and wherewithal to accomplish such a sale. In fact, Thomson is currently working with a broker to sell twenty-four other newspapers.

Thus, it [**110] is clear that Thomson is eminently more qualified to run the newspaper or to sell it again, if that is its choice, than any trustee who could be found. The court concludes that, for these reasons, of all of the admittedly bad choices, rescission is the best one.

Having found the acquisition to be unlawful and having considered all alternatives, we conclude that rescission is the appropriate remedy under the circumstances of this case. Rescission will be prompt, serve as a means of redressing the violation, and is the most effective means of restoring competition. An order will be entered directing the rescission of the assets of the *Times*. The court will retain jurisdiction until the rescission is accomplished.

As we have concluded the, private plaintiffs have standing and they specifically requested rescission and named Thomson as a defendant, we need not rule on the government's motion to amend its complaint to name Thomson as a defendant to also seek the remedy of rescission.

Dated: June 30, 1995

H. Franklin Waters

United States District Judge

JUDGMENT AND ORDER OF RESCISSION

This non-jury matter came on for trial to the court on May 1, 1995, through May 10, [**111] 1995. At the conclusion of the trial, the case was taken under advisement and the court directed the filing of post-trial briefs and proposed findings of fact and conclusions of law. By memorandum opinion of even date, the court has set forth its findings of fact and conclusions of law in accordance with the provisions of [Rule 52 of the Federal Rules of Civil Procedure](#).

For the reasons stated in the memorandum opinion the court finds that the challenged acquisition violates [Section 7](#) of the Clayton Act, [15 U.S.C. § 18](#). IT IS ORDERED AND ADJUDGED in accordance with the memorandum opinion that, within thirty (30) days of the date of this judgment defendants, NAT, L.C., and Thomson Newspapers, Inc., shall rescind the asset purchase agreement entered into between NAT and Thomson on February 6, 1995, for the purchase of the assets of the *Northwest Arkansas Times* by NAT, and restore all matters to the state in which they existed prior to the agreement between said defendants on January 27, 1995. During the time necessary to complete the rescission, the terms of the court's preliminary injunction order entered on February 10, 1995, shall remain in full force and effect.

The court retains [**112] jurisdiction until the rescission has been accomplished.

IT IS SO ORDERED this 30th day of June, 1995.

H. Franklin Waters

²⁵ NAT argues that there is little assurance that any bidders will come forward other than CPI and/or WEHCO. It notes that there were only four expressions of interest in the period of time the *Times* was on the market before NAT purchased the assets. only nineteen days elapsed between Thomson's public announcement of the sale and the closing of the sale. This allowed little time for other interested bidders to come forward. Further, the court notes that Harrington testified that the *Times* was held separate from the other group of 24 papers Thomson was selling because the Fayetteville market was much more promising than the market areas of the other 24 papers.

892 F. Supp. 1146, *1179 1995 U.S. Dist. LEXIS 9514, **112

United States District Judge

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Addis v. Holy Cross Health Sys. Corp.

United States District Court for the Northern District of Indiana, South Bend Division

July 6, 1995, Decided

No. 3:94 cv 118 AS

Reporter

1995 U.S. Dist. LEXIS 21838 *; 1997-1 Trade Cas. (CCH) P71,727

HOWARD M. ADDIS, M.D., HOWARD M. ADDIS, M.D. SURGEON, INC; and TJB PARTNERSHIP, Plaintiffs v. HOLY CROSS HEALTH SYSTEM CORP., ST. JOSEPH'S CARE GROUP, INC., ST. JOSEPH'S MEDICAL CENTER, ST. JOSEPH'S HORIZON CORP., GEORGE B. FRIEND, GVS MANAGEMENT, INC., GEORGE B. FRIEND, M.D., INC., THOMAS R. GRUSZYNSKI, THOMAS R. GRUSZYNSKI, M.D., INC., PATRICK J. O'DEA; and MICHIANA GASTROENTEROLOGY, INC., Defendants

Disposition: [*1] Defendants' Motion for Partial Summary Judgment as to Counts One through Eight GRANTED, Counts Nine through Fourteen of First Amended Complaint DISMISSED without prejudice.

Core Terms

enterprise, antitrust, summary judgment motion, Counts, racketeering activity, defendants', Surgery, summary judgment, anti trust law, privileges, alleges, violations, partial summary judgment, purposes

LexisNexis® Headnotes

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

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN1[] Summary Judgment, Opposing Materials

Where no opposition is made to a motion for summary judgment, the underlying legal merits claimed in that motion must be examined and it is improper to rely solely on some species of default.

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

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

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

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

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

HN2 Discovery, Methods of Discovery

Summary judgment 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. [Fed. R. Civ. P. 56](#).

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

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

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

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

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN3 Supporting Materials, Affidavits

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 United States 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. 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. The nonmoving party cannot rest on its pleadings. The nonmoving party may also not rely on conclusory allegations in affidavits.

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

During its analysis for summary judgment, the court 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 > Racketeer Influenced & Corrupt Organizations > General Overview

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

HN5 Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1962(b), (c), (d), a portion of the Racketeer Influenced and Corrupt Organizations Act, read as follows:(b) It shall be unlawful for any person through a pattern for racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.(d) It shall be unlawful for any person to conspire to violate any of the provisions of 18 U.S.C.S. § 1962(a), (b), or (c) of this section.

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

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

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

HN6 [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

"Racketeering activity" is defined in 18 U.S.C.S. § 1961(1) as a number of different violations of Title 18, including extortion under 18 U.S.C.S. § 1951 and mail fraud under 18 U.S.C.S. § 1341. "Enterprise" is defined by 18 U.S.C.S. § 1961(4) as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C.S. § 1961(5) defines "pattern of racketeering activity" as at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. While the Racketeer Influenced and Corrupt Organizations Act is a criminal statute as part of Title 18, 18 U.S.C.S. § 1964(c) provides that any person injured in his business or property by reason of a violation of 18 U.S.C.S. § 1962 may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

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

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

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

HN7 [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Four allegations are required in a complaint under 18 U.S.C.S. § 1962(c): (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. A plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. Thus the pattern of racketeering activity must show relatedness and continuity, and that continuity can be either closed or open-ended.

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

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

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

HN8 [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

An enterprise as an ongoing "structure" of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making. The enterprise must be more than a group of associated businesses that "are operated in concert" under the control of one family, but must include a structure and goals separate from the predicate acts themselves. For purposes of [18 U.S.C.S. 1962\(c\)](#), a corporation cannot be both the "enterprise" and the "person" conducting or participating in the affairs of that enterprise.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN9 [down] **Remedies, Damages**

Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), provides for private actions for damages by any person injured in his business or property by reason of anything forbidden in the antitrust laws. The injury involved in an antitrust case should reflect the anti-competitive effect either of the violations or of the anti-competitive acts made possible by the violation.

Antitrust & Trade Law > General Overview

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

Antitrust & Trade Law > Clayton Act > Claims

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

Civil Procedure > Judgments > Enforcement & Execution > General Overview

HN10 [down] **Antitrust & Trade Law**

Antitrust standing can be found using the following factors: (1) the directness of the injury to the plaintiff; (2) whether there exists an identifiable class of persons whose self-interest would motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; (4) the difficulty of identifying damages and

apportioning them among direct and indirect victims of the alleged conduct; (5) the importance of avoiding duplicative recoveries; and (6) whether the plaintiff can enforce an antitrust judgment efficiently and effectively. Under section 4 of the Clayton Act, the plaintiff must prove (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."

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Judges: Allen [^{**3}] Sharp, CHIEF JUDGE, NORTHERN DISTRICT OF INDIANA.

Opinion by: Allen Sharp

Opinion

MEMORANDUM AND ORDER

I. Background

This court takes full judicial notice of the massive and elaborate record in this case. That record provides the backdrop of this court's serious and statutory obligations to move civil cases to a proper conclusion expeditiously. That concept was embodied specifically in the Civil Justice Reform Act of 1990, [28 U.S.C. § 1, et seq.](#) Under that act, this court early on engaged in an extremely time-consuming process involving its judges, magistrates, attorneys representing a wide variety of litigants, as well as citizen representatives to formulate specific plans and proposals to provide early disposition of civil cases. It was readily apparent that in the dichotomy of legislative values in the Congress, that earlier and faster was far better. This congressional mandate is, and must be, kept in mind in the disposition of even the most complex and convoluted civil case. This case has now been pending since this plaintiff¹ filed it in this court on February 8, 1994. Currently, there are 330 items listed on the court's docket sheet. Vast judicial resources have already [*4] been expended on it.

This plaintiff is now, and has at all times, been represented in this case by extremely talented and experienced counsel. This court believes deeply in the right of counsel in civil cases to have a wide range of options to advocate for a client's interest. Often this array of options provides counsel with the opportunity to often make sophisticated tactical choices. As will be soon indicated here, counsel for this plaintiff has now obviously chosen one of those tactical choices.

In the first instance, the issues in this litigation were framed in a far-reaching set of allegations reflected in the plaintiff's original complaint filed here. Certainly, the issues and the acrimony between the parties and counsel was heightened by the counter-assertions made by the various defendants. This case is now before this court on defendants' motion for [*5] partial summary judgment filed under [Rule 56, Fed.R.Civ.P.](#), which essentially challenges those claims of this plaintiff based on the federal question jurisdiction of this court under [28 U.S.C. §§ 1331](#) and [1343\(3\)](#).

The aforesaid motion for summary judgment has been pending since February 23, 1995. This plaintiff has been given a substantial opportunity in time to file responses to the defendants' motion for summary judgment. The reasons for the plaintiff's refusal to respond to the defendants' motion for summary judgment has been repeatedly and elaborately stated in the record of this case. The sum and substance of the plaintiff's contentions in this regard come down to an assertion that because of an impending grand jury investigation in this district, that time is not available to respond to the defendants' motion for summary judgment. It is the plaintiff who made knowledge of that investigation a matter of public record for the first time in this case. It has been most recently asserted that this plaintiff is not now a target of that investigation, although a contrary assertion was made earlier on. In this regard, this court also takes full judicial notice of yet another lawsuit [*6] that was filed by this plaintiff during the time frame just referred to. That case, *United States ex rel. Addis v. Holy Cross Health System Corporation, et al.*, was filed on May 4, 1995, and pursuant to the request of this plaintiff, was sealed. However, more recently, on June 13, 1995, this plaintiff has in effect broken that seal and made the existence of that case a matter of public record by including a subpoena to him from the grand jury which requests the documents and records of that litigation.

This court has been lenient in providing this plaintiff with an opportunity to respond to this motion for summary judgment, and he has now specifically declined to do so. Certainly his counsel is aware of the trilogy of Supreme Court decisions that bear on the obligation to respond to motions for summary judgment. 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 \(1986\)](#); and [Anderson v. Liberty Lobby, Inc.](#), [477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). More recently, there is a fourth case, [Eastman Kodak v. Image Technical Services](#), [504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 \(1992\)](#). Certainly it is assumed that counsel for this plaintiff was well aware of the specific teaching from the Supreme Court of the United States that when a broad based and challenging summary judgment motion is advanced, failure to respond to it can be devastating and fatal.

¹ This court will refer to Howard M. Addis, M.D., Howard M. Addis, M.D. Surgeon, Inc. and TJB Partnership collectively as "plaintiff" or "Dr. Addis."

In an entirely different context, where pro se litigants are involved, this circuit honors these values by requiring a specific notice of the effect of failure to respond. See, *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982). In effect, even with counsel present, this court honored the values that are implicit in *Lewis v. Faulkner* and gave this plaintiff a final opportunity to respond to a motion for summary judgment which has now been pending for four months. It is readily apparent from the record in this case that counsel for this plaintiff has made a sophisticated tactical and strategic choice to permit this motion for partial summary judgment to be decided without the benefit of any appropriate response as required by [Rule 56](#) and as specifically required by recent Supreme Court decisions interpreting that rule. In another context, this [*8] circuit has held that even [HN1](#) where no opposition is made to a motion for summary judgment, the underlying legal merits claimed in that motion must be examined and that it is improper to rely solely on some species of default. See, *Williams v. Califano*, 593 F.2d 282 (7th Cir. 1979) (even where a claimant in a social security case has made no response to the government's motion for summary judgment, court must still determine whether the motion has legal merit). Therefore, this court will take the trouble to carefully parse the record in this case to determine whether or not the defendants' motion for summary judgment, or any part of it, is well taken. This court will not bottom its decision on some technical failure to comply with federal or local procedural rules, but, in the spirit of *Williams*, deal in depth with the merits of the plaintiff's claims which are based on federal question jurisdiction.

II. Facts

Under Local Rule 56.1, all facts presented in defendants' Statement of Material Facts which are supported by admissible evidence are deemed true, as none have been controverted by the plaintiff. Plaintiff, Howard M. Addis, M.D., is a physician licensed by the state [*9] of Indiana, and is currently on the active medical staff at Saint Joseph's Medical Center ("Med Center"). Dr. Addis has privileges at the Med Center to perform general surgical procedures, and has held privileges of varying kinds at the Med Center beginning in 1973. Dr. Addis also holds surgical privileges at Memorial Hospital of South Bend, St. Joseph Hospital of Mishawaka, Bremen Community Hospital, and at the Edison Lakes Surgery Center, an outpatient facility in Mishawaka.

In August, 1993, Dr. Addis was the subject of a corrective action at the Med Center involving his care of Mrs. Jean Riley. Dr. Addis had attended Mrs. Riley during an emergency room visit and had performed non-emergency invasive surgery upon her. Mrs. Riley had a prosthetic heart valve, and Dr. Addis failed to order appropriate antibiotics or recognize an infection in that valve prior to performing the surgery, which placed Mrs. Riley at risk. Dr. George Friend, chairman of the Surgery Department of the Med Center, had Mrs. Riley's chart reviewed by two other doctors, and reviewed the chart himself, and then requested that Dr. Paul Howard, president of the Medical Staff at the Med Center, initiate corrective [*10] action. Dr. Howard notified Dr. Addis that the Staff Credentials Committee would meet to discuss his care of Mrs. Riley and that he was encouraged to attend. Dr. Addis declined the opportunity to attend the Credentials Committee meeting, held September 9, 1993, but asked Dr. Howard to read a letter from him to the committee.

The Credentials Committee met and forwarded its report to the Executive Committee. Dr. Howard again informed Dr. Addis both by personal communication and letter that corrective action was being considered and which areas of Mrs. Riley's treatment were being reviewed. Dr. Addis then requested that the Credentials Committee be reconvened so that he might address the issues, and the committee was reconvened with Dr. Addis present on September 20, 1993. The Credentials Committee again forwarded its conclusions to the Executive Committee after this second meeting. The Executive Committee met on September 21, 1993, and Dr. Addis appeared before the committee for approximately one hour during the three to four hour meeting. After hearing Dr. Addis' testimony and the testimony of Dr. Randolph Szlabick, vice-chairman of the Surgery Department, who had reviewed the chart, [*11] and reviewing the entire clinical record, the Executive Committee voted to summarily suspend Dr. Addis' privileges at the Med Center for thirty days. Dr. Howard informed Dr. Addis of the committee's decision that same evening by telephone. Within two days, Dr. Addis requested, both by telephone and letter, that Dr. Howard place him on the "emeritus" staff of the hospital in anticipation of his retirement from active practice.

Dr. Addis received shortly thereafter a letter from Dennis Heck, President of the Med Center, informing him of the summary suspension and giving him information on any appeal he might wish to take. Dr. Addis did not appeal his

suspension, and his privileges have been reinstated and in effect since October 21, 1993. Upon his return to active practice, the Executive Committee reinstated certain proctoring requirements on Dr. Addis which had been deleted from Mr. Heck's letter to Dr. Addis because of Dr. Addis' statement that he would be retiring.

Dr. Addis filed his original complaint in this case in February 1994, alleging violations of the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. §§ 1961-1968](#) (RICO); the Sherman Anti-Trust Act, [15 U.S.C. I*12I § 2](#), and Indiana state law. Plaintiff amended his complaint on November 16, 1994, adding his co-plaintiffs to his complaint. The primary thrust of both the original and amended complaint is that three physicians, Dr. Friend, chairman of the Med Center Surgery Department, Dr. Gruszynski, chairman of the Med Center Obstetrics/Gynecology Department, and Dr. O'Dea, chairman of the Med Center Medical Department (specializing in gastroenterology), conspired with the Med Center, and its corporate family, to drive Dr. Addis out of the surgery-provider market in the South Bend geographic area. Dr. Addis alleged that his use of laparoscopic (laser) surgery had drawn patients away from the three physicians and thus the three attempted to remove him from the market with the complicity of the Med Center. It is relevant to note that all three sit on the Executive Committee, but they are only three of the fifteen members of that committee. No other Executive Committee members are in direct economic competition with Dr. Addis.

After considerable discovery by both parties, defendants filed their motion for partial summary judgment on the two federal question issues, antitrust and civil RICO, and [*13] alleged immunity under the Health Care Quality Improvement Act of 1986 ("HCQIA"), [42 U.S.C. §§ 11101-11152](#). As stated above, plaintiff has refused to respond to the motion for partial summary judgment. Thus, this court will now rule without benefit of advocacy on behalf of the plaintiff.

III. Analysis

HN2 [↑] Summary judgment 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. [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 \(1986\)](#)²; and [Anderson v. Liberty Lobby, Inc.](#), [477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). Celotex addressed the initial burdens of the parties under [Rule 56](#), and [*14] Anderson addressed the standards under which the record is to be analyzed within the structure of [Rule 56](#).

HN3 [↑] 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](#).

Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "designate 'specific facts showing that there [*15] 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 \(7th Cir. 1991\)](#); [Waldrige v. Am. Hoechst Corp.](#), [24 F.3d 918, 920-21 \(7th Cir. 1994\)](#). The nonmoving party may also not rely on conclusory

² 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 \(1988\)](#).

allegations in affidavits. *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079, 1081 (7th Cir. 1992). "The days are 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).

HN4 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 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*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), a case born in the context of **antitrust law**. [*16] 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, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441 (1992).

A. Civil RICO

In Counts One through Five of the First Amended Complaint, plaintiff alleges that various combinations of defendants have violated **HN5** 18 U.S.C. § 1962 (b), (c), and (d), a portion of the RICO act. Those sections read as follows:

(b) It shall be unlawful for any person through a pattern for racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity [*17] or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

HN6 "Racketeering activity" is defined in 18 U.S.C. § 1961(1) as a number of different violations of Title 18, including extortion under § 1951 and mail fraud under § 1341, both of which plaintiff alleges have occurred. "Enterprise" is defined by 18 U.S.C. § 1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(5) defines "pattern of racketeering activity" as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." While RICO is a criminal statute as part of Title 18, § 1964(c) provides that "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover [*18] threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Plaintiff has filed his complaint in this court pursuant to that statute.

In *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985), the Supreme Court upheld an expansive use of the RICO statute in civil litigation. In *Sedima*, the district court dismissed the complaint because it believed that a separate RICO injury was required, which must be distinct from the injury caused by the predicate act. 473 U.S. at 484, 105 S. Ct. at 3279. The court of appeals affirmed, also requiring a RICO, or racketeering, injury to be alleged for standing purposes. *Id. at 485*. Additionally, the court of appeals found that the statute required an allegation that the defendants had been convicted of the predicate criminal acts, which the plaintiff had not done. *Id.* The Supreme Court reversed, holding that no criminal conviction was needed to prosecute an action under § 1964, only criminal conduct, and that there was no requirement of a "racketeering injury" under the statute. *Id. at 493* and 498. The Supreme Court further stated that the use of RICO [*19] against "respected businesses" is one which is contemplated by the statute and is appropriate thereunder. *Id. at 499*.

Sedima requires [HN7](#)[] four allegations in a complaint under [§ 1962\(c\)](#): "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." [Id. at 496](#). In [H.J., Inc. v. Northwestern Bell Tel. Co.](#), [492 U.S. 229, 239, 109 S. Ct. 2893, 2900, 106 L. Ed. 2d 195 \(1989\)](#), the Supreme Court sharpened the definition of "pattern" by holding that "a plaintiff . . . must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." The court in *H.J., Inc.* further stated that continuity "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." [492 U.S. at 241, 109 S. Ct. at 2902](#). Thus the pattern of racketeering activity must show relatedness and continuity, and that continuity can be either closed or open-ended.

The first issue is whether an enterprise, as defined in [18 U.S.C. § 1961\(4\)](#) above, and as required by [§§ 1962\(b\), \(c\), and \(d\)](#), has been [*20] proven by the facts as discussed above. In plaintiff's RICO Case Statement, filed November 14, 1994, plaintiff identified two "enterprises" for purposes of his [§ 1962\(c\)](#) claims: the "Medical Center Enterprise" and the "Ironwood Enterprise." Plaintiff defines the "Medical Center Enterprise" as the Med Center itself, as operated by defendant Care Group, a subsidiary of defendant Holy Cross. Plaintiff also includes defendant Horizon, as a subsidiary of Care Group, in the definition of the "Medical Center Enterprise." The "Ironwood Enterprise" is defined as the medical practices of Dr. Addis and Dr. Farr, the building which houses the Ironwood clinic, and the 26 acres of real estate upon which the Ironwood facility sits.

The Seventh Circuit has recently reviewed the requirements of an enterprise in [Richmond v. Nationwide Cassel L.P.](#), [52 F.3d 640 \(7th Cir. 1995\)](#). *Richmond* defines [HN8](#)[] an enterprise as "an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." [52 F.3d at 644 \(7th Cir. 1995\)](#) (citations omitted). The enterprise must be "more than a group of associated businesses that [*21] 'are operated in concert' under the control of one family," but must include" a structure and goals separate from the predicate acts themselves." [Id. at 645](#) (citations omitted). The *Richmond* court went on to state that "for purposes of [section 1962\(c\)](#), a corporation cannot be both the 'enterprise' and the 'person' conducting or participating in the affairs of that enterprise." [Id. at 646, n.11](#) (citations omitted). In this case, the Med Center is alleged to be both a defendant, ie. a *person* conducting the enterprise's affairs, and the *enterprise itself*. *Richmond* makes it clear that the person and the enterprise must be distinct entities. Citing [Reves v. Ernst & Young](#), [507 U.S. 170, 113 S. Ct. 1163, 1173, 122 L. Ed. 2d 525 \(1993\)](#), the *Richmond* court stated that "liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs." [52 F.3d at 647](#). Here, plaintiff has not shown how the defendants are doing anything other than managing their own affairs in conducting the business of the Med Center. Thus, the plaintiff's allegation that the Med [*22] Center is an "enterprise" for purposes of [18 U.S.C. § 1962](#) is defective as a matter of law, and summary judgment is granted on claims alleging that entity as an enterprise.

In his other RICO counts, plaintiff labels the enterprise as the "Ironwood Enterprise," which he defines as the medical practices of Dr. Addis and Dr. Farr, the building which houses the Ironwood clinic, and the 26 acres of real estate upon which the Ironwood facility sits. Plaintiff has neither alleged nor shown any evidence of any hierarchical structure in this "enterprise," nor that any of the defendants participate in the conduct of this "enterprise's" affairs. Thus, the "Ironwood Enterprise" does not meet the requirements of an enterprise for purposes of [§ 1962](#), and summary judgment is granted on claims alleging that association as an enterprise.

B. Anti-Trust

In Counts Six through Eight, plaintiff alleges that various combinations of defendants have violated the Clayton Act, [15 U.S.C. § 1, et seq.](#) [HN9](#)[] Section 4 of the Clayton Act, [15 U.S.C. § 15](#), provides for private actions for damages by any person "injured in his business or property by reason of anything forbidden in the antitrust laws." The Supreme [*23] Court, in [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.](#), [429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 \(1977\)](#), limited the scope of section 4 by holding that the injury involved in an antitrust case should reflect the anti-competitive effect either of the violations or of the anti-competitive acts made possible by the violation. The Supreme Court further limited the use of section 4 in [Associated General Contractors of California, Inc. v. California State Council of Carpenters](#), [459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#), by requiring that a plaintiff have

antitrust standing. [HN10](#)[¹⁰] That standing could be found using the following factors: (1) the directness of the injury to the plaintiff; (2) whether there "exists an identifiable class of persons whose self-interest would motivate them to vindicate the public interest in antitrust enforcement"; (3) the speculativeness of the alleged injury; (4) the difficulty of identifying damages and apportioning them among direct and indirect victims of the alleged conduct; (5) the importance of avoiding duplicative recoveries; and (6) whether the plaintiff can enforce an antitrust judgment efficiently and effectively. [459 U.S. at 540-45](#). [*24]

The Seventh Circuit refined the requirements needed for an action under section 4 in [Greater Rockford Energy & Technology Co. v. Shell Oil Co., 998 F.2d 391, 395 \(7th Cir. 1993\)](#) cert. denied, 510 U.S. 1111, 114 S. Ct. 1054, 127 L. Ed. 2d 375 (1994), stating that the plaintiff must prove "(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." In their motion for summary judgment, defendants allege that plaintiff has proven neither antitrust injury nor antitrust standing. After careful review of the record, this court agrees and will grant summary judgment accordingly.

In [Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989 \(N.D.Ga. 1992\)](#), the court was faced with a case very similar to Dr. Addis', although the facts in *Robles* are more egregious. In *Robles*, an obstetrician lost his privileges at the only hospital in Cartersville, Georgia, after a peer review situation occurred in which [*25] a direct competitor of Dr. Robles was one of four members of the reviewing panel. [785 F. Supp. at 993-94](#). Robles sued the other two obstetricians in town and the hospital for antitrust violations. *Id.* The *Robles* court found that Robles could not show either antitrust injury or antitrust standing, and thus granted summary judgment on the antitrust claims. [Id. at 999](#).

As in *Robles*, Dr. Addis is arguing that the defendants are attempting to "drive him from the market so that they can take over his market share of the [surgery] practice." [Id. at 997](#). However, this is not sufficient to show that he has suffered "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." [Brunswick Corp, 429 U.S. at 488-89, 97 S. Ct. at 697](#). Dr. Addis has not been removed from the market at all in this case; his privileges were not curtailed in any way at any other hospital in the South Bend area. South Bend has not had a decline in competition, as Addis has continued to compete, and there is evidence in this record that new surgeons have entered the South Bend area. Thus, consumers of surgical providers have [*26] more choice and more competition. Also like *Robles*, Addis has highlighted the various financial dealings between the parties in this case. However, the financial relationships between doctors and hospitals do not impact doctor-patient relationships, and thus do not impact the competition between doctors.

Additionally, Dr. Addis does not have antitrust standing, in that he is not the most appropriate plaintiff to pursue any potential antitrust violations. Both consumers of surgical services and the government would be more "efficient enforcers" of the antitrust laws, as both have "stronger interest[s] in ensuring that prices and services remain at competitive levels." [Robles at 999](#). Reviewing the standing factors from *Associated General Contractors* above, it is clear that injury to competition is not a direct injury to Addis, that the "identifiable class of persons whose self-interest would motivate them to vindicate the public interest in antitrust enforcement" would be consumers, more so than other surgeons; and that, as stated above, there is no antitrust injury in any event. [459 U.S. at 540-45](#). Whether the plaintiff can enforce an antitrust judgment efficiently and [*27] effectively is also in question, as the plaintiff alleges in a recent filing that he has spent approximately \$ 500,000 in legal expenses, and yet he is unable or unwilling to defend this motion.

As Addis has failed to show either antitrust injury or antitrust standing, his claims in Counts Six through Eight are insufficient as a matter of law, and thus summary judgment is granted as to those counts.

C. State Law Claims

As this court has now granted summary judgment as to all eight counts which raise this court's federal question jurisdiction, only Counts Nine through Fourteen, which allege various violations of state law and various common

law violations, remain. This court now declines to exercise its supplemental jurisdiction under [28 U.S.C. § 1367](#), and thus, those counts will be dismissed without prejudice.

IV. Conclusion

For the reasons stated above, defendants' Motion for Partial Summary Judgment as to Counts One through Eight is **GRANTED**, Counts Nine through Fourteen of the First Amended Complaint are **DISMISSED** without prejudice, and plaintiff is given leave to file those claims in state court. The clerk shall enter judgment accordingly.

IT IS [*28] SO ORDERED.

Dated: July 6, 1995

Allen Sharp

CHIEF JUDGE

NORTHERN DISTRICT OF INDIANA

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Kambiz Ajir v. Exxon Corp.

United States District Court for the Northern District of California

July 6, 1995, Decided; July 7, 1995, Filed

NO. C 93-20830 RMW (PVT)

Reporter

1995 U.S. Dist. LEXIS 22758 *

KAMBIZ AJIR, et al., Plaintiffs, v. EXXON CORPORATION et al., Defendants.

Subsequent History: Decision reached on appeal by *Ajir v. Exxon Corp.*, 185 F.3d 865, 1999 U.S. App. LEXIS 25978 (9th Cir. Cal., 1999)

Prior History: [*Ajir v. Exxon Corp.*, 855 F. Supp. 294, 1994 U.S. Dist. LEXIS 7903 \(N.D. Cal., 1994\)](#)

Core Terms

gasoline, dealers, market power, franchises, relevant market, lease, matter of law, franchisees, plaintiffs', vertical, branded, distributors, retail, tanks, monopolization, manufacturer, selling, station, costs, distribution system, consent decree, locked, dual, partial summary judgment, tying arrangement, summary judgment, rule of reason, tying product, market share, tied product

Counsel: [*1] Joseph W. Cotchett, Cotchett, Illston & Pitre, Burlingame, California; Allen Ruby, Morgan, Ruby, Schofield, Franich & Fredkin, San Jose, California, Counsel for Plaintiffs.

John M. Rochefort, McClinton, Weston, Benshoof, Rochefort, Rubalcava & MacCuish, Los Angeles, California; Kelly H. Scoffield, Exxon Company, U.S.A., Houston, Texas, Counsel for Defendants.

Judges: RONALD M. WHYTE, United States District Judge.

Opinion by: RONALD M. WHYTE

Opinion

ORDER GRANTING EXXON'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CARTWRIGHT ACT CLAIMS

The motion for partial summary judgment on Cartwright Act claims of defendants Exxon Corporation, Exxon Company, U.S.A., et al. ("Exxon") was heard on January 27, 1995. The court has read the moving and responding papers and heard the oral argument of counsel.¹ For the reasons set forth below, the court grants Exxon's motion for partial summary judgment on the Cartwright Act claims.

¹ Since the hearing on the motions, plaintiffs have submitted applications for leave to file supplemental briefs accompanied by the supplemental briefs. Defendants have objected to plaintiffs' applications and have also submitted briefs in opposition to plaintiffs' supplemental briefs. The court does not find [*2] good cause for allowing the supplemental briefs and sustains defendants' opposition to them. However, even if the briefs were considered, they would not change the outcome of this motion.

I. BACKGROUND

Plaintiffs in this action are current or former Northern California Exxon dealers who are challenging recent changes to Exxon's standard franchise agreement. Under the previous version of Exxon's standard franchise agreement, plaintiffs were not prohibited from purchasing quantities of gasoline, beyond a required minimum, from independent distributors (or "jobbers") selling Exxon-branded gasoline. Exxon sells gasoline through three types of arrangements: Exxon company-operated outlets, franchised independent dealer-operated ("direct serve") outlets such as plaintiffs, and branded outlets which are supplied with Exxon-branded gasoline by independent branded wholesale distributors. Exxon sells and delivers gasoline to plaintiffs at a price called the "Dealer Tank Wagon" (DTW) or "Dealer Tank Truck" price. Distributors buy gasoline directly from Exxon at a lower price, called the "rack" price or "jobber buying price."

The Tenth through Twelfth Claims for Relief of plaintiffs' Third Amended [*3] Complaint allege that Exxon has violated the Cartwright Act, California's **antitrust law**. Specifically, plaintiffs challenge Exxon's "dual distribution system" of selling gasoline at one price to direct serve dealers and at another price to distributors, who are prohibited from reselling the gas to direct serve dealers.² Additionally, plaintiffs challenge as an illegal tying arrangement the provisions in Exxon's franchise agreement that require that Exxon's tanks, lines, and equipment be used only with Exxon gasoline. The Tenth Claim for Relief challenges the dual distribution system as a horizontal restraint of trade. The Eleventh Claim challenges Exxon's practices as a vertical restraint. The Twelfth Claim alleges monopolization or attempted monopolization.

Exxon brings this motion for partial summary judgment, [*4] arguing that its activities represent vertical, non-price restraints that are valid under the antitrust "rule of reason." Exxon argues that plaintiffs have failed to meet the threshold requirement of proving Exxon's market power in the retail gasoline market. Further, Exxon contends that plaintiffs are collaterally estopped from challenging the restrictions on the use of Exxon's tanks, lines, and equipment by the federal class action consent decree in Bogosian.

II. LEGAL STANDARDS

The purpose of summary judgment is to avoid a trial when there is no genuine factual issue and the moving party is entitled to judgment as a matter of law. Bloom v. General Truck Drivers, Office, Food & Warehouse Union, 783 F.2d 1356, 1358 (9th Cir. 1986). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is a "genuine" issue of material fact only when there is sufficient evidence such that a reasonable juror could find for the party opposing the motion. [*5] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Entry of summary judgment is mandated against a party if, after adequate time for discovery and upon motion, the party 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, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The court, however, must draw all justifiable inferences in favor of the nonmoving parties, including questions of credibility and of the weight to be accorded particular evidence. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991). The court will consider the motion now before it with these standards in mind.

III. ANALYSIS

² Plaintiffs cite Texaco v. Hasbrouck, 496 U.S. 543, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990) in support of their Cartwright claims. However, Hasbrouck is a price discrimination case under the Robinson Patman Act. Plaintiffs have not pleaded such a claim in the instant suit, and, therefore, the Hasbrouck discussion of what constitutes a legitimate functional discount is of no help in resolving the issues presented.

A. Dual Distribution System

1. Tenth Claim—Horizontal Versus Vertical Restraint

Plaintiffs contend that Exxon's agreement with its jobbers to prevent them from selling to direct serve dealers is a horizontal restraint, and thus the rule of per se illegality should apply. See [United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 \(1972\)](#). A horizontal market allocation will be found where competitors agree to give each other a monopoly in a certain area. [Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1354 \(9th Cir. 1982\)](#). [*6] Because Exxon and its distributors were formerly "competitors" in the wholesale market for selling Exxon gasoline to direct serve dealers, plaintiffs insist that Exxon's requirement that distributors not sell to plaintiffs is a horizontal restraint. However, when the source of a conspiracy between a manufacturer and its distributors is the manufacturer, the agreement is vertical. [Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1004 \(5th Cir.\)](#), cert. denied sub nom. [Red Diamond Supply, Inc. v. ACME Welding & Supply, Inc.](#), 454 U.S. 827, 102 S. Ct. 119, 70 L. Ed. 2d 102 (1981). This is true even when the manufacturer also distributes some of its own goods directly. *Id.* Here, it is clear that the source of the distributors' boycott of direct serve dealers is Exxon, as the distributors would undoubtedly prefer to be able to sell to the dealers. Thus, the agreement is imposed from the top down and is vertical. See [Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 295 \(5th Cir. 1981\)](#) ("Vertical restraints are imposed by persons or firms further up the chain of distribution"); [Krehl, 664 F.2d at 1355](#) (upholding district court's finding that dual distribution system was vertical in nature). Accordingly, [*7] plaintiffs' Tenth Claim for Relief, alleging a horizontal restraint of trade, must fail as a matter of law.

2. Eleventh Claim—Vertical Restraint

Because the challenged restriction is a vertical, non-price restraint, the rule of reason applies. [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."). To survive summary judgment under a rule of reason analysis, the plaintiffs must show a substantially adverse effect on competition, and not merely a reduction in intrabrand competition. [Bert G. Gianelli Distributing Co. v. Beck & Co., 172 Cal. App. 3d 1020, 1048-49, 219 Cal. Rptr. 203\(1985\)](#).

Prerequisite of Market Power

A threshold requirement under the rule of reason is that the defendant have sufficient market power to exert control over the price of its goods; absent sufficient market power, the price of a product is set by competition. [Muenster Butane, 651 F.2d at 298](#). Before determining market power, the court must first define the relevant market. Plaintiffs argue that the relevant market is the wholesale market for Exxon gasoline. Exxon argues [*8] that the relevant market is the retail market for all gasoline.

Both market power and market definition are essentially questions of fact. [Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 363 \(9th Cir.\)](#), cert. denied, 488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988); [United States Anchor Manufacturing, Inc. v. Rule Industries, Inc., 7 F.3d 986, 994-95 \(11th Cir. 1993\)](#), cert. denied, 512 U.S. 1221, 114 S. Ct. 2710, 129 L. Ed. 2d 837 (1994). Cf. [Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal. 3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953 \(1971\)](#) (question of law and fact). Nonetheless, in this case, plaintiffs' definition of the relevant market can be rejected as a matter of law. In [Muenster Butane](#), the Fifth Circuit rejected the plaintiffs' attempt to define the relevant market as the market for Zenith television sets:

[Plaintiff's] fundamental mistake throughout this case has been to view the product market as confined to Zenith sets. The record contains no suggestion that Zeniths are unique or that Zenith dealers enjoy a downward sloping demand curve for their sets. Indeed, the uncontradicted testimony . . . indicates that

competition between Zenith dealers and dealers in other brands of television sets was 'so keen' that [a dealer] could not fix a minimum [*9] price for his Zeniths.

In the present case, there is also no suggestion that consumers differentiate among various brands of gasoline or that competition in the sale of gasoline is not intense. Just because Exxon's direct serve dealers may contractually purchase gasoline from only one source—Exxon—does not mean that the relevant market is Exxon gasoline. See Stearns v. Genrad, Inc., 752 F.2d 942, 946 (4th Cir. 1984) ("It has generally been recognized that every manufacturer has a 'natural monopoly' in the sale and distribution of its own products, especially when sold under a trademark."). Plaintiffs have cited, and the court can find, no case upholding a definition of the relevant market as the market for the manufacturer's own product.

Plaintiffs' expert, Dr. Keith Leffler, states that there is "a relevant economic market for the sale of Exxon branded gasoline to dealers in the Greater Bay Area."³ Dr. Leffler opines that because the number of Exxon dealerships in the Bay Area is not increasing, Exxon is able to raise its DTW price above competitive levels without worrying about losing dealers, who are economically "locked in" to their franchises. (Leffler Decl., ¶¶ 15-16.) However, [*10] Dr. Leffler also states that "[a]t the retail level, consumers are very responsive to relatively small differentials in prices across gasoline brands. Therefore, even if a single supplier controlled the retail supply of a brand of gasoline, retail competition with other brands prevents that seller from exercising any significant market power." (*Id.*, ¶ 12.) This conclusion supports a finding that, despite Exxon's alleged attempts at controlling the prices its dealers pay, Exxon cannot raise its DTW prices so high that Exxon dealers are unable to compete with other dealers at the retail level. Further, plaintiffs' claim that they are "locked in" to their relationships with Exxon is irrelevant to the definition of market power. In Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1346-47 (9th Cir. 1987), cert. denied, 488 U.S. 870, 109 S. Ct. 179, 102 L. Ed. 2d 148 (1988), the Ninth Circuit found that the district court's jury instruction on market power was improper, and should have defined the relevant market as the market for dealership franchises:

Obviously there are costs in surrendering one franchise and acquiring another, but these are costs unrelated to the 'market power' of a unique automobile. [*11] These costs will enable the car maker to extract concessions from the dealer, but this power is related to the franchise method of doing business, not to the possible uniqueness of the car.

In Tominaga v. Shepherd, 682 F. Supp. 1489, 1494-95 (C.D. Cal. 1988), the court noted the fallacy of examining the question of market power from the perspective of the franchisee after the contract has been formed:

Plaintiff's implicit argument is that the relevant market is the "Pizza Man franchising" market. This market definition is erroneous as a matter of law. No reasonable argument can be made that Pizza Man possesses the power to coerce potential franchisees to purchase the tied product rather than sell a different brand of fast food (the tying product). The analysis must take place at the 'pre-contract' stage. Plaintiff, however, engages in 'post-contract' analysis concerning defendant's power over already existing franchisees by virtue of their 'sunk costs.' This argument was explicitly rejected in Mozart.

Id. (emphasis added) (citation omitted).

In the present case, plaintiffs' definition of the relevant market as the wholesale market for Exxon gasoline is erroneous as a matter of law. While Exxon franchisees may be locked in, this is not relevant to the market definition. As plaintiffs' own expert admits, Exxon does not have sufficient market power in the Bay Area to set its prices above the market level because there is fierce competition and consumers respond to very small increases

³ Although plaintiffs offer the testimony of an expert economist to support their definition of the relevant market, this does not necessarily preclude [*12] the court from finding lack of market power as a matter of law. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (upholding trial court's finding that implausible economic claim and economic expert opinion had little probative value in comparison with court's own analysis of relevant factors).

in price. (Leffler Decl., ¶ 12.) As a matter of law, Exxon's market share, which is under 10 percent of the retail gasoline market, is insufficient to establish market power. See *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (finding no market power with 25 percent market share); *Liggett Group, Inc. v. Brown & Williamson Tobacco*, 748 F. Supp. 344, 355 (M.D.N.C. 1990) ("With at most twelve [*13] per cent (12%) of the domestic cigarette market, B & W as a matter of law could not exercise market power unilaterally in either the whole cigarette market or the generic segment."). Because plaintiffs cannot prove an essential element of a vertical antitrust claim as to the dual distribution system, this aspect of the Eleventh Claim for Relief must fail.

B. Tying Arrangement

Although plaintiffs' contention that Exxon's dual distribution system is an illegal vertical restraint of trade fails as a matter of law, plaintiffs additionally challenge the lease agreement's requirement that plaintiffs use Exxon's tanks, lines, and equipment only with Exxon branded gasoline as an illegal "tying arrangement." A tying arrangement, or "tie-in," exists where the sale of one product or service is conditioned on the purchase of another. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). Because such an arrangement "serve[s] hardly any purpose beyond the suppression of competition," *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949), it is illegal per se, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969). In the present case, plaintiffs [*14] allege that Exxon is tying its lease of service station sites to the restricted use of its equipment for Exxon gasoline.

1. Market Power

As with a challenge under the rule of reason, a prerequisite to finding a tying arrangement illegal per se is proof that the defendant enjoys monopolistic power in the market for the tying product such that the defendant may restrict competition in the market for the tied product. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984); *Mozart*, 833 F.2d at 1345; *People v. National Ass'n of Realtors*, 120 Cal. App. 3d 459, 473, 174 Cal. Rptr. 728 (1981) (Section 16720 of Cartwright Act).

Once again, the parties disagree as to how to define the relevant market. Plaintiffs contend that the relevant market for determining whether Exxon has market power is the market for Exxon franchises. Dr. Leffler states that Exxon franchisees are locked in to their stations by virtue of the sunk costs invested in their stations, their clientele, and their reputations. (Leffler Decl., ¶ 6(B).) Exxon argues that because Exxon gasoline is not unique and Exxon's share of the retail service station market is less than 10 percent, Exxon cannot force prospective franchisees to become [*15] Exxon dealers. The court agrees. Plaintiffs' argument that the court should consider the fact that Exxon's franchisees are "locked in" to their franchises in determining whether Exxon has sufficient monopoly power is erroneous. Plaintiffs cite *Siegel v. Chicken Delight*, 448 F.2d 43, 47 (9th Cir. 1971), cert. denied, 405 U.S. 955, 92 S. Ct. 1173, 31 L. Ed. 2d 232 (1972) to support their argument that Exxon has illegally tied its leasing and sales agreements with the requirement that its equipment be used only with Exxon gasoline. Although the court in *Chicken Delight* found that the defendant's requirement that its franchisees purchase various unrelated office supplies was an illegal tie in, subsequent cases have criticized *Chicken Delight* or limited it to situations where the tied products are not essential to the franchise agreement and are merely commonplace articles. See *Krehl*, 664 F.2d at 1352-53 (distinguishing *Chicken Delight* from the situation where the trademarked name is associated with the allegedly tied product); *Mozart*, 833 F.2d at 1346-47 (finding as a "basic fact that the 'market' at issue [was] the market for dealership franchises" despite claims that dealers are locked in by costs of surrendering dealerships); [*16] *Tominaga*, 682 F. Supp. at 1494 (criticizing *Chicken Delight* and stressing importance of pre-contract analysis in finding no market power exists in market for tying product). Therefore, the relevant market in this case is the market for gasoline franchises.

The cases hold that a defendant has market power in the tying product where the defendant either has sufficient market share to prevent rivals from selling the tied product or where the tying product is somehow unique.

Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 796 (1st Cir. 1988). This court has already determined that Exxon does not have sufficient market share in the market for service station sites, with less than 10 percent of the gasoline market in the Bay Area. Further, plaintiffs have offered no evidence indicating that gasoline, or gas station franchises, are unique products such that a prospective franchisee would not be free to choose with which gasoline manufacturer to become a franchisee. Accordingly, the court finds that plaintiffs have failed to raise a triable issue of fact regarding an essential element of the tying claim.

2. Effect of Bogosian

Exxon further argues the nationwide consent decree in Bogosian [*17] v. Gulf Oil Corp., 621 F. Supp. 27 (E.D. Pa. 1985) insulates it from all state antitrust claims challenging its lease provisions restricting the use of Exxon's gasoline storage and pumping equipment to Exxon gasoline. According to Exxon, ten of the fifteen plaintiffs in this action were class members in Bogosian and are bound by res judicata. Exxon further argues that the remaining plaintiffs, who were not dealers in 1985 at the time of the settlement, are bound because they "subsequently [came] into the class" and their interests received "actual and efficient protection." See Los Angeles Branch NAACP v. Los Angeles Unified School District, 750 F.2d 731, 741 (9th Cir. 1984), cert. denied, 474 U.S. 919, 106 S. Ct. 247, 106 S. Ct. 248, 88 L. Ed. 2d 256 (1988).

Plaintiffs do not appear to contest that they are bound by Bogosian, but contend that Exxon has not complied with the consent decree. Plaintiffs argue that Bogosian explicitly states that Exxon "shall not require any Exxon lessee dealer to purchase his entire requirement of motor fuel from Exxon." (Simmons Decl., Ex. E, ¶ 7.) Further, although the settlement decree provides that Exxon may, to discharge "all of its obligations under paragraph 7," "provide an Exxon lessee [*18] dealer the opportunity to add additional pumps and tanks at his leased service station for the purpose of the sale of non-Exxon motor fuel," plaintiffs contend that they are denied this opportunity because of the prohibitive costs of installing the equipment and getting the necessary insurance, especially in light of the short duration of the lease (three years). However, nothing in the settlement decree indicates that the court did not consider the reasonableness of the requirement that franchisees pay for their own equipment should they wish to sell non-Exxon gasoline. Nor does the settlement agreement suggest that plaintiffs are entitled to require Exxon to permit them to sell non-Exxon gas other than through their own pumps and tanks if the cost of installing pumps and tanks is substantial or even prohibitive.

Plaintiffs further challenge Exxon's lease agreements as failing to track Bogosian with respect to the conditions under which Exxon may refuse to permit its dealers from installing their own equipment. Plaintiffs cite to Bogosian's requirement that consent not be unreasonably withheld, or not withheld at all, when plaintiffs have complied with the provisions in paragraph 9 [*19] (requiring adequate safety precautions and that dealers purchase adequate insurance). In comparison, paragraph 7.2(b) of the lease agreement provides that the lessee agrees to "install no tanks, lines, or dispensers on the PREMISES without the express written prior consent of LESSOR, and to make any approved installation in accordance with all terms and conditions of any consent given." (Carter Decl., Ex. A.) While this does not explicitly mention Bogosian's requirement that consent not be unreasonably withheld, and that consent be granted if lessees comply with detailed safety requirements, the court will construe a duty of reasonableness into contractual terms, including lease provisions. Cohen v. Ratinoff, 147 Cal. App. 3d 321, 330, 195 Cal. Rptr. 84 (1983) (implying good faith reasonableness requirement to objection to lease assignment despite absence of such language in the lease). The procedures listed in Bogosian must necessarily be considered in determining whether consent has been reasonably withheld. Therefore, the court holds, as a matter of law, that the challenged portion of Exxon's lease agreement, as construed, does not in itself violate the consent decree in Bogosian and, therefore, these [*20] terms are not subject to attack under federal or state antitrust laws by those bound by the Bogosian consent decree. See Bogosian consent decree (Simmons Decl., Ex. E, ¶ 14.).

C. Monopolization Claim

Plaintiffs appear to have essentially abandoned their Twelfth Claim for Relief, monopolization, by failing to respond to Exxon's arguments in its motion for summary judgment. Plaintiffs do challenge, however, Exxon's market

definition argument, which Exxon uses to challenge all three causes of action. Nonetheless, because the court finds that no genuine issue exists as to whether Exxon has sufficient market power in the relevant retail gasoline market, the court holds that, as a matter of law, plaintiffs' monopolization and attempted monopolization claims must fail. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966) (requiring element of monopoly power for illegal monopolization claim); *Falstaff Brewing Co. v. Stroh Brewing Co.*, 628 F. Supp. 822, 829 (N.D. Cal. 1986) (dismissing attempted monopolization claim for failure to state a claim where defendant had insufficient market share); see also discussion in parts III. A.2., III.B.1., *supra*.

IV. ORDER

Exxon's motion for partial [*21] summary judgment on the Cartwright Act claims (Tenth, Eleventh, and Twelfth Claims for Relief) is granted.

DATED: 7/6/95

/s/ Ronald M. Whyte

RONALD M. WHYTE

United States District Judge

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Howerton v. Grace Hosp.

United States District Court for the Western District of North Carolina, Shelby Division

July 7, 1995, Decided ; July 7, 1995, FILED

CIVIL NO. 4:90CV187

Reporter

1995 U.S. Dist. LEXIS 21123 *; 1995-2 Trade Cas. (CCH) P71,208

PHILIP T. HOWERTON, M.D.; RAY M. ANTLEY, M.D.; and BLUE RIDGE RADIOLOGY ASSOCIATES, P.A., Plaintiffs, vs. GRACE HOSPITAL, INC.; and PIEDMONT MEDICAL IMAGING, P.C., Defendants.

Prior History: [*1] Adopting Magistrate's Document of September 13, 1993, Reported at: [1993 U.S. Dist. LEXIS 21042.](#)

Disposition: Defendants' motion for summary judgment granted and action dismissed. Defendants' motion to strike denied.

Core Terms

radiology, outpatient, Plaintiffs', exclusive contract, inpatient, monopolization, antitrust, Declaration, radiologists, termination, staff, patients, imaging, charges, prices, competitor, referrals, clinic, opened, monopoly power, privileges, percent, magistrate judge, Defendants', Deposition, Memorandum, conspiracy, facilities, outpatient services, de facto

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Magistrates > General Overview

[HN1](#) **Judicial Officers, Magistrates**

A federal district court reviews de novo those portions of a magistrate's memorandum and recommendation to which objections have been filed. [28 U.S.C.S. § 636\(b\)](#).

Civil Procedure > Judicial Officers > Magistrates > General Overview

[HN2](#) **Judicial Officers, Magistrates**

The clear language in [28 U.S.C.S. § 636\(b\)](#) provides that on review of a magistrate judge's memorandum and recommendation, a district court may also receive further evidence or recommit the matter to the magistrate with instructions.

Civil Procedure > Judicial Officers > Magistrates > General Overview

[**HN3**](#) **Judicial Officers, Magistrates**

Arguments not raised before the magistrate judge must be considered by the district court when submitted with objections. By definition, de novo review entails consideration of an issue as if it had not been decided previously. It follows, therefore, that the party entitled to de novo review must be permitted to raise before the court any argument as to that issue that it could have raised before the magistrate. The same reasoning applies to new evidence.

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

[**HN4**](#) **Entitlement as Matter of Law, Legal Entitlement**

A motion for summary judgment is appropriate in any civil action in which there is no genuine issue of material fact and one party is entitled to judgment as a matter of law.

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

[**HN5**](#) **Burdens of Proof, Movant Persuasion & Proof**

The party moving for summary judgment has the burden of showing that there are no facts, combination of facts or evidence supporting the nonmoving party's case.

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

[**HN6**](#) **Entitlement as Matter of Law, Appropriateness**

In ruling on a motion for summary judgment, a court will consider that there is no genuine issue of material fact, and summary judgment is therefore appropriate, when the record as a whole could not lead a rational trier of fact to find for the nonmoving party.

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

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

[**HN7**](#) **Entitlement as Matter of Law, Appropriateness**

In ruling on a motion for summary judgment, a court will view the pleadings and material presented in the light most favorable to the nonmoving parties.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

[**HN8**](#) **Conspiracy to Monopolize, Elements**

Antitrust law limits the range of permissible inferences from ambiguous evidence. Thus, conduct as consistent with permissible competition as with illegal restraint does not, standing alone, support an inference of antitrust violation. Thus, if the factual context renders an antitrust claim implausible - if the claim is one that simply makes no economic sense - plaintiffs must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

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

HN9[**Private Actions, Standing**

In order to have standing to pursue a private antitrust claim, plaintiffs must show more than injury from defendants' conduct, they must show antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Thus, injury which results merely from competition is not sufficient to warrant antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

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

HN10[**Sherman Act, Claims**

Section 1 of the Sherman Act provides that every contract, combination or conspiracy, in restraint of trade or commerce among the several States is declared to be illegal. 15 U.S.C.S. § 1. This language includes restrictive contracts which impose unreasonable restraints on competition. Nonetheless, a plaintiff claiming a § 1 violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. Unilateral conduct on the part of a single person or enterprise falls outside the purview of this provision in the **antitrust law**. If a plaintiff is able to show the existence of an illegal contract, then the next step is to establish that the agreement is an unreasonable restraint on trade either per se or according to the rule of reason. However, it is unnecessary to reach this second step if the plaintiff has not established an illegal contract.

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

Evidence > Burdens of Proof > Burden Shifting

HN11[**Private Actions, Sherman Act**

In the general run of cases under the Sherman Act, a plaintiff must prove an antitrust injury under the rule of reason. Under this test the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive redeeming virtues of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives. Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior.

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

[**HN12**](#) [blue download icon] Sherman Act, Scope

The threshold question in analyzing the antitrust implications of a business practice is whether it will lessen competition, not whether it harms a competitor.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

[**HN13**](#) [blue download icon] Private Actions, Sherman Act

A staffing decision does not constitute an antitrust injury. There is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all.

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

[**HN14**](#) [blue download icon] Private Actions, Sherman Act

Merely changing exclusive contractors cannot constitute a violation of the antitrust laws. This is true despite the fact that substituting one exclusive contractor for another may have the consequence of boycotting or shutting out the displaced contractor.

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

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

[**HN15**](#) [blue download icon] Conspiracy to Monopolize, Sherman Act

When plaintiffs have not shown an illegal combination or concerted action between two legally distinct economic entities, of necessity, the claim for unreasonable restraint of trade must fail.

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

[**HN16**](#) [blue download icon] Tying Arrangements, Sherman Act Violations

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

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

[**HN17**](#) [blue download icon] Tying Arrangements, Sherman Act Violations

The lack of a hospital's economic interest in a tied product is sufficient to defeat a tying claim.

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

HN18 [L] **Price Fixing & Restraints of Trade, Tying Arrangements**

Proof of market power in a tying claim does not become relevant unless and until proof of tying is established.

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

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

HN19 [L] **Monopolies & Monopolization, Actual Monopolization**

Section 2 of the Sherman Act provides that no person 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 > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

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

HN20 [L] **Attempts to Monopolize, Elements**

Unlawful monopoly consists of the possession of monopoly power in the relevant market and willful acquisition or maintenance of that power. In order to prove an attempted monopolization claim, plaintiffs must show 1) a specific intent to monopolize a relevant market, 2) predatory or anti-competitive acts, and 3) a dangerous probability of successful monopolization. Because specific intent may be inferred from anticompetitive conduct, it is appropriate to begin with an inquiry into such conduct. The standard for ascertaining anticompetitive conduct as stated by the U.S. Supreme Court: If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory. Nonetheless, the central principle remains the same: One who does not compete in a product market or conspire with a competitor cannot be held liable as a monopolist in that market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN21 [L] **Actual Monopolization, Monopoly Power**

Growth or development resulting from business acumen is not tantamount to acquisition of monopoly power.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN22 [L] **Actual Monopolization, Claims**

Monopoly leveraging is the use of monopoly power in one market, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor' in another distinct market. The Fourth Circuit has not yet recognized this as a cause of action.

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

HN23 [blue] **Conspiracy to Monopolize, Elements**

In order to sustain a claim for conspiracy to monopolize, Plaintiffs must show concerted action, a specific intent to achieve an unlawful monopoly, and commission of an overt act in furtherance of the conspiracy.

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

HN24 [blue] **Monopolies & Monopolization, Conspiracy to Monopolize**

Conduct as consistent with permissible competition as with illegal conspiracy does not itself support an inference of antitrust conspiracy.

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

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

HN25 [blue] **Private Actions, Remedies**

Plaintiffs fail to make a showing of antitrust injury when the only injury shown by the facts, viewed in the light most favorable to plaintiffs, is injury to them resulting from competition, not injury to competition itself.

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

HN26 [blue] **Expert Witnesses, Credibility of Witnesses**

Scrutiny of expert testimony is especially proper where it consists of an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it. This is particularly true, in a situation when an expert has apparently taken factual data from a specific project in dispute, and formulated estimates of damages.

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

HN27 [blue] **Expert Witnesses, Credibility of Witnesses**

Where resolution of a causation issue depends on expert opinion testimony, that testimony must reach a higher standard of probability rather than possibility.

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RADIOLOGY ASSOCIATES, P.A., plaintiffs: Wayne W. Martin, Morganton, NC USA. Robert N. Meals, Culp, Guterson & Grader, Seattle, WA USA.

For GRACE HOSPITAL, INC., defendant: James H. Sneed, Washington, DC USA. Thomas M. Starnes, Patton, Starnes, Thompson, Aycock & Teele, Morganton, NC USA. For PIEDMONT MEDICAL IMAGING, P.C., defendant: Thomas C. Morphis, Tate, Young, Morphis, Bach & Farthing, Hickory, NC USA.

Judges: LACY H. THORNBURG, UNITED STATES DISTRICT COURT JUDGE

Opinion by: LACY H. THORNBURG

Opinion

MEMORANDUM AND ORDER

THIS MATTER is before the Court on objections to the Memorandum and Recommendation of Chief United States Magistrate Judge J. Toliver Davis. For the reasons stated below, the Court adopts the recommendation of Magistrate Judge Davis and grants summary judgment to the Defendants and dismisses the action.

[*2] I. STANDARD OF REVIEW

[**HN1**](#) The Court reviews *de novo* those portions of the Memorandum and Recommendation to which objections have been filed. [28 U.S.C. § 636\(b\)](#). Plaintiffs submitted additional evidence with the objections in the form of affidavits which were not placed before the Magistrate Judge at the time of his decision. Defendants object to this new evidence and move to strike it from the record, citing *Callas v. Trane CAC, Inc.*, 776 F. Supp. 1117 (W.D. Va. 1990), *aff'd without op.*, 940 F.2d 651 (4th Cir. 1991). The district court there precluded consideration of affidavits presented for the first time in connection with objections to the memorandum and recommendation, noting that parties may not "hold back" in proceedings before the magistrate judge hoping to submit additional evidence at the *de novo* review stage. *Id.*, at 1119. The court also noted that no reason for the delay in submission had been given. *Id.* However, the court did review the affidavits in question, found them unreliable, and refused to accord them any weight.

Although affirmed by the Fourth Circuit, the precedential value of the Callas opinion is doubtful in view of [**HN2**](#) the clear language [*3] in [28 U.S.C. § 636\(b\)](#) providing that on review of a magistrate judge's memorandum and recommendation, the district court "may also receive further evidence or recommit the matter to the magistrate with instructions." [28 U.S.C. § 636\(b\)](#). Indeed, a later opinion of the Fourth Circuit has quoted this portion of the statute and held that [**HN3**](#) arguments not raised before the magistrate judge must be considered by the district court when submitted with objections. [United States v. George](#), 971 F.2d 1113, 1118 (4th Cir. 1992). "By definition, *de novo* review entails consideration of an issue as if it had not been decided previously. It follows, therefore, that the party entitled to *de novo* review must be permitted to raise before the court any argument as to that issue that it could have raised before the magistrate." *Id.* The same reasoning applies to new evidence. While this reasoning increases the potential for parties to frustrate the delegation of matters to magistrate judges, the sanctions of Rule 11 are an appropriate solution to such conduct. The Defendants' motion to strike is therefore denied and the Court will consider the new evidence submitted with the objections.

[*4] II. SUMMARY JUDGMENT STANDARD

[**HN4**](#) "A motion for summary judgment is appropriate in any civil action in which there is no genuine issue of material fact and one party is entitled to judgment as a matter of law." *Shepard's, Motions in Federal Court*, § 9.17 (2d ed. 1991). [**HN5**](#) The party moving for summary judgment has the burden of showing that there are no facts,

combination of facts or evidence supporting the nonmoving party's case. *Id.*, at § 9.23. [HN6](#) In ruling on such a motion, the Court will consider that

there is no genuine issue of material fact, and summary judgment is therefore appropriate, when the record as a whole could not lead a rational trier of fact to find for the nonmoving party.

Id., at § 9.27. [HN7](#) In ruling on the pending motion, the Court will view the pleadings and material presented in the light most favorable to the Plaintiffs, as the nonmoving parties. [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#), on remand [In re Japanese Electronic Products Antitrust Litigation, 807 F.2d 44 \(3d Cir. 1986\)](#), cert. denied, [Zenith Radio Corp. v. Matsushita Electric Industrial Co., \[*5\] 481 U.S. 1029, 95 L. Ed. 2d 527, 107 S. Ct. 1955 \(1987\)](#). "But [HN8](#) antitrust law limits the range of permissible inferences from ambiguous evidence . . . Thus, . . . conduct as consistent with permissible competition as with illegal [restraint] does not, standing alone, support an inference of antitrust [violation]." [475 U.S. at 588](#). Thus, if the "factual context renders [Plaintiffs'] claim implausible - if the claim is one that simply makes no economic sense - [Plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* (Citations omitted).

III. FINDINGS OF FACT

On October 1, 1990, Plaintiffs filed this action seeking relief from Defendants for violations of the Sherman Act, [15 U.S.C. §§ 1](#) and [2](#). In addition, state law causes of action for violation of due process, breach of contract, and tortious interference with business relations were asserted but later dismissed in January 1993. In summarizing the facts, the Court has construed the facts most favorably to the Plaintiffs and sets forth undisputed facts without reference to pleadings. Plaintiffs have objected to certain findings of fact by the Magistrate [\[*6\]](#) Judge; and, where appropriate, reference is made to pleadings to resolve the findings of fact. "Mindful that [Plaintiffs'] version of any disputed issue of fact thus is presumed correct, we begin with the factual basis of [Plaintiffs'] claims." [Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 456, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#).

Philip T. Howerton, M.D. (Howerton), and Ray M. Antley, M.D. (Antley), are radiologists doing business through Blue Ridge Radiology Associates, P.A. (Blue Ridge). Blue Ridge is a North Carolina professional association located in Morganton and the two doctors are its only shareholders.

Grace Hospital, Inc. (Grace) is a North Carolina non-profit corporation formed in 1908, also located in Morganton. Piedmont Medical Imaging, P.C. (PMI) is a professional corporation providing radiology services in the Morganton area. Richard Theodore Mull, M.D. (Mull) is the sole shareholder of PMI and employs four other radiologists.

Grace operates a radiology department in which inpatient, outpatient, and emergency radiology services are provided 24 hours a day, 7 days a week. Patients are charged a technical fee for the use of the department's [\[*7\]](#) equipment and a professional fee from the doctors who review the reports.

Howerton has been a member of the Grace staff since 1966. He joined the predecessor group to Blue Ridge in 1966, a group which provided radiology services to Grace. Antley became a member of the Grace staff in 1985 at the same time he became associated with Blue Ridge.

Beginning in 1984, Blue Ridge provided radiology services to Grace pursuant to written contract, renewed annually, until Grace terminated the contract by 90 days written notice on June 29, 1990. The contract by its terms was non-exclusive, meaning that other radiologists not associated with Blue Ridge but who had privileges at Grace could also use the hospital's facilities. *Exhibits 24 and 25 attached to Affidavit of Robert N. Meals*. However, according to Plaintiffs' expert, prior to termination of the contract, Blue Ridge had the majority of business with Grace. ("Blue Ridge's position as the dominant supplier of inpatient professional radiology services at Grace prior to the PMI monopoly was the result of successful competition." Declaration of Keith B. Leffler, Ph.D., filed May 7, 1993 at P 35.) Despite the language of the contract, [\[*8\]](#) Plaintiff Antley testified that other doctors "more or less had to do business with us for inpatients," referring to inpatient radiology treatments. *Deposition of Ray M. Antley, M.D., taken July 13, 1992, at 91*. The Court notes Plaintiffs' objection to the Magistrate Judge's finding of fact on this issue, but

finds Plaintiffs' own evidence shows that Blue Ridge had a *de facto* exclusive arrangement with Grace in connection with inpatient professional radiology services.¹

During the time that Blue Ridge [*9] provided the radiology services to Grace, all hospital equipment, personnel, facilities, and records were used by Blue Ridge. Blue Ridge and Grace each billed separately for their services. In setting its fees, Blue Ridge did not consider the possibility of other doctors competing for the radiology services. No portion of Blue Ridge's professional fees was turned over to Grace; no portion of Grace's technical fees was turned over to Blue Ridge.

Howerton initially suggested to Grace officials in 1984 that a free-standing outpatient radiology center should be built in the area. In 1986, Howerton informed Grace by letter of his intention to establish such a facility. Howerton, in hopes of a joint venture with Grace, presented his plans to the hospital board at a meeting in October 1986, at which time he proposed that Blue Ridge provide administrative services to Grace not being provided under the written contract. The board adopted resolutions stating 1) a willingness to consider a joint venture in a diagnostic imaging clinic, 2) a willingness to meet again with Blue Ridge to renegotiate a more satisfactory contract, provided that Howerton agreed to postpone the imaging clinic, 3) directing [*10] a committee be formed to meet with Howerton, and 4) determining that if Blue Ridge proceeded with the establishment of a diagnostic imaging clinic, Grace would terminate the contract.

The parties continued to negotiate during the next year and a half. In May 1988, Howerton concluded that Grace would not enter into a joint venture for the clinic and that contract negotiations to revise the 1984 contract were at an end. Howerton solicited a study of the feasibility of a diagnostic imaging clinic from Richard Dorson of the American College of Radiology who concluded that the clinic could capture 60 percent of the referred outpatient procedures being performed at Grace. Dorson also noted that many physicians interviewed commented on the poor relationship between Grace and the Blue Ridge group and complained about the medical performance of one Blue Ridge radiologist.

Blue Ridge proceeded with its plan to establish the clinic in early 1989. Plaintiffs determined to proceed in reliance on Dorson's report and their concern that another group would beat them "to the punch" by building an outpatient facility. In projecting their success, Blue Ridge assumed they would continue to use Grace's [*11] equipment, facilities, personnel, and records.

Grace learned about the plans in July 1989. It was concerned about loss of revenue from outpatient imaging, coverage, on-call coverage, administrative complications, and conflicts of interest inherent in allowing access to business records by a separate facility. Grace began a search for radiologists to provide coverage in its department. On behalf of Grace, Douglas C. Keir, then the Assistant Administrator of the hospital, contacted executives and department heads at Valdese General Hospital in Valdese, North Carolina; Catawba Memorial in Hickory, North Carolina; and Caldwell Memorial in Lenoir, North Carolina. In late July or early August 1989, Keir met with Mull, practicing alone under the name of PMI at Catawba Memorial. Keir proposed that any contract with PMI be an exclusive contract.

Blue Ridge began construction of its facility less than one mile from Grace in March 1990. In April 1990, Grace and PMI executed an exclusive contract to provide radiological services. By letter of June 22, 1990, Grace notified Blue Ridge that it was invoking the 90-day termination provision of the contract. Blue Ridge opened its center on August [*12] 1, 1990. Two months later, it initiated this suit.

Since August 1990, Blue Ridge and Grace have competed in the market for outpatient radiological services. Blue Ridge opened with 8 employees, state of the art x-ray, fluoroscopy, mammography, computerized axial

¹ In fact, in a declaration submitted by Plaintiffs in opposition to the motion for summary judgment, Dr. Michael Alexander claimed that Mull had told him Howerton and Antley had prevented him from obtaining privileges at Grace during the period when Blue Ridge provided services. **Declaration of Michael S. Alexander, M.D., in Opposition to Defendants Grace Hospital's and Piedmont Medical Imaging's Motions for Summary Judgment, filed May 7, 1993.** Mull, a competing radiologist, ultimately formed PMI.

tomography, color vascular, and ultrasound equipment. It did not offer magnetic resonance imaging (MRI) or nuclear medicine services available at Grace.² Blue Ridge is open Monday through Friday and closes daily at 5:30 P.M.

The contract between Grace and PMI specifies that Grace will bill separately for its technical services, as will PMI for its professional services. However, there is a provision allowing termination of the contract for the charging of excessive professional fees.

Before Blue Ridge opened its facility, Grace was the only significant provider of outpatient technical services and Blue Ridge the only significant provider of outpatient [*13] professional services in Morganton. Since August 1990, patients may obtain the same services at either Grace or Blue Ridge using either PMI or Blue Ridge radiologists. The average outpatient technical radiology charges at Grace are approximately 47 percent higher than those at Blue Ridge. According to Plaintiffs' expert, Richard Dorson, free-standing imaging facilities are able to offer outpatient services at a lower charge because "hospitals [are] not designed to be efficient competitors for outpatient services and their overhead for all services are covered in these charges."³ **Declaration of Richard L. Dorson in Opposition to Defendants' Motions for Summary Judgment, filed May 7, 1993, at 3.** Since opening the facility, Howerton has made efforts to market Blue Ridge, including sending promotional letters to physicians. In addition, the facility has received referrals due to the reputation of Howerton and Antley among local physicians.

[*14] In 1991, Blue Ridge had a total of \$ 1,237,210 in charges for procedures performed with \$ 913,857 of those charges being collected. In 1992, Blue Ridge's charges increased to \$ 1,432,695 with total collections of \$ 954,731. For each year the facility has been in operation, its revenue has exceeded expenses. Blue Ridge has not missed any scheduled payments for rent, mortgage, salaries or other expenses since its opening.

Many physicians have attributed improvements in the radiology department at Grace to the competition of Blue Ridge. Blue Ridge has received referrals from physicians who joined Grace's medical staff after August 1990 and who had no previous experience with Howerton and Antley at Grace. Moreover, no physicians practicing in Morganton (including new ones) have decreased their referrals to Blue Ridge.

Dr. Michael S. Alexander, a former PMI radiologist, stated that Grace steered inpatients to return to Grace for outpatient imaging after discharge. Supplemental Declaration of Michael S. Alexander, M.D., filed October 19, 1993. Douglas Neal stated that he was treated on an outpatient basis by Dr. Lee, a Grace staff member, in 1993. When Dr. Lee advised he needed a chest [*15] x-ray, he informed the technician that he preferred to have the x-ray performed at Blue Ridge, but was advised that the x-ray had to be performed at Grace. Declaration of H. Douglas Neal, filed October 19, 1993.

In December 1992, a majority of the physicians on staff at Grace, signed a declaration stating that if Howerton and Antley were granted privileges to the radiology department at Grace, they would refer some of their patients to Howerton and Antley. Plaintiffs also supplied declarations of 19 physicians who are members of Grace's staff supporting access to Grace for Howerton and Antley. Plaintiffs have established a good working relationship with referring physicians.

The employment market for radiologists is nationwide. According to Plaintiffs' expert, in 1989, 60 percent of all radiologists in the United States had an exclusive contract with their hospitals to provide professional services in radiology. Declaration of Richard Dorson, filed May 7, 1993, at 6.

IV. DISCUSSION

² It appears that during the process of litigation, Blue Ridge has obtained access to MRI equipment.

³ The Court notes Plaintiffs' objection to the Magistrate Judge's finding of fact on this issue, but finds that Plaintiffs' evidence shows the fact as stated.

Plaintiffs have alleged violations of [§ 1](#) of the Sherman Act by means of a tying arrangement, exclusive dealing, and unreasonable restraint of trade. They allege violations of [§ 2](#) by attempted [*16] monopolization and monopolization.

HN9[] In order to have standing to pursue a private antitrust claim, Plaintiffs must show more than injury from Defendants' conduct, they must show "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [*Balaklaw v. Lovell, 14 F.3d 793, 797 \(2d Cir. 1994\)*](#) (emphasis in original). Thus, injury which results merely from competition is not sufficient to warrant antitrust injury. *Id.*

A. Overview of [§ 1](#) claims

HN10[] [Section 1](#) of the Sherman Act provides that "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . , is declared to be illegal." [15 U.S.C. § 1](#). This language includes restrictive contracts which "impose unreasonable restraints on competition." [*Coffey v. Healthtrust, Inc. 955 F.2d 1388, 1391 \(10th Cir. 1992\)*](#). Nonetheless, "a plaintiff claiming a [§ 1](#) violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. Unilateral conduct on the part of a single person or enterprise falls outside the purview [*17] of this provision in the antitrust law." [*Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 542* \(2d Cir.\), cert. denied, 126 L. Ed. 2d 337, U.S. __, 114 S. Ct. 388 \(1993\).](#)

If a plaintiff is able to show the existence of an illegal contract, then the next step is to establish that the agreement is an unreasonable restraint on trade either *per se* or according to the rule of reason. *Id.* However, it is unnecessary to reach this second step if the plaintiff has not established an illegal contract. *Id.*

HN11[] In the general run of cases a plaintiff must prove an antitrust injury under the rule of reason. Under this test plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors.... After the plaintiff satisfies its threshold burden of proof under the rule [*18] of reason, the burden shifts to the defendant to offer evidence of the pro-competitive "redeeming virtues" of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives ... Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior.

Id., at 543 (emphasis in original).

B. Exclusive dealing

Plaintiffs claim that Grace's exclusive contract with PMI for inpatient radiology services constitutes exclusive dealing. This claim must fail because Plaintiffs cannot move past the first step in the [§ 1](#) inquiry: they have failed to establish anything other than unilateral conduct on the part of Grace. The undisputed facts show that in 1986, Grace determined to terminate Blue Ridge's contract if and when it opened an outpatient imaging facility. When Grace learned in 1989 that Howerton was going through with his plans to do so, it began making its plans to replace Blue Ridge in the radiology department. Grace approached Mull; Grace first mentioned [*19] and insisted on an exclusive contract. The fact that Mull was interested in the contract for financial or personal reasons does not show a combination or concerted action to restrain trade.⁴ The crucial fact is that Grace made the decision to terminate

⁴ Mull, a competing radiologist, alleged that he had been denied privileges at Grace while Blue Ridge had the exclusive arrangement for radiology. According to Plaintiffs' evidence, he was delighted at the opportunity to receive retribution.

Blue Ridge and Grace approached Mull insisting on an exclusive contract. Thus, Plaintiffs have not moved past the first step in the inquiry.

Other courts have reached the same conclusion. In *Balaklaw, supra*, almost identical factually to the case at hand, plaintiff had been the president of a group of anesthesiologists solely providing anesthesia services to a hospital. As here, although there was no exclusive contract, plaintiff had a "de facto" exclusive contract with the Hospital." *Balaklaw, 14 F.3d at 796. [*20]* Thereafter, the hospital solicited other anesthesiologists to provide the same service and entered into an exclusive contract with another group. On the issue of inpatient professional services, the court quoted *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 29-31, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*, noting that

even if [the new group of anesthesiologists] 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 [the hospital], the range of choice will be enlarged . . . , but the most significant restraints on the patient's freedom to select a specific [radiologist] will nevertheless remain.

Id., at 798.

Like here, plaintiff failed to establish anything other than the replacement by the hospital of one exclusive arrangement with another. From the point of view of the patient, the consumer, nothing changed. "It is clear that what occurred after the implementation of the [*21] [exclusive] contract . . . was only a reshuffling of competitors." *Id.* (citing *Coffey, 955 F.2d at 1393*). As in Coffey and *Balaklaw*, Plaintiffs here had a *de facto* exclusive contract prior to the change to PMI. Only the provider has changed; Grace has not changed its method of providing those services. *Id., at 799.*

Nor have Howerton and Antley been excluded from or limited in a broader market for employment because the market for radiologists is nationwide. *Id.* Moreover, the contract with PMI executed October 9, 1990, had an initial period of four years, thereafter renewable annually. **Exhibit 23 attached to Affidavit of Robert N. Meals, filed May 7, 1993.** It also provided for termination without cause after the initial term by written notice 180 days prior to termination. *Id.* Thus, the scope of the contract was not unreasonable. *Id.* "Such a situation may actually encourage, rather than discourage, competition, because the incumbent and other, competing [radiologists] have a strong incentive continually to improve the care and prices they offer in order to secure the exclusive positions." *Balaklaw, 14 F.3d at 799* (citing *Steuer v. [*22] National Medical Enter., 672 F. Supp. 1489, 1516 (D.S.C. 1987)*, aff'd, 846 F.2d 70 (4th Cir. 1988)). Indeed, Plaintiffs' evidence shows that the radiology equipment at Grace significantly improved after Blue Ridge opened its facility. Declaration of James Morris Croft, M.D., filed May 7, 1993, at 4 ("Since Blue Ridge Radiology opened its clinic in 1990, Grace Hospital . . . finally purchased an up-to-date ultrasound machine and made improvements in their mammographic images. These improvements at Grace Hospital were prompted mainly as a direct effect of competition from Blue Ridge's outpatient clinic.").

Plaintiffs' primary complaint is that their ability to acquire outpatient business is damaged by their inability to also perform inpatient radiology services at Grace, claiming that the day-to-day contact with referring physicians is the source of business. But the facts show that referrals from physicians on staff at Grace not only continue, but have not decreased. Citing Grace's location in Morganton, an area described by Plaintiffs as rural, they argue Grace's exclusive contract with PMI has limited their ability to have sufficient contact with referring physicians to acquire [*23] business. However, Plaintiffs have neither argued nor shown that they could not acquire staff privileges at another relatively close hospital such as Catawba Memorial in Hickory, North Carolina. These arguments all overlook *HN12*↑ the "threshold question in analyzing the antitrust implications of a business practice [which] is whether it will lessen competition, not whether it harms a competitor." *Steuer, 672 F. Supp. at 1501.* From the record, it appears that Grace's contract with PMI has increased competition for the outpatient services despite the fact that Blue Ridge may have been harmed.

The same arguments raised here have been rejected by the Fourth Circuit in the *Steuer* case. Plaintiffs there were pathologists who for 23 years were the only providers of pathology services to the hospital. When the hospital

awarded the contract to a different group of pathologists, plaintiffs claimed they were the brunt of exclusive dealing, noting the hospital was the only one in the county. The district court held that plaintiffs had failed to demonstrate the presence of competition within the market prior to the termination of the contract or lessening of competition thereafter. *Id.* [*24] "Thus, reduced to its essentials, plaintiffs' [claims] rest[] not on any showing of lessened competition, but merely on the fact that they are disappointed competitors who must now provide their services elsewhere." *Id.*

Plaintiffs cite the fact the while they had a relationship with Grace, other physicians could read films on behalf of their patients, should they choose to do so. This allegation is not sufficient to show true competition; the overwhelming evidence of record from Plaintiffs themselves is that Blue Ridge had a de facto exclusive contract with Grace. Howerton himself testified that when setting prices for professional services at Grace, he never considered the possibility that other radiologists might be brought into the hospital. Deposition of Philip T. Howerton, M.D., taken December 18, 1992, at 30-31. The factual context of the case renders this claim implausible. *Steuer, 672 F. Supp. at 1500* (quoting *Matsushita, supra*); and at 1502 n.7 ("Plaintiffs take the position that their contractual relationship with CMH was not exclusive. While the word "exclusive" did not appear in plaintiffs' contracts, . . . those contracts unquestionably made plaintiffs [*25] responsible for fulfilling all of the hospital's professional pathology requirements. Plaintiffs' argument to the contrary is frivolous.").

Plaintiffs also argue that Grace's charges for outpatient services are higher than their charges for the same procedures. However, this does not "establish injury to competition because the relevant inquiry is not whether prices have increased, but whether they have increased over the competitive level. Plaintiffs, however, failed to offer any evidence regarding competitive pricing levels." *Id., at 1502*. Indeed, Grace included a provision in its contract with PMI allowing termination of the contract if PMI charges excessive professional fees. Plaintiffs' evidence shows that Grace continued to set its prices for technical radiological services with a view toward its competition. Larry Hurd testified at his deposition that Grace set its prices consistent with those being charged by other facilities. "Typically what we would do would be to survey a number of people and take an average of whatever the charges were. So we may be higher than some and lower than others." Excerpt from the Deposition of Larry Hurd, attached to Declaration of Michael [*26] D. Helgren, filed October 13, 1993, at 35-36. Grace never contacted Blue Ridge concerning competitive prices because it considered only fees of other hospitals. *Id., at 112*. This evidence shows that Grace did not increase prices over competitive levels. *Steuer, 672 F. Supp. at 1502-03*. "The only restraints alleged are that plaintiffs cannot now practice in the business form they prefer and the prices the hospital charges may be somewhat higher now than they were. . . . *HN13*[↑] A staffing decision does not . . . constitute an antitrust injury." *BCB Anesthesia Care v. Passavant Mem. Area Hosp., 36 F.3d 664, 667-9 (7th Cir. 1994)* (noting the hundreds of cases involving staffing at single hospitals in which it is "invariably" determined that "there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all.").

In summary, *HN14*[↑] "merely changing exclusive contractors, . . . cannot constitute a violation of the antitrust laws. This is true despite the fact that substituting one exclusive contractor for another may have the consequence of 'boycotting or shutting out' the displaced contractor." [*27] *Steuer, 672 F. Supp. at 1502* (citations omitted). Plaintiffs have failed to show that the contract in question lessened competition.

C. Unreasonable restraint of trade

The Court has determined that *HN15*[↑] Plaintiffs have not shown an illegal combination or concerted action between two legally distinct economic entities. Therefore, of necessity, the claim for unreasonable restraint of trade must fail. *Capital Imaging, 996 F.2d at 547*.

D. Tying arrangement

Plaintiffs argue that Grace has tied the provision of inpatient technical services to the purchase of inpatient professional radiology services in violation of [§ 1](#).

[HN16](#) [↑] A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement violates [§ 1](#) of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.

[Eastman Kodak Co., 504 U.S. at 461-62](#) (citations omitted).

However, Grace is not [*28] a competitor in the inpatient professional radiology market because it does not share any portion of the fees generated by PMI. [White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104 \(4th Cir. 1987\)](#).

[HN17](#) [↑] "The lack of the hospital's economic interest in the tied product is sufficient to defeat [Plaintiffs'] tying claim . . .". *Id.*

Plaintiffs argue that Grace benefits from the performance of inpatient radiology services by its ability to charge for inpatient technical services. Nonetheless, the fact that Grace does not compete in the inpatient radiology market defeats this argument. *Id.*; see also, [Beard v. Parkview Hosp., 912 F.2d 138, 141 \(6th Cir. 1990\)](#) ("mile seller of the tying product must have benefited directly from the sale of the tied product," in a case factually identical to that at hand).

Plaintiffs also claim that proof of Grace's economic power in the market shows that it is engaged in an illegal tying arrangement. In other words, forcing patients to use PMI for inpatient radiology services eliminates competition for outpatient radiology services. This argument overlooks the fact that outpatient radiology services are performed only by referral from treating [*29] physicians. Plaintiffs have attached 20 declarations from physicians holding staff privileges at Grace who state that they prefer Blue Ridge's services and desire Howerton and Antley to have access to Grace for inpatient radiology services. These physicians account for over 78 percent of the admissions to Grace. See, Affidavits attached to Plaintiffs' Response to Motion for Summary judgment. These physicians make referrals to Blue Ridge for outpatient services because they prefer Howerton and Antley and find their services less expensive.

However, it is unnecessary to reach the issue of market power. [HN18](#) [↑] Proof of market power in a tying claim does not become relevant unless and until proof of tying is established. [Beard, 912 F.2d at 142-44; Jefferson Parish, 466 U.S. at 12 n.17.](#) "As a matter of law, . . . because [Grace] received no direct economic benefit from the radiological services provided to its patients by [PMI], it engaged in no unlawful tying arrangement, under either the per se or the rule of reason approaches, by entering into an exclusive contract for radiological services with [PMI]."

[Beard, 912 F.2d at 144.](#)

E. Essential facilities claim

Plaintiffs [*30] have abandoned their claim for antitrust relief pursuant to the essential facilities doctrine. Plaintiffs' Objections to Magistrate Judge's Memorandum and Recommendation, at 27. The Court therefore will not address this claim.

F. [Section 2](#) claims: attempted monopolization and monopolization

[HN19](#) [↑] [Section 2](#) of the Sherman Act provides that no person 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](#). Plaintiffs claim the exclusive contract with PMI effectively eliminates competition in the outpatient radiology market.

HN20 [+] Unlawful monopoly consists of the possession of monopoly power in the relevant market and willful acquisition or maintenance of that power. [Beard, 912 F.2d at 144](#). In order to prove an attempted monopolization claim, Plaintiffs must show 1) a specific intent to monopolize a relevant market, 2) predatory or anti-competitive acts, and 3) a dangerous probability of successful monopolization. [Advanced Health-Care Servs. v. Radford Community Hosp., 910 F.2d 139 \(4th Cir. 1990\)](#). Because specific intent may be inferred from [*31] anticompetitive conduct, it is appropriate to begin with an inquiry into such conduct. [M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 166 \(4th Cir. 1992\)](#), cert. denied, [508 U.S. 972, 113 S. Ct. 2962, 125 L. Ed. 2d 662 \(1993\)](#).

The standard for ascertaining anticompetitive conduct has been stated by the Supreme Court: "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." [Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 86 L. Ed. 2d 467, 105 S. Ct. 2847 \(1985\)](#). Nonetheless, the central principle remains the same: "One who does not compete in a product market or conspire with a competitor cannot be held liable as a monopolist in that market." [White, 820 F.2d at 104](#); see also, [Beard, 912 F.2d at 144](#); [Steuer, 672 F. Supp. at 1520](#). Grace does not compete with Blue Ridge for outpatient radiology services because it does not receive any portion of the fees generated by PMI. Any claim against Grace for monopolization or attempted monopolization must fail.

Only PMI may be considered a competitor of Blue Ridge in this market. But, [*32] PMI may only perform outpatient radiology services at Grace under the terms of its contract, thus eliminating any "dangerous probability" of successful monopolization. *Id.* And, that contract may be terminated without cause upon 180 days notice or with cause at any time as a result of excessive fees charged by PMI.⁵ *Id.* PMI in this sense is not a separate economic actor. [Capital Imaging, 996 F.2d at 544](#); [Oksaken v. Page Memorial Hosp., 945 F.2d 696, 706 \(4th Cir. 1991\)](#), cert. denied, [502 U.S. 1074, 117 L. Ed. 2d 137, 112 S. Ct. 973 \(1992\)](#). Thus, PMI cannot be seen as having any monopoly power. [White, 820 F.2d at 105](#); [Beard, id.](#); [Steuer, id.](#)

The only remaining issue as to PMI is whether there was specific intent to engage in anticompetitive conduct. The record clearly shows that PMI was solicited by Grace and Grace officials were the ones who insisted that the contract with [*33] PMI be exclusive.⁶ Plaintiffs claim Grace's attorney disparaged them at a staff meeting to explain why Howerton and Antley were no longer given privileges to read inpatient films. Assuming such statements were made, they may not be attributed to PMI.

In addition, Plaintiffs' evidence proves Grace's contentions that they had recurring problems in service from Blue Ridge prior to terminating the contract.

We've had problems with service and other things that have come up ever since I've been on the [*34] board. At least every so often there are constant conflicts between them and surgery having to do with what procedures are going to be performed at the hospital, and they have refused to perform certain procedures in the past, and we had to bring in consultants to show that it is appropriate for them to do it. In some instances they have done it, in other instances I don't think they have.

Exhibit 2, Transcript of Executive Committee Meeting of the Board of Grace Hospital, August 18, 1989, at 103, attached to Affidavit of Robert N. Meals, filed May 7, 1993; Excerpts from Deposition of Larry Hurd, October 8, 1991, at 120-130; Exhibit 14 attached to Affidavit of Robert N. Meals, filed May 7, 1993.

In sum, Plaintiffs have not shown monopolization or attempted monopolization by Grace or PMI.

⁵ The initial 4-year period of the contract has terminated and the contract is renewable on a yearly basis.

⁶ Plaintiffs claim the fact that Mull later refused to forego nonexclusivity in order to allow Howerton and Antley to participate in inpatient services shows anticompetitive conduct. When a group of doctors approached Mull about this prospect, he declined. This occurred after the fact; that is, after Grace had already offered and entered into the exclusive contract with PMI. **HN21** [+] Growth or development resulting from business acumen is not tantamount to acquisition of monopoly power. [Beard, 912 F.2d at 144](#).

G. Monopoly leveraging

[HN22](#) [↑] Monopoly leveraging is "the use of [monopoly] power [in one market], however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor' in another distinct market." [M & M Medical Supplies, 981 F.2d at 168](#) (citations omitted). The Fourth Circuit has not yet recognized this as a cause of action. [*35] Assuming, *arguendo*, that such a cause exists, since neither Grace nor PMI had monopoly power in the relevant markets, this claim must fail as well.

Plaintiffs argue that PMI has monopoly power in the inpatient radiology market which it has used in the outpatient technical market to destroy Blue Ridge. However, as noted above, PMI does not have market power due to the terms and conditions of its contract.

Plaintiffs also claim Grace has monopoly power in the inpatient technical market which it has used to destroy competition from Blue Ridge in the outpatient technical market. Plaintiffs' evidence, however, shows that 60 percent of the radiologists in America have an exclusive contract with the hospitals where they practice. On December 12, 1992, Plaintiffs' economic expert, Keith Leffler, testified he had insufficient data at that point to determine whether or not Grace and PMI have market power in the outpatient radiology and technical markets. Deposition of Keith Leffler, December 2, 1992, at 54-5, *attached to* Declaration of Michael D. Helgren, filed October 13, 1993. He also testified that in order to ascertain what portion of the outpatient market Blue Ridge has as compared [*36] to Grace, he would have to know the revenues and numbers of procedures performed at Blue Ridge on patients or for physicians from the three zip code areas surrounding Morganton. *Id.* Plaintiffs' other expert, Fredric Kennedy, opined in May 1993, that "based upon technical fee revenues for the years 1991 and 1992, Grace Hospital provides significantly more than half of the outpatient radiologic services with market shares in the 60% to 73% range...." Declaration of Fredric D. Kennedy, Ph.D., filed May 7, 1993, at 6-7. Based on Plaintiffs' own expert, after two years in business, Blue Ridge had acquired 40 percent of the market.⁷ Plaintiffs have simply failed to show any antitrust injury caused by Grace's shift of a *de facto* exclusive contract from one group to another.⁸

[*37] H. Conspiracy to monopolize

[HN23](#) [↑] In order to sustain a claim for conspiracy to monopolize, Plaintiffs must show "concerted action, a specific intent to achieve an unlawful monopoly, and commission of an overt act in furtherance of the conspiracy." [Advanced Health-Care Servs., 910 F.2d at 150](#). Plaintiffs claim Mull's willingness to enter into an exclusive contract and his later opposition to a nonexclusive contract proves specific intent and commission of an overt act. It is undisputed that Grace first approached Mull about an exclusive contract. It is also undisputed that this inquiry came after learning that Howerton was building an outpatient facility. In 1986, the board had resolved that at such time as Blue Ridge did build such a facility, the contract would be terminated. Moreover, the board had been disillusioned with Blue Ridge prior to this point in time. The inquiry of Mull came at a point in time when Grace officials were concerned that Blue Ridge would pull out leaving Grace with no radiology coverage. Assuming Mull harbored ill will against Howerton and Antley because they had denied him privileges at Grace, this does not negate the fact that Grace approached [*38] him and first mentioned exclusivity. [HN24](#) [↑] "Conduct as consistent with permissible competition as with illegal conspiracy does not itself support an inference of antitrust conspiracy." [White, 820 F.2d at 102](#). Grace's board acted unilaterally; Mull was sought out to replace Blue Ridge. *Id., at 103*. There is insufficient evidence for a jury to find a conspiracy between Grace and Mull. *Id.*

⁷ The parties do not dispute there are no other facilities competing in the area.

⁸ The Court notes the declaration of John Andrews, another expert for Plaintiffs. Dr. Andrews opines that Blue Ridge did not have sufficient earnings to pay the average radiologist's salary in the southeast in 1991 and 1992, \$ 237,000 and \$ 250,000 per year, respectively. Many young businesses are not able to provide high salaries to their owners during the start up phase. That is not a ground upon which to base an antitrust action. Declaration of John J. Andrews, Ph.D., filed May 7, 1993.

I. Antitrust injury

Assuming *arguendo*, that Plaintiffs had established the elements necessary to show unlawful action pursuant to §§ 1 and 2 of the Sherman Act, [HN25](#)[¹] they still have failed to make a showing of antitrust injury. The only injury shown by the facts, viewed in the light most favorable to Plaintiffs, is injury to them resulting from competition, not injury to competition itself. [*Balaklaw, supra.*](#)

Plaintiffs rely on the declaration of their economic expert, Dr. Keith Leffler, to show antitrust injury. Dr. Leffler opines that Blue Ridge will continue to sustain a decline in outpatient revenues; that Grace has increased its share of the outpatient market; that patients pay higher prices at Grace for the same services offered by Blue Ridge; that the quality of outpatient [*39] radiology has declined; and thus, there has been an anti-competitive effect on the market. Declaration of Leffler, filed May 7, 1993, at 22, 25-28.

Despite such conclusions, Dr. Leffler states that he has "not detailed the basis for my opinions about the market definitions here, although I have reviewed a great deal of data and have devoted substantial effort and thought to the issue of market definition." [*Id., at 6.*](#) He concludes that Grace has monopoly power in the outpatient technical market as a result of exclusionary actions taken by Grace. In support of this, he points to Grace's dominant status during the time that it had a contract with Blue Ridge, thus, implicating Blue Ridge's participation in such dominance. [*Id., at 7.*](#) Leffler concludes that Grace blocks referrals from its staff physicians to Blue Ridge. [*Id., at 10, 12-13.*](#) However, as noted infra, 20 physicians having privileges at Grace and referring 78 percent of the admissions to Grace filed declarations supporting Blue Ridge. Those physicians refer to Blue Ridge despite any action or conduct by Grace. According to Leffler, Blue Ridge is losing a market share in the outpatient market as a result of its inability [*40] to perform inpatient procedures at Grace. Nonetheless, he concluded that after two years, Blue Ridge had acquired approximately 40 percent of the market and the supporting declarations of 20 fellow physicians refutes the allegation that Blue Ridge is losing a market share. Referrals have not decreased; new physicians to the community refer patients to Blue Ridge; and no physician at Grace has decreased its referrals to Blue Ridge. Antley Affidavit at 12-13; Howerton Deposition of December 18, 1992, at 21-26.

Leffler further finds that outpatients in the Morganton area are paying higher prices for these services as a result of Grace's monopoly power. However, Richard Dorson, Plaintiffs' expert, stated that 60 percent of the radiologists in the United States have exclusive contracts with hospitals, and traditionally, hospitals have charged more for outpatient services in order to cover overhead. His conclusion that the quality of radiology services has declined in also in direct opposition to declarations filed by Plaintiffs in which referring physicians state that Grace has improved its equipment due to the direct competition of Blue Ridge.

In short, the opinion of Dr. Leffler concerning [*41] market power and monopolization is unreliable because such is refuted by Plaintiffs' evidence and is not supported by the record. [*Tyger Const. Co., Inc. v. Pensacola Const. Co., 29 F.3d 137 \(4th Cir. 1994\).*](#)

[HN26](#)[¹] "Scrutiny of expert testimony is especially proper where it consists of 'an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it.'" This is particularly true, in a situation such as this, when an expert has apparently taken factual data from the specific project in dispute, and formulated estimates of damages.

[*Id., at 145*](#) (citations omitted). Leffler's opinion uses selective factual allegations, often not supported in the record, to establish the causation of antitrust injury. [HN27](#)[¹] Where resolution of a causation issue depends on expert opinion testimony, that testimony must reach a higher standard of probability rather than possibility. [*Sakaria v. Trans World Airlines, 8 F.3d 164, 173 \(4th Cir. 1993\)*](#). Plaintiffs have failed to show antitrust injury caused by Defendants.

V. CONCLUSION

This lawsuit essentially boils down to a situation where "what's good for the [*42] goose is good for the gander." Blue Ridge had no problem with a *de facto* exclusive arrangement as long as they were the beneficiaries thereof. Blue Ridge made a considered and reasoned business decision to risk a new business, an outpatient imaging facility. Only two months after opening that facility, Howerton and Antley determined to file this suit alleging that they were unable to make money in that business because of Grace's actions. That decision appears to have been based on a belief that they were automatically entitled to a certain share of the outpatient radiology business, despite the infancy of the business. Plaintiffs' tenacity in linking facts to purported theories is outweighed only by the volume of their filings. It appears Plaintiffs sought through the sheer volume of paperwork to spin a cause of action for antitrust violations out of their angst at having been replaced in an exclusive contract situation. Nonetheless, "conduct as consistent with permissible competition as with illegal [restraint] does not . . . support inference of antitrust [violations]." *Matsushita, supra.*

VI. ORDER

IT IS, THEREFORE, ORDERED that Defendants' motion for summary [*43] judgment is hereby ALLOWED, and this matter will be dismissed by way of Judgment filed herewith.

IT IS FURTHER ORDERED that Defendants' motion to strike is DENIED.

THIS the 7th day of July, 1995.

LACY H. THORNBURG

UNITED STATES DISTRICT COURT JUDGE

JUDGMENT

For the reasons stated in the Memorandum and Order filed herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendants' motion for summary judgment is ALLOWED, and this matter is hereby DISMISSED ON THE MERITS IN ITS ENTIRETY.

THIS the 7th day of July, 1995.

LACY H. THORNBURG

UNITED STATES DISTRICT COURT JUDGE



Three Crown Ltd. Partnership v. Salomon Bros.

United States District Court for the Southern District of New York

July 13, 1995, Decided

92 Civ. 3142 (RPP)

Reporter

1995 U.S. Dist. LEXIS 9961 *; 1995-2 Trade Cas. (CCH) P71,076

THREE CROWN LIMITED PARTNERSHIP, THREE CROWN CAPITAL PARTNERS and MEADOWLANDS FUND, L.P., Plaintiffs, -against- SALOMON BROTHERS, INC, PAUL MOZER, STEINHARDT MANAGEMENT CO., INC., STEINHARDT PARTNERS, L.P., MICHAEL STEINHARDT, ERNEST THEURER, GEORGE SOROS, Individually and d/b/a SOROS FUND MANAGEMENT, QUANTUM FUND N.V., QUASAR INTERNATIONAL PARTNERS C.V., CAXTON CORP., BRUCE KOVNER, LUTTRELL CAPITAL MANAGEMENT AND D. SCOTT LUTTRELL, Defendants.

Core Terms

purchasers, Defendants', financing, antitrust, markets, overcharges, auctioned, positions, Plaintiffs', damages, trading, commodity, sellers, prices, repos, transactions, customers, decisions

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN1 [down arrow] Purchasers, Direct Purchasers

An antitrust violator cannot use as a defense allegations that the direct purchaser plaintiff has not been damaged where the plaintiff had passed the overcharges on to its customers. The United States Supreme Court has stated that it is unwilling to open the door to duplicative recoveries under § 4 of the Clayton Act.

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[Private Actions, Standing

When a relationship is established and an injury occurs that is the result of a monopoly or a restraint of trade, the courts allow plaintiffs to sue and recover their damages.

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Judges: Robert P. Patterson, Jr., [*2] U.S.D.J.

Opinion by: Robert P. Patterson, Jr.

Opinion

OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

Defendants Salomon Brothers Inc ("Salomon"), Paul Mozer ("Mozer"), Steinhardt Management Company, Inc. ("Steinhardt Management"), Steinhardt Partners, L.P. ("Steinhardt Partners"), SP Investors International N.V. ("Steinhardt Investors"), Michael Steinhardt ("Steinhardt"), Ernest Theurer ("Theurer"), George Soros, individually and d/b/a Soros Fund Management ("Soros"), Quantum Fund N.V. ("Quantum"), Quasar International Partners ("Quasar"), Caxton Corporation ("Caxton"), Bruce Kovner ("Kovner"), Luttrell Capital Management ("Luttrell Capital") and D. Scott Luttrell ("Luttrell") move pursuant to [Rules 12](#) and [56 of the Federal Rules of Civil Procedure](#) for judgment on the pleading, or in the alternative, for summary judgment on the antitrust claims contained in Plaintiffs' Second Amended Complaint.

In counts one through four, Plaintiffs Three Crown Limited Partnership, Three Crown Capital Partners and Meadowlands Fund, L.P. (collectively, "Three Crown") allege that Defendants violated [Sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. § 1 \(1988\)](#) and request treble damages pursuant [*3] to Section 4 of the Clayton Act, [15 U.S.C. § 15\(a\) \(1988\)](#). Defendants argue that Three Crown lacks antitrust standing as a matter of law under the decisions rendered by the Supreme Court in [Illinois Brick v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#) and [Kansas v. Utilicorp Limited, 497 U.S. 199, 111 L. Ed. 2d 169, 110 S. Ct. 2807 \(1991\)](#).

BACKGROUND

The Second Amended Complaint charges that certain of the Defendants secretly joined together to monopolize and restrain trade by cornering and manipulating the cash and the financing markets for an issue of United States government two-year notes auctioned in April 1991 (the "April Notes") and for a similar issue auctioned in May 1991 (the "May Notes").

In April 1991, certain of the Defendants led by Steinhardt and Caxton by taking "long" positions in the when-issued market; by purchases at the Treasury auction; and by purchases in the secondary market, often utilizing "repos"¹ to finance their long position in the April Notes, accumulated a combined position of almost \$ 20 billion of April notes, representing about 160% of the approximately \$ 12 billion of April Notes issued by the U.S. Treasury. [*4]²

[*5] In the U.S. Treasury Auction of the May Notes, certain of the Defendants, by similar purchases and financing, acquired approximately \$ 18 billion of the May Notes or nearly 150% of the issue. These activities are alleged to have resulted in the Defendants' control of the long position in the markets for the April and May Notes. The purchases of April and May Notes by Defendants are alleged to have had the effect of concentrating control of the long position in each of the issues and simultaneously creating a substantial "short" position in each issue that could only be eliminated if the Defendants reduced the size of their positions in the issue.

Defendants are alleged to have then caused a "squeeze" by directing that certain of their two-year notes be lent by "repo" transactions to certain entities which would not sell those securities in the repo market, thereby restricting the supply of April and May Notes to short sellers. These actions are alleged to have resulted in a shortage of April and May Notes for short sellers which caused short sellers to bid up prices for April and May Notes in the cash and financing markets. From the time after the auctions of the April and May Notes [*6] in April and May 1991, respectively, through mid-July 1991, the April and May Notes are alleged to have traded at distorted prices.

At the time of Defendants' acts, Plaintiffs allege they were engaged in a trading strategy which caused them to be short sellers in the cash and financing markets for the April and May Notes. They assert that, as a result of Defendants reducing the available supply of April and May Notes, Plaintiffs were forced to lend funds at below-market rates to acquire long securities to cover, and keep open, their short positions and, in view of their losses, were ultimately forced to pay an artificially high price in the cash market for the April and May Notes to eliminate their short positions in the underlying securities.

ANALYSIS

Defendants premise their motion on *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977). Illinois Brick Co. ("Illinois Brick") was a manufacturer and distributor of concrete block in the greater Chicago area which sold the block primarily to masonry contractors for the masonry portions of construction projects. The masonry contractors would submit bids to participate in a project to the [*7] general contractors. The general contractors would, in turn, submit bids for projects to customers such as the State of Illinois and 700 local governmental entities in the greater Chicago area, each of whom sued Illinois Brick in that action alleging that

¹ "Repos" are Repurchase Agreements commonly used to fund positions in Treasury securities comprised of two distinguishable transactions: the sale of Treasury securities and a forward agreement to repurchase the same securities for a certain price at a certain time in the future. The seller agrees to repurchase the same securities at a given time in the future at a price which determines the amount of interest for the use of the funds. In a reverse repo, the repo buyer delivers the funds and receives securities in exchange. At contract maturity the buyer receives sums, including interest and returns the securities. See Department of Treasury, Securities and Exchange Commission, Board of Governors of the Federal Reserve System, Joint Report on the Government Securities Market ("Joint Report"), Appendix A at A-11 (1992).

² Due to the use of repos, there is no limit to the quantity of securities in the aggregate that can be held "long" or "short" in the Treasury market. See Horowitz Aff. at P 4.

Illinois Brick, the manufacturer, had engaged in a price fixing conspiracy. As pointed out by the Supreme Court, the plaintiffs lacked standing to sue under section four of the Clayton Act as they were indirect purchasers of the concrete block which passed through two separate levels in the chain of distribution before reaching the State of Illinois and the other governmental entities, the plaintiffs in the case. [431 U.S. at 735](#).

The Supreme Court's analysis in *Illinois Brick* expanded on its earlier decision in [Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)](#) in which it held that [HN1](#) an antitrust violator could not use as a defense allegations that the direct purchaser plaintiff had not been damaged since the plaintiff had passed the overcharges on to its customers. [392 U.S. at 494](#). In *Illinois Brick*, the Supreme Court stated that "we are unwilling to 'open the door' [*8] to duplicative recoveries' under § 4", [Illinois Brick, 431 U.S. at 731](#), quoting [Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 264, 31 L. Ed. 2d 184, 92 S. Ct. 885 \(1972\)](#) (footnote omitted), and reasoned that allowing indirect purchasers to recover from the manufacturer would create a serious risk of multiple liability for a defendant, since under *Hanover Shoe*, a defendant could not use the "pass-on" theory to reduce its damages. [Id. at 730](#).

The Supreme Court noted that in *Hanover Shoe*, the Court was concerned about the uncertainty and difficulty of proving price and output decisions in the real world as opposed to "the economists' hypothetical model" and about the costs to the judicial system and efficient enforcement of the antitrust laws of attempting to reconstruct those price and output decisions in the courtroom. [Id. at 731-32](#), citing [Hanover Shoe, 392 U.S. at 493](#).

The Supreme Court further stated that the teaching of *Hanover Shoe* would allow for the pass-on defense in the limited situation of a pre-existing cost plus contract. [Illinois Brick, 431 U.S. at 736](#). After this analysis, the Court held that "Permitting the use of pass-on [*9] theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion recovery among all potential plaintiffs who could have absorbed part of the overcharge -- from direct purchasers to middlemen to ultimate consumers." [Id. at 737](#). After a consideration of various market contexts in which the broad rule of denying recovery to indirect purchasers would apply, the Court determined that the difficulty of determining the amount of pass-on likely to be involved in each market and its susceptibility to proof in a judicial forum would bring about the "combination of increasing the costs and diffusing the benefits of bringing a treble-damages action [which] could seriously impair this important weapon of antitrust enforcement". [Id. at 744](#). The Court rejected any attempts to carve out exceptions to the *Hanover Shoe* rule for particular markets, *id.*, and held that only direct purchasers would be provided the distinction as "private attorneys general" to enforce the antitrust laws under § 4 of the Clayton Act. [Illinois Brick, 431 U.S. at 746](#).

In [Kansas v. Utilicorp United, Inc., 497 U.S. 199, 111 L. Ed. 2d 169, 110 S. Ct. 2807 \(1990\)](#), [*10] the Court affirmed *Illinois Brick* and denied antitrust standing to residential consumers for overcharges by natural gas suppliers to public utilities who passed those overcharges on to residential consumers. The Court held that only the public utility, as a direct purchaser, could bring suit for the overcharge against the natural gas suppliers. [Id. at 204](#).

In the case at bar, Defendants base their motion on Plaintiffs' admission that at no time did they deal with any of the Defendants directly either for purchases or sales or in repo transactions financing the April and May Notes. Thus, say Defendants, pursuant to *Illinois Brick*, they cannot be held liable for any overcharges for the April and May Notes or for the refinancing of Plaintiffs' short positions caused by the actions of third parties. They point out that Plaintiffs' claim involves many of the same complexities of proof of their damages as concerned the Court in *Illinois Brick*. Speculation over the future course of interest rates fuels the when-issued market from the time the auction is announced to the date the auction is held. Prices for the securities and the interest rates for their financing are affected [*11] by the decisions of a large number of investors. Indeed, long and short positions in the financing markets for the securities far exceed the amount actually auctioned off. See generally, Joint Report, App. A at A-1 - A-12 (describing Characteristics of the Primary and Secondary Markets for Treasury securities). By use of financing mechanisms such as repos and reverse repos, the rights to hold the securities auctioned are traded on a daily basis both in the financing and cash markets. If there is no manipulation, this trading has the benefit of creating a stable, efficient market. Joint Report at 9. On the other hand, when there is manipulation, the number of parties making economic decisions makes difficult the task of determining accurately what costs are passed on by any party to other purchasers or borrowers of those same securities.

It is clear that this case does not involve a claim of an overcharge passed on through a vertical chain of distribution as in *Illinois Brick* or *Hanover Shoe*. Rather, the parties here were part of the same market,³ each taking opposite positions as to the future direction of the price of the April and May Notes. Plaintiffs complain that [*12] they suffered direct injury because of Defendants' success in cornering the markets for the April and May Notes and the manner in which Caxton and Steinhardt and certain other Defendants financed those securities by repos. In short, they allege those Defendants arranged the parking of a portion of the long position to create the squeeze.

This case is akin to [*Pollock v. Citrus Associates of the New York Cotton Exchange, Inc., 512 F. Supp. 711 \(S.D.N.Y. 1981\)*](#) in which the short sellers of orange juice futures claimed that defendants, a broker dealer and a sales representative of the broker dealer, had engaged in a squeeze which drove the prices of orange juice futures to an artificially high level. Judge Pierce refused to deny plaintiffs standing by [*13] applying of *Illinois Brick*, saying

it should be made clear that this is not a pass on case to which the holding of *Illinois Brick* is applicable.

[512 F. Supp. at 719, n.7.](#)

Judge Pierce noted that the plaintiffs who had sold short would suffer damage since they would have to pay higher prices for futures contracts as a direct result of defendants' control of the other side of the market, and that as individuals "in the 'target area' of an antitrust conspiracy", plaintiffs had standing to sue. [*Pollock, 512 F. Supp. at 719*](#), citing [*Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1296 at n.2 \(2d Cir. 1971\)*](#), cert. denied, 406 U.S. 930, 32 L. Ed. 2d 132, 92 S. Ct. 1776 (1972).

In [*Strax v. Commodity Exchange, Inc., 524 F. Supp. 936 \(S.D.N.Y. 1981\)*](#), Judge Lasker refused to apply *Illinois Brick* and exempt defendants from antitrust allegations based on the reasoning in *Pollock*. In *Strax*, a short seller brought an action against silver buyers, commodity brokerages, commodity exchanges and others for allegedly monopolizing the trade of silver and causing the price of refined silver and silver futures to rise [*14] and thus damage the short side of the market. Judge Lasker also found that "the plaintiffs were well within the 'target area' of the defendants' alleged anticompetitive behavior and that there existed "a 'legally significant causal relationship between the [defendants'] alleged violation and the [plaintiffs'] alleged injury.'" [*Strax, 524 F. Supp. at 940*](#), quoting [*Pollock, 512 F. Supp. at 719*](#). Again, the court refused to apply *Illinois Brick*, finding that to do so "would be to preclude the application of the antitrust laws to any economic activity effected through an exchange system, since it is impossible to show that a particular purchaser bought from a particular purchaser bought from a particular seller in such a context. [] Such a proposition finds no support in law or policy." [*Strax, 524 F. Supp. at 940*](#).

In *Minpeco S.A. v. Conti Commodity Services*, No. 81-7619 (S.D.N.Y. Nov. 10, 1987), Judge Lasker found the reasoning of *Strax* and *Pollock* was still sound and again differentiated the "vertical market" at issue in *Illinois Brick* to instances in which "the 'target area' of defendants' alleged anticompetitive behavior" included a plaintiff who [*15] "was in direct contact with the defendant insofar as the parties were on opposite sides of the market" as in *Strax*, *Pollock*, and *Minpeco*. *Id.*

It is true that a difference between *Pollock*, *Strax* and *Minpeco* and the case at bar is that the commodity market is subject to regulation by the Commodity Futures Trading Commission which requires large traders and position-holders in particular futures contracts to maintain books and records of their transactions and positions in both the futures and cash market for the particular commodity. See Joint Report, Appendix B at B-69. In the time period of which Plaintiffs complain, no similar record of trades in April and May Notes exists because such trades were not conducted over an exchange but in private transactions in which prices and financing rates are set using information on electronic trading screens, see Horowitz Aff. at P 5, and without the benefit of interdealer price information available to the public, see Joint Report, Appendix B at B-88. As a matter of general market practice, customers buy, sell and finance their Treasury securities through primary dealers and not directly with non-dealer customers. [*16] Horowitz Aff. at P 6. Thus, as a practical matter in the when-issued and after-market for

³ Salomon, as a primary dealer, could be considered part of a vertical chain but the complaint allegations against them are principally for aiding Defendants Caxton and Steinhardt by arranging financing of those Defendants' holdings in the April and May Notes.

government securities, each of the 38 primary dealers in U.S. Treasury Securities could be described as maintaining a separate market in the Treasury securities. Consequently, if Plaintiffs' claims were based on overcharging by Defendants passed on through third-parties to Plaintiffs, proof of the degree to which Plaintiffs were damaged as a result of Defendants' conduct would reach a degree of complexity equal to that voiced by Justice White in *Illinois Brick*.

Nevertheless, the complexity of such proof does not mean that *Illinois Brick* should apply. Defendants' assertion that Plaintiffs are seeking as damages the overcharges passed on to them does not withstand scrutiny. Instead, what Plaintiffs are seeking are damages they sustained as a direct result of Defendants' conduct. Indeed, Defendants' reliance on Plaintiffs' acknowledgment that they did not purchase or refinance any securities through any of the Defendants is misplaced. There is no showing or allegation that the transactions of Defendants were ever passed through to Plaintiffs through any chain of distribution, and the application [*17] of *Illinois Brick* and its progeny is therefore unwarranted.

Defendants are right that the Plaintiffs' claim amounts to a charge of price fixing of the cash and refinancing markets for the April and May Notes. See Defs.' Rep. Mem. at 3. Defendants are wrong, however, when they claim Plaintiffs are seeking to recover for overcharges by Defendants passed on by Defendants' customers to Plaintiffs. There is no such allegation and no proof that such a relationship existed.

Plaintiffs are claiming a conspiracy to monopolize and a restraint of trade pursuant to which prices in two markets, cash and refinancing, were manipulated to Defendants' advantage at the expense of Plaintiffs and other holders of short positions. Plaintiffs have claimed "a legally significant causal relationship between the alleged violation and the alleged injury." See *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 12 (1980), citing II P. Areeda & D. Turner, *Antitrust Law* § 334a (1978). [HN2](#) When such a relationship is established and an injury occurs that is the result of a monopoly or a restraint of trade, the courts allow plaintiffs to sue and recover their damages. *Reading*, 631 F.2d at 12; see, e.g., *Pollock v. Citrus Associates*, 512 F. Supp. 711 at 719 (S.D.N.Y. 1981); *Strax v. Commodity Exchange Inc.*, 524 F. Supp. 936 (S.D.N.Y. 1981), *Minpeco S.A. v. Conti Commodity Services*, No. 81 Civ. 7619 (S.D.N.Y. 1987).

CONCLUSION

Defendants' motion to dismiss the antitrust charges in the Second Amended Complaint pursuant to [Rule 12\(c\)](#) and [Rule 56 of the Federal Rules of Civil Procedure](#) is denied.

IT IS SO ORDERED.

Dated: New York, New York

July 13, 1995

Robert P. Patterson, Jr.

U.S.D.J.

Williams v. 5300 Columbia Pike Corp.

United States District Court for the Eastern District of Virginia, Alexandria Division

July 13, 1995, Decided ; July 13, 1995, FILED

Civil Action No. 95-225-A

Reporter

891 F. Supp. 1169 *; 1995 U.S. Dist. LEXIS 10176 **; 1995-2 Trade Cas. (CCH) P71,101

JULIA B. WILLIAMS, ET AL., Plaintiffs, v. THE 5300 COLUMBIA PIKE CORP., ET AL., Defendants.

Core Terms

shareholders, residents, condominium association, condominiums, plaintiffs', non-participating, appraisals, conversion, conspiracy, cooperative, defaulted, shares, Sherman Act, state-law, disparity, stock, antitrust, conspire, courts, standard deviation, discovery, Housing, parties, summary judgment, federal claim, market value, fair price, statistical, monopolize, conspiracy to monopolize

LexisNexis® Headnotes

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

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

HN1[

The Sherman Act, [15 U.S.C.S. §§ 1-2](#), forbids conspiracy to restrain or monopolize interstate trade or commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > General Overview

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN2[

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A corporation cannot conspire with its wholly-owned subsidiary or with its officers and directors to restrain or monopolize interest trade or commerce. A narrow exception exists for directors or officers who are acting on their own behalf as well as for the corporation. This exception applies only when an officer has an independent stake in achieving a corporation's illegal motive. An officer or director must have a purpose that is independent of his interest in the corporation's success.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN3 Antitrust & Trade Law, Sherman Act

A parent corporation cannot conspire to restrain or monopolize interstate trade or commerce with its wholly-owned subsidiary. Two legally separate entities cannot conspire if they share a similar unity of interest.

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

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

HN4 Conspiracy to Monopolize, Elements

To prove conspiracy to monopolize, plaintiffs must show (1) the existence of a conspiracy to monopolize, (2) specific intent to monopolize, (3) overt acts in furtherance of the conspiracy, and (4) an effect on an appreciable amount of interstate commerce. A "conspiracy to monopolize" means a conspiracy to acquire or maintain the power to exclude competitors from some portion of commerce. Plaintiffs need not prove that defendants succeeded or even came close to obtaining monopoly power or excluding any competitors. Because the gist of monopolization is the power to exclude competition, a conspiracy to monopolize must be one that is somehow rationally directed toward the exclusion of competitors.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Mergers & Acquisitions Law > Sales of Assets > General Overview

Real Property Law > Common Interest Communities > Condominiums > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Fiduciaries

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > ... > Types of Damages > Judgment Interest > Rates

[**HN5**](#) [] Contract Interpretation, Fiduciary Responsibilities

While self-dealing may give rise to tort or contract liability, it is not itself an antitrust violation. It is not inconceivable that mere unfair business practices, or business torts, could in the proper situation constitute an antitrust violation. A corporation's sale of its assets at a below-market price cannot be transformed into a Sherman Act violation merely because the sale itself is characterized as a conspiracy, or because boilerplate language concerning attempt to monopolize is included in the complaint.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

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

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

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

[**HN6**](#) [] Price Fixing & Restraints of Trade, Vertical Restraints

Price-fixing, a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. §§ 1-2](#), may be horizontal, such as a pricing agreement among competing manufacturers, or vertical, such as a resale price agreement between a manufacturer and a distributor or retailer. Such agreements are illegal whether or not the price set is reasonable. The Sherman Act does not prohibit "price-fixing" agreements between the buyer and seller of an asset. The reason is that every sale requires "fixing" or setting a price. The Sherman Act merely prohibits a buyer and seller from making an agreement that restricts either party's pricing discretion in future transactions with other parties.

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

[**HN7**](#) [] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A contract between a purchaser and a seller cannot constitute impermissible price-fixing unless it somehow affects price formation beyond the sales contemplated by the contract itself.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN8**](#) [] Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. §§ 1-2](#), forbids conspiracies to restrain trade. The statute does not impose an affirmative obligation on anyone to encourage others to trade. It does not require a party to disclose appraisals that might alert someone else to an asset's true value.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Amendments Act

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

Labor & Employment Law > Affirmative Action > General Overview

Labor & Employment Law > Discrimination > General Overview

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Condominiums > Conversions

HN9 [blue icon] **Housing & Public Buildings, Fair Housing**

The Fair Housing Act, [42 U.S.C.S. §§ 3601-3631](#), prohibits discrimination in the sale or rental of housing based on race, color, religion, sex, familial status, national origin, or handicap. In evaluating Fair Housing Act claims, courts employ the same method of analysis used in Title VII employment discrimination cases. To establish a prima facie case of discrimination, plaintiffs may prove either (a) that a challenged housing action or practice is motivated by a discriminatory purpose, or (b) that it has a discriminatory impact.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

Labor & Employment Law > ... > Disparate Treatment > Evidence > Statistical Evidence

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Amendments Act

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

Civil Rights Law > ... > Fair Housing Rights > Protected Classes > Racial Discrimination

Labor & Employment Law > ... > Disparate Impact > Evidence > Statistical Evidence

HN10 [blue icon] **Housing & Public Buildings, Fair Housing**

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A prima facie case of discrimination under the Fair Housing Act, [42 U.S.C.S. §§ 3601-3631](#), is established only if a challenged housing practice has a significant disproportionate impact on the minorities in the total group to which it is applied. Statistics have critical, if not decisive, importance in determining the significance of an alleged disparity. A bare showing of a minor statistical inequality does not establish a prima facie case. The disparity must be "sufficiently substantial" that it raises an inference of causation. Plaintiffs must offer statistical evidence of a kind and degree sufficient to show that a challenged practice caused residents to be treated unfairly because of their membership in a protected group.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Amendments Act Evidence > Inferences & Presumptions > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Public Health & Welfare Law > Housing & Public Buildings > General Overview

[HN11](#) **Housing & Public Buildings, Fair Housing**

While rigid mathematical formula cannot alone control a decision, courts in Fair Housing Act, [42 U.S.C.S. §§ 3601-3631](#), and Title VII cases have sometimes used "standard deviation" analysis to evaluate the significance of statistical disparities. The U.S. Supreme Court has suggested that, for large samples, a disparity of more than two or three standard deviations significantly undercuts the hypothesis that disparities are random. That a smaller disparity precludes a finding of discrimination is not necessarily true. Courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three. Standard deviation analysis becomes less reliable where the sample is very small in size.

Evidence > Inferences & Presumptions > General Overview

[HN12](#) **Evidence, Inferences & Presumptions**

The binomial distribution serves as a satisfactory approximation for the hypergeometric distribution where the number of "trials" is very small relative to the entire pool from which selections are made.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Amendments Act

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

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Public Health & Welfare Law > Housing & Public Buildings > General Overview

HN13 [blue icon] **Housing & Public Buildings, Fair Housing**

The existence of a significant statistical disparity, even one resulting from economic inequality, is sufficient to create a *prima facie* case of discrimination under the Fair Housing Act, [42 U.S.C.S. §§ 3601-3631](#), and shift the burden to a defendant to come forward with a legitimate business justification for the challenged practice. If the defendant succeeds, the burden shifts finally back to the plaintiff to prove that there is discrimination by showing that the proffered justification is pretextual. At that point, a defendant must prevail if it appears that the disparity is attributable to economic inequality rather than impermissible discrimination.

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

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

Governments > Courts > Judicial Comity

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

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

HN14 [blue icon] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

District courts may decline to exercise supplemental jurisdiction over a state-law claim that raises a novel or complex issue of state law, or substantially predominates over the federal claims involved. In addition to the novelty and complexity of the issues, factors relevant to the exercise of this discretion are judicial economy, convenience of and fairness to litigants, and comity between the state and federal courts.

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

HN15 [blue icon] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

In general, novel and difficult questions of state law should be decided by that state's courts. The force of this principle increases with the degree of novelty and difficulty. Dismissal in these circumstances gains nothing if the dismissed state-law claims are then filed and decided in another state's courts.

Business & Corporate Law > ... > Corporate Formation > Place of Incorporation > General Overview

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

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Internal Corporate Affairs

HN16 [blue icon] **Corporate Formation, Place of Incorporation**

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The internal affairs of a corporation are governed by the law of the state of incorporation. A corporation is subject to regulation by other states in which it carries on its activities, and under certain circumstances, the law of these states may displace the corporate law of the state of incorporation.

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Dissolution & Winding Up

Real Property Law > Common Interest Communities > Cooperatives > General Overview

Business & Corporate Law > Cooperatives > General Overview

HN17 [] **Cooperatives, Dissolution & Winding Up**

Va. Code Ann. § 55-454(E)(1) provides that, upon termination of a cooperative, the respective interests of proprietary lessees are the fair market values of their cooperative interests immediately before the termination.

Business & Corporate Law > ... > Corporate Governance > Shareholders > General Overview

HN18 [] **Corporate Governance, Shareholders**

Delaware courts recognize that in some circumstances Delaware law permits shareholders (as distinguished from shares) to be treated unequally.

Business & Corporate Law > ... > Appraisal Actions & Dissent Rights > Right to Dissent > Sales of Assets & Property

Governments > Fiduciaries

Mergers & Acquisitions Law > Sales of Assets > Duties & Liabilities of Directors & Officers

Business & Corporate Law > ... > Management Duties & Liabilities > Defenses > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > General Overview

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > General Overview

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > Discretion

Business & Corporate Law > ... > Shareholder Actions > Appraisal Actions & Dissent Rights > Fair Market Value

Mergers & Acquisitions Law > Sales of Assets > General Overview

Mergers & Acquisitions Law > Sales of Assets > Rights of Dissenting Shareholders

HN19 [] **Right to Dissent, Sales of Assets & Property**

A corporation may sell all or substantially all of its assets, but the directors have a fiduciary duty to obtain a fair price. A fair price is one to which a reasonable and willing seller and a reasonable and willing buyer, under all circumstances, would agree. Ordinarily, determination of assets' fair value is within the directors' business judgment

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and discretion, and the burden of proof is on a dissenting shareholder to demonstrate unfairness. But where directors and shareholders who approved a sale have an interest in the transaction, the burden shifts to the proponents of a sale to show the directors' utmost good faith and the transaction's scrupulous fairness.

Mergers & Acquisitions Law > Sales of Assets > General Overview

[**HN20**](#) [L] Mergers & Acquisitions Law, Sales of Assets

An individual is "interested" in a sale transaction if she serves as a director, or shareholder, of both the selling and purchasing corporations.

Mergers & Acquisitions Law > Sales of Assets > General Overview

Real Property Law > Common Interest Communities > Condominiums > Conversions

Business & Corporate Law > ... > Shareholder Actions > Appraisal Actions & Dissent Rights > General Overview

Mergers & Acquisitions Law > Mergers > Rights of Dissenting Shareholders

Real Property Law > Common Interest Communities > Condominiums > General Overview

[**HN21**](#) [L] Mergers & Acquisitions Law, Sales of Assets

There is no rule of law providing that, where assets become more valuable as a result of being sold, a fair sale price must include this increase in value. A court's valuation of stock should not be affected by a merger, sale, or other transaction that gives rise to the appraisal proceeding. If a corporation becomes more valuable as a result of a transaction, this increased value is to be enjoyed only by the shareholders who participate in the transaction.

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Business & Corporate Law > ... > Shareholder Actions > Appraisal Actions & Dissent Rights > General Overview

Real Property Law > Common Interest Communities > Condominiums > General Overview

[**HN22**](#) [L] Cooperatives, Formation

Delaware law provides that courts in appraisal cases shall determine a stock's fair value exclusive of any element of value arising from the accomplishment or expectation of a disputed transaction. [Del. Code Ann. tit. 8, § 262\(h\)](#).

Business & Corporate Law > ... > Appraisal Actions & Dissent Rights > Right to Dissent > Mergers & Acquisitions

Mergers & Acquisitions Law > Liabilities & Rights of Successors > De Facto Mergers

Business & Corporate Law > ... > Shareholder Actions > Appraisal Actions & Dissent Rights > General Overview

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Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Mergers > Rights of Dissenting Shareholders

Mergers & Acquisitions Law > Sales of Assets > General Overview

Mergers & Acquisitions Law > Sales of Assets > Rights of Dissenting Shareholders

HN23 [blue icon] Right to Dissent, Mergers & Acquisitions

Delaware is one of the small minority of states where appraisal is generally not available after a sale of all or substantially all of a corporation's assets. Delaware courts have declined to find that a properly executed sale of assets may be treated as a "de facto merger" to which appraisal rights extend. Where minority shareholders challenge a sale of assets, as opposed to a merger, valuation may take into account an increase in the assets' value that is attributable to the sale itself.

Counsel: [**1] FOR PLAINTIFFS: Julian Karpoff, Esq., Karpoff, Title & Mitnick, Arlington, VA.

FOR DEFENDANTS: Thomas C. Mugavero, Esq., Montedonico, Hamilton & Altman, P.C., Washington, D.C.

Judges: Honorable T. S. Ellis, III, United States District Judge

Opinion by: T. S. Ellis, III

Opinion

[*1171] MEMORANDUM OPINION

This action is a collection of federal and state claims in which a few residents of a cooperative apartment building complain they were treated unfairly by the cooperative corporation when the cooperative was converted to condominiums. Plaintiffs' basic complaint is that, while the condominium conversion increased the apartment units' value, this increase was enjoyed solely by the residents who participated in the conversion and purchased condominiums. But plaintiffs, who were unable to obtain financing to participate in the conversion, did not receive the benefit of this increase. In plaintiffs' view, this violated federal antitrust and housing discrimination laws, and amounted to a breach of contract and fiduciary duties under state law.

[*1172] The antitrust claims fail to pass threshold muster and must be dismissed. The housing discrimination claim survives threshold dismissal, although it remains [**2] to be determined whether it may be resolved on summary judgment. The state claims, entertained pursuant to supplemental jurisdiction, also require further development and argument for disposition.

I.

Carlyle House, the building at the center of this dispute, is located at 5300 Columbia Pike in Arlington, Virginia, and contains 136 residential units. It was built in 1976 and operated initially as a rental apartment building. In 1980, the building was converted to ownership by a cooperative association. In this connection, a Delaware corporation was formed, namely the defendant The 5300 Columbia Pike Corporation ("the Co-op Corporation"). The Co-op Corporation purchased Carlyle House, financing the purchase with a mortgage secured by the building. The corporation then issued stock allocated among the various apartment units in the building. Each shareholder, in addition to being a partial owner of the corporation, became entitled to occupy an apartment in the building under a proprietary lease. The corporation relied on the shareholders' monthly payments under the proprietary leases to

meet its mortgage obligations. From time to time, shareholders defaulted on their proprietary [**3] lease payments. When these defaults went uncured, the Co-op Corporation obtained possession of the defaulting shareholder's shares and their apartment units. The corporation would then hold these "defaulted shares" until they could be sold to a new shareholder.

The Board of Directors of the Co-op Corporation consisted of five individuals, each a resident ¹ of the building. In the early 1990's, the Board began to explore the idea of converting the building to a condominium form of ownership. In September 1993, the corporation's by-laws were amended to permit the Board to develop a plan for such a conversion. The amended by-laws provided that upon approval by a majority of both the Board and the shares, the Board would have discretion to implement the plan "in the best interests of the shareholders as a whole," and its discretion would be subject to challenge only upon a showing of bad faith.

[**4] The Board developed a condominium conversion plan under which each resident would have the opportunity to purchase his or her unit in fee simple as a condominium in return for a payment equal to a proportionate share of the Co-op Corporation's mortgage. Because most residents would need to borrow money to make this purchase payment, the corporation arranged with a lender, Crestar Bank, to offer financing to each of the residents in the form of mortgages on the condominium units. Once the Coop Corporation sold the units to the residents and collected the purchase payments, it would then be able to retire its own mortgage on the building and dissolve. After the conversion, the building's common areas would be owned and maintained by a condominium association to which each resident would belong. A Virginia corporation would be formed for this purpose, namely the defendant The Carlyle House Unit Owners' Association, Inc. ("the Condominium Association"). The five directors of the Co-op Corporation would become the directors of the Condominium Association.

The Board's conversion plan dealt with two anticipated complicating factors. First, it was anticipated that not every resident would [**5] be willing or able to purchase her unit from the Co-op Corporation in the conversion. As a result, the plan called for the Co-op Corporation to sell each of these "non-participating" units to the newly-created Condominium Association, and to use the proceeds first to pay off the unit's share of the master mortgage, then to repay any remaining debts owed by the non-participating shareholder to the Co-op Corporation, and finally to pay the seller's portion of the closing costs of the acquisition. Any remaining proceeds, or "equity," would go to the non-participating shareholder in exchange for cancellation of [*1173] her stock and proprietary lease interest. The second complicating factor anticipated by the plan was that some of the building's units were unoccupied, the former residents having defaulted on their obligations and surrendered their shares to the Co-op Corporation. To cover this complication, the plan called for the Co-op Corporation to sell these defaulted units to the Condominium Association, with the proceeds, after satisfaction of debts, to be distributed ratably among the Co-op Corporation's shareholders at its dissolution.

With respect to disposition of both non-participating [**6] and defaulted units, the Board had to set the price at which the units would be sold to the Condominium Association. In this regard, the Board expected that the market value of the building's units as condominiums would be higher than the market value of the corresponding shares in the cooperative. Conversion, the Board recognized, might well result in an increase in each unit's market value.² To ascertain what the units might be worth as condominiums, the Board commissioned preparation of "target" appraisals. These appraisals are the subject of dispute, for plaintiffs allege that the Board improperly concealed them from the residents. Thus, the minutes of the Board's June 15, 1994 meeting reflect a decision to "keep the exact amounts [of the target appraisals] unpublicized for now, to prevent owners from taking premature marketing or selling measures."

¹ For convenience, the term "resident" is used to refer to a person who was a shareholder and proprietary lessee of the Co-op Corporation.

² The parties disagree about the amount of the increase. For example, plaintiffs allege that the conversion increased the market value of the Mouzon unit from \$ 93,000 as a co-op to \$ 118,000 as a condominium, and increased the market value of the Williams unit from \$ 109,000 as a co-op to \$ 145,000 as a condominium. Defendants point out that those values are only appraised estimates, and that these appraised values do not reflect or take into account the substantial marketing costs required to make sales. In any event, resolution of this dispute is not required for any of the conclusions reached in this opinion.

[**7] According to plaintiffs, the Board initially intended that the increase in market value attributable to the conversion would be enjoyed by all of the building's residents, even those who did not purchase their units as condominiums. In support of this assertion, plaintiffs note that the Board held several meetings during late summer 1994 to acquaint residents with the proposed plan. In these meetings, the Co-op Corporation's President, David Falk, allegedly stated that non-participating units would be sold to the Condominium Association at their lower "co-op value," but would then be re-sold on the open market as condominium units, with the increase in value being remitted to the non-participating shareholders.³ But the Board ultimately adopted a different course. It decided that the units would be sold to the Condominium Association at a price equal to their appraised fair market value as cooperative units, with the Condominium Association to retain any increase in value realized when the units were later re-sold as condominiums. Thus, the plan contained no provision by which non-participating shareholders might benefit from the increase in market value attributable to the conversion. [**8]

On September 27, 1994, the conversion plan was approved by a properly-noticed shareholder vote. The building's residents then applied for loans to purchase their units. While most of the residents obtained such loans, the residents of six units, including plaintiffs, were either unable to qualify for loans or unwilling to accept the interest rate offered to them. On December 30, 1994, the building was declared to [**9] be a condominium. By deed of January 6, 1995, the Co-op Corporation conveyed the six non-participating units, along with sixteen defaulted units, to the Condominium Association in return for the sum of \$ 2,502,000. The Condominium Association financed this purchase by borrowing [*1174] from Crestar Bank.⁴ After distributing the proceeds according to the plan's terms, the Co-op Corporation dissolved.

Following the conversion, the Condominium Association allowed a grace period of six months for plaintiffs and other non-participating shareholders to rent and continue living in their units, during which time they could [**10] still seek financing to purchase their units. Plaintiffs contend that the proposed rents exceeded the amount they were previously paying under their proprietary leases and exceeded the units' fair market rental value.

In February 1995, while the six-month grace period was still in effect, plaintiffs commenced this action seeking damages and injunctive relief against the Co-op Corporation, the Condominium Association, and the five individuals who served as directors of both entities. Plaintiffs present two federal claims: (i) violation of the Sherman Act, [15 U.S.C. §§ 1-2](#), and (ii) violation of the Fair Housing Act, [42 U.S.C. §§ 3601-3631](#). In addition, plaintiffs present two state-law claims alleging breach of contract and breach of fiduciary duty. Defendants have moved to dismiss all four counts, while plaintiffs seek summary judgment as to liability on the state-law claims.

Diversity jurisdiction is not present here. As a result, the Court has subject matter jurisdiction over plaintiffs' state-law claims only because they are supplemental to plaintiffs' federal claims. See [28 U.S.C. § 1337](#). Analysis, therefore, properly begins with defendant's contention that the federal claims [**11] are without merit and should be dismissed.

II.

³Contrary to defendants' assertions, Falk's statements at the meeting are not inadmissible hearsay, at least as to some defendants, since Falk is both a party and an agent of the defendant corporations. See [Rule 801\(d\)\(2\), Fed. R. Evid.](#) In addition, the statements are not offered to prove the truth of the matter asserted if they are introduced not to show that the Board initially intended to pay the units' condominium value, but instead merely to show that Falk misstated the plan's terms, giving rise to expectations on the part of plaintiffs that were not fulfilled. See [Rule 801\(c\), Fed. R. Evid.](#)

⁴Defendants contend that they could not have received any unfair benefit from the fact that some shareholders did not purchase their units as condominiums because the Condominium Association had to assume significant debt to purchase the non-participating units. Of course, the debt assumed would have been even greater had the Condominium Association paid a higher price for the non-participating units.

HN1[] The Sherman Act forbids conspiracy to restrain or monopolize interstate trade or commerce. See [15 U.S.C. §§ 1-2](#). Here, plaintiffs allege that defendants conspired both to monopolize the sale of the building's non-participating and defaulted units, and to fix prices for the sale of those units.

A.

As an initial matter, defendants persuasively argue that no conspiracy occurred here because the only defendants are the Coop Corporation, the Condominium Association, and their directors. It is well-settled that **HN2**[] a corporation cannot conspire with its wholly-owned subsidiary or with its officers and directors. See [Copperweld Corp. v. Independence Tube Corp.](#), [467 U.S. 752, 769-70, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#). Based on [Copperweld](#), the individual defendant directors in this case cannot be deemed to have conspired with either the Co-op Corporation or the Condominium Association.

A narrow exception to the [Copperweld](#) doctrine exists for directors or officers who are "acting on their own behalf" as well as for the corporation. [Copperweld](#), [467 U.S. at 770 n.15](#). But this exception applies only when "the officer [**12] has an independent stake in achieving the corporation's illegal motive." [Greenville Pub. Co. v. Daily Reflector, Inc.](#), [496 F.2d 391, 399 \(4th Cir. 1974\)](#); see also [Buschi v. Kirven](#), [775 F.2d 1240, 1252 \(4th Cir. 1985\)](#). In other words, the officer or director must have a purpose that is *independent* of his interest in the corporation's success.⁵

Plaintiffs in this case have not alleged that any of the five directors involved had a motive independent of their interest in the success of the defendant corporations. It is true that each of the directors now owns a condominium unit in the building, and therefore if the Condominium [**13] Association was unjustly enriched at the plaintiffs' expense, the five [*1175] directors are indirectly enjoying a portion of that unjust enrichment. But again, this merely indicates that the directors had an interest in the Condominium Association's success, both as directors and as shareholders. Because their interest is derived solely from their affiliation with the Co-op Corporation and the Condominium Association, the directors legally cannot conspire with either corporation.⁶

[**14] Apart from the individual directors, the only possible conspiracy in this case is between the Co-op Corporation and the Condominium Association. Yet this, too, is no antitrust conspiracy. Although [Copperweld](#) specifically held only that **HN3**[] a parent corporation cannot conspire with its wholly-owned subsidiary, the Fourth Circuit has since held that [Copperweld](#) requires a "functional approach" to the question of intracorporate immunity and that two legally separate entities cannot conspire if they share a "similar unity of interest." [Oksanen v. Page Memorial Hosp.](#), [945 F.2d 696, 703 \(4th Cir. 1991\)](#)⁷ [**15] (hospital's board of trustees could not conspire with hospital's medical staff), cert. denied, [502 U.S. 1074, 117 L. Ed. 2d 137, 112 S. Ct. 973 \(1992\)](#).⁸ Here, the Condominium Association is essentially the successor to the Co-op Corporation under the building's new ownership

⁵ For example, in [Greenville Publishing](#), the panel held that the defendant newspaper company could be deemed to have conspired with its president to eliminate the plaintiff's competing newspaper because the president also had an interest in a *third* newspaper, one that would also have benefitted from elimination of the plaintiff's business. See [496 F.2d at 400](#).

⁶ The Co-op Corporation and the Condominium Association are not unrelated, independent entities. See *infra* note 8 and accompanying text. As a result, plaintiffs cannot persuasively argue that the directors could conspire with one of the defendant corporations because they had an independent personal stake in the other defendant corporation. Cf. [Freeman v. Medevac MidAmerica of Kansas, Inc.](#), [719 F. Supp. 1014, 1015 \(D.Kan. 1989\)](#) (finding individual could conspire with two *independent* corporations, both of which he served as an officer).

⁷ Four judges dissented from Judge Wilkinson's *en banc* majority opinion on grounds unrelated to this issue.

⁸ Other circuits have similarly recognized that two entities cannot conspire if they comprise "a single economic unit serving a common interest." [Guzowski v. Hartman](#), [969 F.2d 211, 214 \(6th Cir. 1992\)](#) (two racetracks owned by two corporations owned by same two shareholders), cert. denied, [122 L. Ed. 2d 132, 113 S. Ct. 978 \(1993\)](#); [City of Mt. Pleasant v. Associated Elec. Cooperative, Inc.](#), [838 F.2d 268, 275 \(8th Cir. 1988\)](#) (collection of rural electric cooperatives).

regime, and it has the same function, the same five directors, and with the exception of the six non-participating units, the same shareholders as the Co-op Corporation. In sum, plaintiffs' antitrust claims fail because the two corporations were legally incapable of conspiring with one another.

B.

Quite apart from the doctrine of intracorporate immunity, plaintiffs' allegations do not amount to an antitrust violation for other reasons. Their first claim is conspiracy to monopolize sale of the twenty-two non-participating and defaulted units in violation of [§ 2](#) of the Sherman Act. See [15 U.S.C. § 2](#). [HN4](#)[]. To prove conspiracy to monopolize, plaintiffs must show (1) the existence of a conspiracy to monopolize, (2) specific intent to monopolize, (3) overt acts in furtherance of the conspiracy, and (4) an effect on an appreciable amount of interstate commerce. See, e.g., [Bacchus Indus., Inc. v. Arvin](#) [\[*161\]](#) [Indus., Inc.](#), 939 F.2d 887, 895 (10th Cir. 1991). A "conspiracy to monopolize" means a conspiracy to acquire or maintain the power to exclude competitors from some portion of commerce. See [American Tobacco Co. v. United States](#), 328 U.S. 781, 809, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946). The plaintiffs need not prove that the defendants succeeded or even came close to obtaining monopoly power or excluding any competitors. See [id. at 789](#); [Alexander v. National Farmers Org.](#), 687 F.2d 1173, 1181-82 (8th Cir. 1982), cert. denied, 461 U.S. 937, 77 L. Ed. 2d 313, 103 S. Ct. 2108 (1983). But because the gist of monopolization is the power to exclude competition, a conspiracy to monopolize must be one that is somehow rationally directed toward the exclusion of competitors.⁹

[\[*17\] \[*1176\]](#) Here, the key element of a conspiracy to monopolize, namely an agreement directed toward excluding or lessening competition, is missing. Plaintiffs allege that the Co-op Corporation sold the twenty-two non-participating and defaulted units to a related entity, the Condominium Association, at a price below the fair market value. The simple fact is that no matter what price was paid by the Condominium Association for the twenty-two units, the transaction would have been no more or less exclusionary.¹⁰

Although the allegation of below-market pricing gives this case an antitrust appearance, only a moment's reflection reveals the falsity of this appearance. At most, a sale of units from the Co-op Corporation [\[*18\]](#) to the Condominium Association is a species of self-dealing. [HN5](#)[]. While self-dealing may give rise to tort or contract liability, it is not itself an antitrust violation. For example, a trustee may be liable for breach of fiduciary duty if she sells trust assets to herself at below-market prices, or if she extends herself a loan from trust assets at a below-market interest rate. But in neither case has she violated the antitrust laws. This distinction between self-dealing and monopolization was recognized in [A.D.M. Corp. v. Sigma Instruments, Inc.](#), 628 F.2d 753 (1st Cir. 1980). There, the panel rejected the notion that a conspiracy in violation of the Sherman Act occurred where a corporation's president conspired with competitors to divest the corporation of its assets at an inadequate price. The panel noted that "while it is not inconceivable that 'mere' unfair business practices, or business torts, could in the proper situation constitute an antitrust violation," the gravamen of plaintiff's complaint was that a fair price had not been paid for the assets. [Id. at 754](#). And regardless of the price paid, the effect on competition would have been the same, for the corporation would [\[*19\]](#) have been divested of its assets and no longer in competition. Thus, the panel recognized that a corporation's sale of its assets at a below-market price cannot be transformed into a Sherman Act violation "merely because the sale itself is characterized as a 'conspiracy', or because boilerplate language concerning 'attempt to monopolize' is included in the complaint." [Id.](#)¹¹ The same reasoning obtains here.

⁹ Cf. [Lifeline Ltd. No. II v. Connecticut Gen. Life Ins. Co.](#), 821 F. Supp. 1201, 1205 (E.D.Mich. 1993) (noting that plaintiff who alleges irrational or economically implausible antitrust conspiracy must come forward with particularly persuasive evidence of conspiracy), modified on other grounds, [821 F. Supp. 1213 \(E.D.Mich. 1993\)](#).

¹⁰ There is, for example, no allegation that the Condominium Association agreed to any limits on its future sale of the twenty-two units. In fact, defendants point out that the Condominium Association must sell the non-participating and defaulted units in order to retire the debt incurred to purchase them.

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No matter how low or unfair the price paid for the twenty-two units may have been, allegations of conspiracy to monopolize are wholly inapposite here.¹²

[**20] C.

Equally meritless is plaintiffs' claim of conspiracy to engage in price-fixing. [HN6](#)[↑] Price-fixing, a violation of [§ 1](#) of the Sherman Act, may be horizontal, such as a pricing agreement among competing manufacturers, or vertical, such as a resale price agreement between a manufacturer and a distributor or retailer. See, e.g., [United States v. Topco Assocs., Inc., 405 U.S. 596 \(1972\)](#) (horizontal); [Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 \(1968\)](#) (vertical). Such agreements are illegal whether or not the price set is reasonable. See [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-23, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#). But the Sherman Act does not, of course, prohibit "price-fixing" agreements between the buyer and seller of an asset. The reason, obviously, is that every sale requires "fixing" or setting a price.¹³ [*21] Thus, the Sherman Act [*1177] merely prohibits a buyer and seller from making an agreement that restricts either party's pricing discretion in future transactions with other parties.¹⁴

[**22] Here, plaintiffs allege that the Co-op Corporation and the Condominium Association "fixed" a price for the sale of the twenty-two units. This is true, but it was not price-fixing proscribed by the Sherman Act. Rather, these entities merely set a price to effect a sale. Significantly, there is no allegation that the future pricing actions of either party was restricted. The Condominium Association did not agree, for example, to offer the twenty-two units later for re-sale only at a particular price. Plaintiffs' true complaint is not that defendants fixed a price for the sale, but that they fixed an unreasonable one. While the price set by the defendants may have been illegal, unfair, or improper for other reasons, it was not price-fixing in violation of [antitrust law](#).¹⁵

D.

¹¹ See also [Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 272 \(5th Cir. 1979\)](#) (recognizing that Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce").

¹² Because plaintiffs' claim of conspiracy to monopolize is without merit for the reasons discussed, the Court need not reach defendants' additional arguments that the plaintiffs have improperly defined the relevant market as consisting only of twenty-two units in one apartment building, or that defendants' control of this market constituted a natural monopoly.

¹³ Cf. [Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1436 \(7th Cir. 1986\)](#) ("It is not the law that if someone hires a real estate broker to sell his house for \$ 100,000 he and the broker have made an agreement to fix the resale price of the house and are therefore guilty of a per se violation of the Sherman Act, carrying felony penalties.").

¹⁴ Thus, it is well-established that [HN7](#)[↑] a contract between a purchaser and a seller cannot constitute impermissible price-fixing unless it somehow affects price formation beyond the sales contemplated by the contract itself. See [Sitkin Smelting & Refining Co. v. FMC Corp., 575 F.2d 440, 446](#) (3d Cir.), cert. denied, [439 U.S. 866, 58 L. Ed. 2d 176, 99 S. Ct. 191 \(1978\)](#); [Garshman v. Universal Resources Holding, Inc., 625 F. Supp. 737, 743 \(D.N.J. 1986\)](#); [Humboldt Bay Mun. Water Dist. v. Louisiana-Pacific Corp., 608 F. Supp. 562, 567 \(N.D.Cal. 1985\)](#), aff'd without opinion, [787 F.2d 597 \(9th Cir.\), cert. denied, 479 U.S. 884 \(1986\)](#); [Sausalito Pharmacy, Inc. v. Blue Shield of Cal., 544 F. Supp. 230, 234-37 & n.1 \(N.D.Cal. 1981\)](#), aff'd, [677 F.2d 47](#) (9th Cir.), cert. denied, [459 U.S. 1016, 74 L. Ed. 2d 510, 103 S. Ct. 376 \(1982\)](#); [Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Conn., Inc., 518 F. Supp. 1100, 1107 \(D.Conn. 1981\)](#), aff'd, [675 F.2d 502 \(2d Cir. 1982\)](#); [Blue Cross & Blue Shield v. Michigan Ass'n of Psychotherapy Clinics](#), 1980-2 Trade Cas. P 63,351, at 75,794-95 (E.D.Mich. 1980); [Quality Auto Body, Inc. v. Allstate Ins. Co.](#), 1980-2 Trade Cas. P 63,507, at 76,696 (N.D.Ill. 1980), aff'd, [660 F.2d 1195 \(7th Cir. 1981\)](#), cert. denied, [455 U.S. 1020, 72 L. Ed. 2d 138, 102 S. Ct. 1717 \(1982\)](#); [Knuth v. Erie-Crawford Dairy Coop. Ass'n, 326 F. Supp. 48, 53 \(W.D.Pa. 1971\)](#), aff'd in part and rev'd in part on other grounds, [463 F.2d 470 \(3d Cir. 1972\)](#), cert. denied, [410 U.S. 913 \(1973\)](#).

¹⁵ For the same reasons, plaintiffs' allegations concerning the rent charged to the non-participating shareholders after the conversion do not state a valid antitrust claim.

Though not specifically mentioned in their complaint, **[**23]** plaintiffs have presented one additional allegation that merits attention.¹⁶ The minutes of the Co-op Corporation's Board of Directors reveal that, several months before the conversion plan was adopted, the Board agreed not to disclose to shareholders the exact amounts of certain "target" appraisals reflecting the potential value of the building's units as condominiums. In so doing, the Board apparently wished to prevent the residents "from taking premature marketing or selling measures." According to plaintiffs, the Board feared that some residents might well seek to sell their co-op shares if they realized that the shares had increased in value as a result of the pending conversion. Thus, plaintiffs contend that an antitrust violation occurred by virtue of defendants' conspiracy to restrain or prevent sale of co-op shares prior to the conversion by suppressing the target appraisal information.

[24]** Assuming, *arguendo*, that plaintiffs' allegations regarding the target appraisals are entirely true,¹⁷ they do not, even so, describe an antitrust violation. To be sure, [HN8](#)[↑] the Sherman **[*1178]** Act forbids conspiracies to restrain trade. See [15 U.S.C. § 1](#). Yet, the statute does not impose an affirmative obligation on anyone to encourage others to trade. It does not require a party to disclose appraisals that might alert someone else to an asset's true value. Thus, the Sherman Act did not obligate the Board to disclose appraisals or other information that might cause residents to sell their shares. Even assuming that the board concealed the appraisals from the shareholders, it did nothing to restrain or prevent any resident from selling his share at any time. This is not to say that plaintiffs were not entitled to disclosure of the appraisals. Rather, it is merely to say that if the Board had a duty to disclose them, this duty arose from some source other than the Sherman Act. In sum, while the Board may have had a fiduciary or other duty to disclose the appraisals to the shareholders, its alleged decision to withhold them is not a conspiracy in violation of federal **antitrust law**.

[25] III.**

Plaintiffs' second federal claim is that the condominium conversion plan's treatment of the non-participating shareholders violated the Fair Housing Act. See [42 U.S.C. §§ 3601-3631](#). [HN9](#)[↑] This statute prohibits discrimination in the sale or rental of housing based on race, color, religion, sex, familial status, national origin, or handicap. See [42 U.S.C. § 3604](#). In evaluating Fair Housing Act claims, courts employ the same method of analysis used in Title VII employment discrimination cases. See [Betsey v. Turtle Creek Assocs.](#), *736 F.2d 983, 988 (4th Cir. 1984)* (citing [McDonnell Douglas Corp. v. Green](#), *411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*). Thus, to establish a *prima facie* case of discrimination, plaintiffs may prove either (a) that the challenged housing action or practice was motivated by a discriminatory purpose, or (b) that it had a discriminatory impact. See [Betsey](#), *736 F.2d at 986*. Here, plaintiffs are attempting to succeed via the latter route, contending that African-American, Hispanic, and handicapped persons are disproportionately represented among the group of shareholders who were unable to purchase their units as **[**26]** condominiums.

¹⁶ Plaintiffs raised this allegation in memoranda and oral argument. Giving them the benefit of the doubt, the Court will construe the complaint's general antitrust claims as encompassing this allegation, as well.

¹⁷ Defendants have already submitted one affidavit which seems to indicate that plaintiffs' allegations are an inaccurate account of the facts. The Board's minutes indicate only that the "exact amounts" of the appraisals would not be publicized. According to defendants, there was no effort to suppress any information. The Board merely refrained from distributing a memorandum containing the target appraisal figures because it knew that the value of individual units might differ greatly from the target appraisals, and the Board did not want residents to be disappointed by failed attempts to market their units at prices near the target values. The appraisals were discussed at the Board's meeting and included in its minutes, both of which were open to the public. Moreover, the target appraisals were disclosed to the residents in time for them to sell their units prior to the conversion, which occurred in January 1995. Thus, the appraisals were made available to the shareholders at informational meetings in August 1994 and at the corporation's annual meeting in September 1994, and were published in an offering statement distributed to shareholders in connection with the conversion. In addition, defendants point out that the Board heavily emphasized to the shareholders at all times that the proposed conversion would benefit everyone by increasing the market value of the building's units.

HN10[] A *prima facie* case is established only if the challenged housing practice had a *significant* disproportionate impact on the minorities in the total group to which it was applied. See [Hanson v. Veterans Admin., 800 F.2d 1381, 1386 \(5th Cir. 1986\)](#); [Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 \(9th Cir. 1982\)](#). Statistics have critical, if not decisive, importance in determining the significance of the alleged disparity. See [Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995](#) & n.3, [101 L. Ed. 2d 827, 108 S. Ct. 2777 \(1988\)](#) (plurality) (discussing disparate impact analysis under Title VII); [United States v. Mitchell, 580 F.2d 789, 791 \(5th Cir. 1978\)](#). A bare showing of a minor statistical inequality does not establish a *prima facie* case. Rather, the disparity must be "sufficiently substantial" that it raises an inference of causation. See [Watson, 487 U.S. at 995](#). In other words, plaintiffs must offer statistical evidence of a kind and degree sufficient to show that the challenged practice caused residents to be treated unfairly *because of* their membership in a protected group. See [id. at 994](#).

It is therefore necessary [**27] to examine closely the statistics concerning the Carlyle House's residents.¹⁸ [**28] At the time of the conversion, shares representing 120 of the building's 136 total units were owned by individuals. Of the 120 units, 114 (or 95%) were purchased as condominiums by residents, while 6 (or 5%) were non-participating units [*1179] conveyed to the Condominium Association. The racial and disability status of the residents was as follows:

	Non-participating units	Participating Units
African-American	2	8
Hispanic	1	4
Asian-American	0	10
White	3	¹⁹ 92
Total	6	114
Disabled	2	8
Not disabled	4	106
Total	6	114

As plaintiffs note, African-American, Hispanic, and disabled persons are overrepresented to some extent in the non-participating group.²⁰ The question is whether this numerical disparity is significant enough to warrant a *prima facie* inference that residents were treated unfairly because of their race, ethnicity, or handicap status.

HN11[]

While emphasizing that "rigid [**29] mathematical formula" cannot alone control the decision, courts in Fair Housing Act and Title VII cases have sometimes used "standard deviation" analysis to evaluate the significance of statistical disparities. See [Watson, 487 U.S. at 995](#) & n.3; [Betsey, 736 F.2d at 988 n.4](#) (citing [Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 53 L. Ed. 2d 768, 97 S. Ct. 2736 \(1977\)](#), and [Castaneda v. Partida, 430 U.S. 482, 51 L. Ed. 2d 498, 97 S. Ct. 1272 \(1977\)](#)). Although there is no rigid rule on this point, the Supreme Court has suggested that, for large samples, a disparity of more than two or three standard deviations significantly undercuts

¹⁸ These statistics were not included in plaintiffs' complaint, but were submitted by defendants at the Court's direction. Plaintiffs have not challenged these figures.

¹⁹ These 92 units were owned by approximately 80 individuals, since some owned more than one unit for investment purposes. This fact, not taken into account in the standard deviation analysis discussed here, would marginally diminish the significance of the observed disparities.

²⁰ Each party, not surprisingly, presents the statistics in the light most favorable to it. For example, defendants emphasize that 80% of African-American residents purchased their units, as opposed to approximately 97% of white residents. By contrast, plaintiffs prefer to state that 20% of African-American residents were left out of the conversion, as compared to only 3% of white residents. Alternatively, one might say that 8.3% of the building's residents were African-American, but 33.3% of those who did not participate in the conversion were African-American. The use of standard deviations to measure fluctuations from a predicted value is intended to eliminate the need to choose among these alternative, arguably deceptive, ways of characterizing the same underlying numbers.

the hypothesis that the disparities are random. See *Hazelwood, 433 U.S. at 311 n.17; Castaneda, 430 U.S. at 496 n.17*. Yet, the converse, namely that a smaller disparity precludes a finding of discrimination, is not necessarily true. Thus, Fourth Circuit decisions have recognized that "courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three." *EEOC v. American Nat'l Bank, 652 F.2d 1176, 1193 (4th Cir. 1981)*, *reh'g en banc denied, 680 F.2d 965* (4th [**30] Cir.), cert. denied, 459 U.S. 923 (1982). In addition, standard deviation analysis becomes less reliable where, as here, the sample is very small in size. See *American Nat'l Bank, 652 F.2d at 1193 n.12*.²¹ In this case, the statistics reveal a disparity of approximately [*1180] 2.26 standard deviations for African-Americans, 1.57 standard deviations for Hispanic residents, 2.26 standard deviations for disabled persons, and 3.02 standard deviations for persons falling in any one or more of the three minority groups.²² Disparities of this magnitude are inconclusive. They neither prove nor disprove

²¹ In several opinions, Judge Widener vigorously attacked the Fourth Circuit's failure to apply correct statistical principles, especially standard deviation analysis, in evaluating evidence of discrimination. In particular, he emphasized that statistical significance tests properly account for sample size. See *Moultrie v. Martin, 690 F.2d 1078, 1083-84* & nn.7-10 (4th Cir. 1982); *American Nat'l Bank, 680 F.2d at 967-69 nn.3-6* (dissenting from denial of rehearing *en banc*). Yet, even following Judge Widener's analysis, it is impossible to conclude that a *prima facie* case has not been presented here, for the largest disparity in this case, 3.02 standard deviations, is significant at a 95% confidence level.

²² A standard deviation is a statistic used to measure the dispersion of a distribution from an expected value. For example, 8.33% (10 out of 120) of the building's units were occupied by African-Americans. Thus, if 6 units in the building were not purchased as condominiums, one would expect that, on average and all other things being equal, 0.5 of these non-participating units would have been occupied by African-Americans. In fact, the actual number of such units occupied by African-Americans was 2. Standard deviation calculations are used to measure the significance of the difference between the expected value of 0.5 and the observed value of 2. Courts applying standard deviation analysis in discrimination cases have typically used the formula for a binomial distribution. Yet, a true binomial distribution involves what is known as "sampling with replacement." See Freund & Simon, *Modern Elementary Statistics* 147, 183 (8th ed. 1992). This case, like most others, involves sampling from a finite pool *without* replacement. For example, if one had randomly selected one of the building's units, there was an 8.33% (10 out of 120) chance of picking the unit of an African-American resident. But if one had then randomly selected a second, different unit, the odds would have changed. If the first unit selected was occupied by African-Americans, the odds of selecting a second African-American unit from the remaining pool would fall to 7.56% (9 out of 119). If an African-American unit was not selected first, the odds of selecting such a unit on the second try would rise to 8.40% (10 out of 119). On selecting a third unit, still different odds would apply. In other words, each "trial" or selection is not independent of the others, because units selected are not "replaced" into the pool and no unit can be selected twice. As a result, this case involves what is known as a hypergeometric distribution. See *Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 336 n.18* (4th Cir. 1983), cert. denied, *466 U.S. 951, 80 L. Ed. 2d 539, 104 S. Ct. 2154* (1984). *HN12*[] The binomial distribution serves as a satisfactory approximation for the hypergeometric distribution where the number of "trials" is very small relative to the entire pool from which selections are made. See Freund & Simon, *supra*, at 191-93. In many discrimination cases, the pool is very large, such as all the potential jurors or employees in an entire city or county. Here, the pool consists of only 120 units. Thus, it is preferable here to use the formula for a hypergeometric distribution, which is:

$$\text{Variance} = n$$

*

$$a * b$$

*

$$a + b - n$$

$$(a + b) n 2$$

$$a + b - 1$$

where n equals the number of trials (the 6 non-participating units), a equals the number of items of one kind (the 10 units with African-American residents), and b equals the number of the remaining items in the pool (the 110 units with non-African-

discrimination. It seems likely that the statistical evidence presented here, without more, would not alone create a triable issue of fact on the ultimate question of whether there was discrimination. Yet, the numbers involved do cross, if only barely, the level required to establish a *prima facie* case and therefore avoid threshold dismissal of plaintiffs' claim. There is a distinction noticeable among the various groups' participation rates that a reasonable observer might conclude was not due to mere chance. ²³

[**31]

[**32]

[**33] [*1181] Because plaintiffs have presented a valid *prima facie* claim under the Fair Housing Act, the burden is now on defendants to assert a legitimate business purpose or purposes for the challenged practice, namely the condominium conversion plan. Defendants have suggested several possible business justifications for the challenged aspect of the conversion plan, and after further discovery, they will have the opportunity to present these and any additional explanations.²⁴ Assuming defendants succeed in establishing a legitimate business purpose, and showing that no less discriminatory alternative was available to accomplish that purpose, the burden will shift to plaintiffs to present evidence showing that defendants' explanations are merely pretextual and that impermissible discrimination was in fact involved. See [Betsey, 736 F.2d at 988](#). In sum, defendants' motion to dismiss the federal housing discrimination claim must be denied, but the stay of discovery will be lifted so the parties may pursue discovery, after which defendants may seek summary judgment, if the record warrants.

[**34] IV.

American residents). See Freund & Simon, *supra*, at 209. The standard deviation is simply the square root of the variance. In this example, the standard deviation is approximately 0.663. Thus, the difference between the expected value of 0.5 and the observed value of 2 is a span of approximately 2.26 standard deviations. Similar calculations result in disparities of 1.57 standard deviations for Hispanic persons, and 2.26 standard deviations for disabled persons. The same analysis can be done for the combination of the three protected groups, namely African-American persons, Hispanic persons, and disabled persons. A total of 23 of the building's 120 units were occupied by persons within at least one of the three groups, while 4 of the 6 non-participating units were occupied by a person in at least one of the groups. The calculation for the three groups in combination reveals a disparity of approximately 3.02 standard deviations.

²³Indeed, defendants' own arguments suggest that the disparity observed here is not random. They submit that the plan had a significant disparate impact, if at all, only because African-American, Hispanic, and disabled persons continue to suffer a general economic disadvantage in American society. Because they have less money and less access to credit, they were less likely to purchase condominiums during the conversion. Discrimination by lenders might also exist, further exacerbating the disparity, but these defendants would not be liable for that discrimination. Finally, defendants' argue, a Fair Housing Act violation cannot arise from a disparity attributable to this general statistical link between wealth and race, ethnicity, and handicap status. See [Boyd v. Lefrak Org., 509 F.2d 1110, 1113](#) (2d Cir.) ("A businessman's differential treatment of different economic groups is not necessarily racial discrimination and is not made so because minorities are statistically overrepresented in the poorer economic groups."), cert. denied, [423 U.S. 896, 46 L. Ed. 2d 129, 96 S. Ct. 197 \(1975\)](#). Even assuming, *arguendo*, that defendants' premise is correct, that economic inequality was the sole cause of the asserted disparities, defendants are still not entitled to threshold dismissal of plaintiffs' claim. See [Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1037-38 n.10](#) (2d Cir. 1979) (rejecting Boyd's suggestion that Title VII's burden-shifting scheme does not apply under Fair Housing Act); [Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934](#) (2d Cir.), aff'd, [488 U.S. 15, 102 L. Ed. 2d 180, 109 S. Ct. 276 \(1988\)](#); [Tinsley v. Kemp, 750 F. Supp. 1001, 1010-11 \(W.D.Mo. 1990\)](#). While these defendants ultimately may not be held liable under the Fair Housing Act for economic discrimination, HN13[[↑]] the existence of a significant statistical disparity, even one resulting from economic inequality, is sufficient to create a *prima facie* case and shift the burden to the defendant to come forward with a legitimate business justification for the challenged practice. If the defendant succeeds, the burden shifts finally back to the plaintiff to prove that there was discrimination by showing that the proffered justification is pretextual. At that point, defendant must prevail if it appears that the disparity was attributable to economic inequality rather than impermissible discrimination. In sum, defendants' argument may ultimately prove to be dispositive, but it does not dispose of plaintiffs' claim at this stage.

²⁴In addition, defendants may respond to plaintiffs' allegation that they were charged exorbitant rents to continue living in the building during the six-month grace period following the conversion.

In addition to their federal claims, plaintiffs contend that defendants are liable for breach of contract and fiduciary duty. Defendants have moved to dismiss these claims, while plaintiffs seek summary judgment. The initial question is whether these claims should be adjudicated here or dismissed without prejudice to permit the parties to adjudicate them in state court.

A.

Defendants argued for dismissal of the state-law claims in the event all federal claims were dismissed. See [28 U.S.C. § 1367\(c\)\(3\)](#) (district court may dismiss supplemental claims after dismissing all claims within original jurisdiction). As discussed above, the federal housing discrimination claim survives defendants' threshold attack. Yet, [HN14](#) [↑] district courts may also decline to exercise supplemental jurisdiction over a state-law claim that "raises a novel or complex issue of State law," or "substantially predominates" over the federal claims involved. See [28 U.S.C. § 1367\(c\)\(1\)-\(2\)](#). In addition to the novelty and complexity of the issues, factors relevant to the exercise of this discretion are judicial economy, convenience of and fairness to litigants, and comity between the state and [\[*35\]](#) federal courts. See [United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-27, 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\)](#). These factors, applied here, point persuasively to the conclusion that jurisdiction over the state-law claims should be retained.

[HN15](#) [↑] In general, novel and difficult questions of state law should be decided by that state's courts. And the force of this principle increases with the degree of novelty and difficulty. Yet, dismissal in these circumstances gains nothing if the dismissed state-law claims are then filed and decided in another state's courts. Because plaintiffs and their counsel, as well as defendants and the Carlyle House building, are located in Virginia, it appears likely that plaintiffs would pursue their state-law claims in Virginia courts if [\[*1182\]](#) they were dismissed here. From this, it follows that dismissal under [§ 1367\(c\)](#) would gain nothing if Delaware law, rather than Virginia law governs the state-law issues. Analysis of the [§ 1367](#) dismissal issue appropriately begins with the choice of law question.

Plaintiffs were shareholders of a Delaware corporation that operated a cooperative apartment building in Virginia. In general, [HN16](#) [↑] the internal [\[*36\]](#) affairs of a corporation are governed by the law of the state of incorporation. See [Bockover v. Life Ass'n of America, 77 Va. 85 \(1883\)](#); [Draper v. Paul N. Gardner Defined Plan Trust, 625 A.2d 859, 864-66 \(Del. 1993\)](#); [18 Am.Jur.2d Corporations §§ 17-27 \(1985\)](#); [Restatement, Conflict of Laws 2d §§ 302-306](#). Of course, a corporation is subject to regulation by other states in which it carries on its activities, and under certain circumstances, the law of these states may displace the corporate law of the state of incorporation. For example, many states regulate the affairs of cooperatives and condominiums. Thus, Virginia has an extensive statutory scheme applicable to cooperative apartment buildings located within its borders. See Va. Code §§ 55-424 to 55-506. The statute contains detailed provisions governing the termination of cooperative ownership. See Va. Code § 55-454.²⁵ Yet, Virginia's statute applies only to cooperatives created after July 1, 1982. See Va. Code § 55-425(A). As a result, it does not apply to the cooperative involved here, which was created in 1980. Virginia also has a statutory scheme governing condominiums. See Va. Code §§ 55-79.30 to [\[*37\]](#) 55-79.103. Yet, it also contains no provision applicable to the central issue presented here, namely the Co-op Corporation's treatment of its shareholders in the conversion. Because Virginia law contains no provision governing the relationship between the Co-op Corporation and its shareholders, that relationship remains governed solely by the law of the state of incorporation, namely Delaware.

²⁵ [HN17](#) [↑] The statute provides that, upon termination of a cooperative, "the respective interests of proprietary lessees are the fair market values of their cooperative interests immediately before the termination." Va. Code § 55-454(E)(1). Each side in this case interprets the word "termination" differently, and therefore each believes that the statute would support its position if applied. Defendants argue that the statute provides for valuation immediately prior to termination of cooperative ownership of the building, and so requires valuation of the units as cooperative apartments. Plaintiffs argue that the statute requires valuation immediately prior to termination, or dissolution, of the Co-op Corporation. By the time the Co-op Corporation was dissolved, the conversion to condominium ownership had occurred, and therefore plaintiffs contend that valuation of the units as condominiums was appropriate. It is unnecessary to resolve this dispute because the statute does not apply to this case.

[**38] Absent assurance from the parties that the state claims, if dismissed without prejudice, would be brought in Delaware, there is little reason to dismiss the case based on the novelty or complexity of the issues presented. Moreover, dismissal here would disserve the goals of judicial economy, convenience, and fairness, since the parties have already conducted a substantial amount of discovery, and the Court is already familiar with the facts of the case. As a result, the Court will retain supplemental jurisdiction and address the merits of plaintiffs' state-law claims.

B.

This is, distilled to its essence, a case about a corporation's obligations to its shareholders.²⁶ Plaintiffs argue that the conversion plan violated the fundamental principle that all shares of the same type must be treated equally.

²⁷ [**40] Yet, the conversion plan [*1183] did treat all shares equally in the sense that every resident was offered the same opportunity to purchase a condominium unit. Plaintiffs suggest, without citing authority, that a corporation cannot grant shareholders an opportunity, even on equal terms, if shareholders' varying ability to obtain access to capital will mean that some enjoy the opportunity [**39] and others do not.²⁸ The absence of cited authority is no accident; the law is sensibly to the contrary. Were this not so, a corporation, for example, would be precluded from issuing a dividend in the form of an option to purchase some asset, such as stock or a bond, at a particular price. To exercise the option would require payment of the designated price, a requirement that shareholders of unequal wealth would have an unequal ability to meet. Yet, corporations are not barred from issuing such dividends. See generally [18B Am.Jur.2d Corporations § 1175](#) (1985). In short, there is no rule of Delaware law that requires the type of equality demanded by plaintiffs.²⁹

The situation plaintiffs present is appropriately analyzed in terms of fairness rather than equality. [HN19](#) A corporation may sell all or substantially all of its assets, but the directors have a fiduciary duty to obtain a fair price. See [Allaun v. Consolidated Oil Co., 16 Del. Ch. 318, 147 A. 257, 260 \(Del.Ch. 1929\)](#); [Allied Chem. & Dye Corp. v. Steel & Tube Co. of America, 14 Del. Ch. 1, 120 A. 486, 493-94](#) [**41] ([Del.Ch. 1923](#)).³⁰ [**42] A fair price is one to which a reasonable and willing seller and a reasonable and willing buyer, under all circumstances, would agree. See [Marks v. Wolfson, 41 Del. Ch. 115, 188 A.2d 680, 686 \(Del.Ch. 1963\)](#).³¹ Ordinarily, determination of the

²⁶ Plaintiffs' claim for breach of contract is essentially identical to their claim for breach of fiduciary duty, since it is based on the principle that shareholders' rights are contractual in nature. See [Gaskill v. Gladys Belle Oil Co., 16 Del. Ch. 289, 146 A. 337, 339 \(Del.Ch. 1929\)](#) ("It is elementary that the rights of stockholders are contract rights.").

²⁷ This principle applies to all Delaware corporations by statute and case law. See Del.Code § 8-151(a), (d) (stock shall have only those preferences stated in, or adopted by resolution authorized by, certificate of incorporation); [Grover v. Simmons \(In re Sea-Land Corp. Shareholders Litig.\), 642 A.2d 792, 799-803](#) ([Del.Ch.](#)) (discussing Delaware's "rule of equality"), aff'd without published opinion, [633 A.2d 371 \(Del. 1993\)](#). In addition, plaintiffs point to a provision in the Co-op Corporation's by-laws requiring that all shares receive a ratable portion of the corporation's assets in the event of dissolution.

²⁸ It is important to note that the defendant corporations had no control over the shareholders' dealings with potential lenders. See [Sea-Land, 642 A.2d at 803](#) ("To be chargeable with having violated a fiduciary duty involving equal treatment precepts, the board must at the very least have approved the transaction creating the disparity.").

²⁹ Thus, [HN18](#) Delaware courts recognize that "in some circumstances Delaware law permits shareholders (as distinguished from shares) to be treated unequally." [Sea-Land, 642 A.2d at 799 n.10](#). While the Co-op Corporation treated all shares equally, an inequality arose because of the shareholders' varying economic and credit status.

³⁰ In September 1993, an amendment to the Co-op Corporation's by-laws provided the Board with discretion to implement a conversion plan in the shareholders' "best interests" subject to challenge only for bad faith. Yet, a by-law amendment surely cannot eliminate directors' fiduciary duty of loyalty and fairness to shareholders. See [Del. Code tit. 8, § 102\(b\)](#) (providing that certificate of incorporation may limit directors' personal liability, but may not waive liability for breach of duty of loyalty).

assets' fair value is within the directors' business judgment and discretion, and the burden of proof is on the dissenting shareholder to demonstrate unfairness. See [Baron v. Pressed Metals of America, Inc., 35 Del. Ch. 325, 117 A.2d 357, 361 \(Del.Ch. 1955\)](#), aff'd, [35 Del. Ch. 581, 123 A.2d 848 \(Del. 1956\)](#). But where, as here, the directors and the shareholders who approved the sale have an interest in the transaction,³² [*1184] the burden shifts to the proponents of the sale to show the directors' "utmost good faith" and the transaction's "scrupulous fairness." See [Alcott v. Hyman, 42 Del. Ch. 233, 208 A.2d 501, 506-07 \(Del. 1965\)](#). Thus, the question presented here is what was a fair price for sale of the non-participating and defaulted units.

[**43] Plaintiffs' central argument is that the units became more valuable as a result of the condominium conversion, and that a fair price for the units, and consequently for plaintiffs' stock, had to include all, or at least some, of this increase in value. Yet, contrary to plaintiffs' assertions, [HN21](#)[] there is no rule of law providing that, where assets become more valuable as a result of being sold, a fair sale price *must* include this increase in value. In fact, some authority indicates there is a rule to the contrary, providing in effect that a fair price does not include any part of an increase in value attributable to the sale itself. When corporations undergo significant changes, such as mergers, consolidations, or as here, sales of all or substantially all assets, disgruntled shareholders sometimes have a statutory right to demand appraisal and payment of their stocks' fair value. There is a long and well-established rule that the court's valuation of the stock should not be affected by the merger, sale, or other transaction that gives rise to the appraisal proceeding. In other words, if a corporation becomes more valuable as a result of a transaction, this increased value is [**44] to be enjoyed only by the shareholders who participate in the transaction. This principle has been recognized by numerous courts,³³ [***45] commentators,³⁴ state legislatures,³⁵ and the drafters of model corporation laws.³⁶ For example, [HN22](#)[] Delaware law provides that courts in

³¹ The relevant considerations and methods for determining fair value have been set forth in numerous opinions. See, e.g., [Baron v. Pressed Metals of America, Inc., 35 Del. Ch. 581, 123 A.2d 848 \(Del. 1956\)](#); [Alcott v. Hyman, 42 Del. Ch. 233, 208 A.2d 501 \(Del. 1965\)](#). It is important to note that the fair value of the units here was not necessarily the "co-op value" or the "condominium value." While no rational purchaser would have paid more than the condominium value, reasonable parties to such a sale might well have negotiated a price somewhere in between so as to divide the benefits accruing from the sale.

³² [HN20](#)[] An individual is "interested" in a sale transaction if she serves as a director, or shareholder, of both the selling and purchasing corporations. See [Alcott, 208 A.2d at 505-06](#); [Abelow v. Symonds, 40 Del. Ch. 462, 184 A.2d 173, 175 \(Del.Ch. 1962\)](#), aff'd *sub nom.*, [Abelow v. Midstates Oil Corp., 41 Del. Ch. 145, 189 A.2d 675 \(Del. 1963\)](#). Here, disinterested director approval was impossible, because the two corporations involved had the same five directors. Similarly, at the time they voted on the conversion plan, the Co-op Corporation's shareholders intended later to become shareholders of the Condominium Association and, with the exception of plaintiffs and the other non-participating shareholders, they eventually did so. Thus, the majority of the selling corporation's shareholders had an expectant interest in the purchasing corporation, and their approval of the sale was not disinterested. Defendants have submitted evidence indicating that one of the plaintiffs, Julia Williams, voted in favor of the conversion plan. Had a majority of the non-participating shareholders voted in favor of the plan, it would be necessary to decide whether this constituted disinterested shareholder approval.

³³ See [Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 74 A.2d 71, 72 \(Del. 1950\)](#) (recognizing that "the basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which was taken from him"); [Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 A. 452, 455 \(Del.Ch. 1934\)](#) (recognizing that valuation must be made "as if the merger had never been conceived"); see also Annotation, *Valuation of Stock of Dissenting Stockholders in Case of Consolidation or Merger of Corporation, Sale of Its Assets, or the Like*, 48 A.L.R.3d 430, § 4 (1973); Annotation, *Valuation of Stock of Dissenting Stockholders in Case of Consolidation or Merger of Corporation, Sale of Its Assets, or the Like*, 38 A.L.R.2d 442, §§ 4[b], 11 (1954).

³⁴ See [18A Am.Jur.2d Corporations § 805](#), at 678; § 837, 708-09 (1985); 18 C.J.S. *Corporations* § 349, at 685 (1990); Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 35 Harv.L.R. 233, 243 (1931); Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L.J. 223, 231 (1962); Note, *Appraisal Statutes--An Analysis of Modern Trends*, 38 Va.L.Rev. 915, 932 (1952).

³⁵ See, e.g., [Cal. Corp. Code § 1300\(a\)](#); [Conn. Gen. Stat. § 33-855\(3\)](#) (effective January 1, 1997); [Fla. Stat. § 607.1301\(2\)](#); [Ind. Code § 23-1-44-3](#); [Mich. Comp. Laws § 450.1761\(d\)](#); Tex. Bus. Corp. Act art. 5.12A(1)(a); [Va. Code § 13.1-729](#).

appraisal cases shall determine the stock's "fair value exclusive of any element of value arising from the accomplishment or expectation" of the disputed transaction. [Del. Code tit. 8, § 262\(h\)](#). If applicable here, this principle firmly supports defendants' view that the Co-op Corporation's assets and stock were properly valued on the basis of their "co-op value," rather than on the basis of their condominium value.

Yet, several questions [\[**46\]](#) remain to be answered regarding the application of this principle under Delaware law and the facts of this case. Does the principle apply only in cases arising under the appraisal statute, or in other contexts where the fair value of a corporation's assets or stock are disputed, such as where minority shareholders attack a transaction's fairness by suing the corporation or its directors for breach of fiduciary duty? ³⁷ [\[**47\]](#) Does it apply in a case involving a sale of assets rather than a merger or consolidation? ³⁸ [\[**48\]](#) [\[*1185\]](#) Finally, is this general principle subject to any exceptions relevant here? ³⁹

³⁶ See ALI-ABA Model Business Corp. Act. § 13.01(3) (3d ed. 1984) (defining shares' "fair value" as value "immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable"); ALI-ABA Model Business Corp. Act § 81(a)(3) (2d ed. 1969) (same).

³⁷ Authority other than Delaware case law, although meager, indicates that the principle applies in non-appraisal cases. See [Perkins v. Public Serv. Co., 93 N.H. 459, 45 A.2d 210, 212-14 \(N.H. 1945\)](#); Annotation, 48 A.L.R.3d at 451, § 4[a]; Annotation, 38 A.L.R.2d at 450, § 4[b]. Delaware cases offer mixed signals on this point. Compare [Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107, 111 \(Del. 1952\)](#) (disregarding increased value of target corporation's stock attributable to attempted merger, where minority shareholders sued to enjoin allegedly unfair merger), with [Cinerama, Inc. v. Technicolor, Inc., 63 U.S.L.W. 2291, 1994 WL 568654](#), at *9 (Del.Ch. 1994) (noting, in suit for breach of fiduciary duty, that merger's terms reflected fair allocation of "synergistic value" arising from merger, without mentioning appraisal statute or suggesting Delaware law requires court to disregard such value in evaluating merger's fairness), and [Tanzer v. International Gen. Indus. Inc., 402 A.2d 382, 393-95 \(Del.Ch. 1979\)](#) (suggesting that, while appraisal statute precludes dissenting shareholders from sharing in appreciation caused by merger, same rule does not apply in nonappraisal cases, but concluding evidence that merger increased company's value was too speculative to demonstrate merger's unfairness).

³⁸ On this question, authority from other states suggests that mergers and sales of assets are treated identically. Appraisal statutes in most states apply to both mergers and sales of assets, and therefore courts apply the same valuation principles to each. See, e.g., [In re Clark's Will, 257 N.Y. 487, 178 N.E. 766, 768 \(N.Y. 1931\)](#). Yet, Delaware's legislature and its courts have previously shown a unique propensity to distinguish mergers and sales of assets with regard to valuation and the rights of dissenting shareholders. For example, [HN23](#) [↑] Delaware is one of the small minority of states where appraisal is generally not available after a sale of all or substantially all of a corporation's assets. See [Del. Code tit. 8, § 262\(c\)](#) (appraisal rights apply after sale of assets only if certificate of incorporation provides); [Tanzer, 402 A.2d at 390-91](#) (appraisal rights generally not available for sale of assets). Moreover, Delaware courts have declined to find that a properly executed sale of assets may be treated as a "de facto merger" to which appraisal rights extend. See [Hariton v. Arco Elecs., Inc., 40 Del. Ch. 326, 182 A.2d 22, 26-27 \(Del.Ch. 1962\)](#), aff'd, [41 Del. Ch. 74, 188 A.2d 123 \(Del. 1963\)](#); [Heilbrunn v. Sun Chem. Corp., 38 Del. Ch. 321, 150 A.2d 755, 757-59 \(Del. 1959\)](#). More specifically, in two cases, Delaware courts have implied that where minority shareholders challenge a sale of assets, as opposed to a merger, valuation may take into account an increase in the assets' value that is attributable to the sale itself. See [Sterling, 93 A.2d at 111-14](#) (holding that, upon a merger, minority shareholders are entitled to receive property substantially equivalent in value to what they had before the merger was proposed, but repeatedly emphasizing that case did not involve a sale of assets); [Tanzer, 402 A.2d at 390-91](#) (discussing minority shareholders' argument that "cash-out" merger was unfair because it enabled majority shareholders to appropriate entire accession to company's value caused by merger, when alternative forms of same transaction, such as sale of assets, would have enabled minority shareholders to share accession).

³⁹ It is unclear whether Delaware law provides for any exception. One court has recognized that an exception exists where fraud is present. See [Jones v. Missouri-Edison Elec. Co., 233 F. 49, 50 \(8th Cir. 1916\)](#). A second possible exception exists for shareholders involuntarily excluded from the disputed merger or sale. A shareholder who opposes and elects not to participate in a transaction should neither share in the gain if the transaction increases the company's value, nor share in the loss if it has the opposite effect. See, e.g., [In re West Waterway Lumber Co., 59 Wash. 2d 310, 367 P.2d 807, 810 \(Wash. 1962\)](#). Yet, this reasoning does not apply to shareholders who have no choice whether to participate. Thus, appraisal statutes in many states expressly provide that the increased value of a corporation arising from a sale or merger is not excluded from valuation if "such

[**49] In sum, defendants have not established that this or any other rule of Delaware law warrants threshold dismissal of plaintiffs' claims. Similarly, plaintiffs have not established grounds entitling them to summary judgment, for they have not shown how the Court may determine, without relying on disputed factual issues, that defendants failed to set a fair price for the corporation's assets and to assign a fair value to plaintiffs' stock.⁴⁰ [**50] As a result, both defendants' motion to dismiss [*1186] and plaintiff's motion for summary judgment must be denied. The stay of discovery now in effect will be lifted, and both parties, after discovery, have leave to seek summary judgment on the issues presented here, should the record warrant it. In addition, the parties may indicate whether they believe certification of questions to the Delaware Supreme Court would be advisable in this case.⁴¹

V.

In sum, plaintiffs' federal antitrust claims are without merit and must be dismissed, and their federal housing discrimination claim survives threshold dismissal, but, after discovery, may yet fail on summary judgment motion in the event defendants establish a legitimate non-discriminatory purpose for the challenged aspects of the plan and plaintiffs fail to show that the purpose is pretextual. The Court will continue to exercise supplemental jurisdiction over plaintiffs' state-law claims, and the parties will now have an opportunity to pursue discovery and address the questions of Delaware corporate law presented here at the summary judgment stage.

An appropriate order will issue.

T. S. Ellis, III

United States District Judge

Alexandria, Virginia

July 13, 1995

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exclusion would be inequitable." See, e.g., [Colo. Rev. Stat. § 7-113-101\(4\)](#); Idaho Code § 30-1-81(a) (3); [N.H. Rev. Stat. § 293-A:13.01\(3\)](#); [S.D. Codified Laws § 47-6-40\(3\)](#); [Va. Code § 13.1-729](#). Although this proviso has received little judicial interpretation, the commentary to the Model Business Corporation Act indicates that it aims to distinguish a minority shareholder "excluded against his will," such as by a "squeeze-out" merger, from one who willingly "refuses to maintain a continuing interest" in the corporation after the merger or sale. See Conrad, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights (Sections 73, 74, 80, and 81)*, 33 Bus. Law. 2587, 2601 (1978). Here, plaintiffs do not fit neatly into either category, for the corporation invited them to participate in the conversion by buying their units as condominiums, but they were excluded by their inability to obtain financing on acceptable terms.

⁴⁰ Although not alleged in their complaint, plaintiffs have cited one additional manner in which the defendants allegedly breached their fiduciary duties, namely by their suppression of certain target appraisals of the units' value as condominiums. See *supra* Part II.D. If privy to the target appraisals, plaintiffs argue, they could have sold their Co-op Corporation stock prior to the conversion at a price higher than the stock's "co-op value." Plaintiff may seek to add this allegation to their complaint by amendment, and, if so, defendants may test the presence of factual support for it by way of motion for summary judgment. See *supra* note 17.

⁴¹ See [Del. Const. art. IV, § 11\(9\)](#); Del. [Supreme Court Rule 41\(a\)\(ii\)](#); [Rales v. Blasband](#), 626 A.2d 1364 (Del. 1993).



Verson Corp. v. Verson Int'l Group PLC

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

July 17, 1995, Decided ; July 18, 1995, DOCKETED

No. 93 C 2996

Reporter

899 F. Supp. 358 *; 1995 U.S. Dist. LEXIS 10106 **

VERSON CORPORATION, a Delaware corporation, Plaintiff, vs. VERSO INTERNATIONAL GROUP PLC, an English corporation, VERSO WILKINS LIMITED, an English corporation, and VERSO INTERNATIONAL LIMITED, an English corporation, Defendants.

Core Terms

know-how, assign, rights, license agreement, parties, presses, sublicense, license, argues, patent, motion to dismiss, right to use, competitors, settlement agreement, Licensee, replacement part, matter of law, manufacture, co-owner, compete, exclusive right, restrictions, territorial, covenants, ownership, anti trust law, patent license, five year, termination, settlement

LexisNexis® Headnotes

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN1[] Settlements, Settlement Agreements

In settlements, as in all contracts, every effort is made to give force to the words employed by the parties and to not imply words that the parties could have used but did not.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN2[] Conveyances, Assignments

899 F. Supp. 358, *358 1995 U.S. Dist. LEXIS 10106, **10106

The holder of a nonexclusive patent license may not assign its license unless the right to assign is expressly provided for in the license agreement. Patent licenses are treated as personal to the licensee and therefore are presumed to be not assignable.

Evidence > Inferences & Presumptions > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN3 Evidence, Inferences & Presumptions

There is a strong presumption against implying a right to assign licenses for intellectual property.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

Trade Secrets Law > Protected Information > Know-How

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

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

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

Trade Secrets Law > Federal Versus State Law > General Overview

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

HN4 Conveyances, Licenses

The very nature of a patent is a government-authorized monopoly in a certain market, and much of the law of intellectual property is designed to protect a company's innovations from competitors.

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

Patent Law > Ownership > Conveyances > General Overview

HN5 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Restrictions in patent licenses are not per se violations of the antitrust laws.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN6 Settlements, Settlement Agreements

The labels given to parties by an agreement are not dispositive of the court's inquiry into the parties' status. Rather, the focus is on the substantive rights conferred by the agreement.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN7 Conveyances, Assignments

The term "assignment" has a particular meaning in patent law implying formal transfer of title.

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Judges: JAMES B. MORAN, Senior Judge, U.S. District Court

Opinion by: JAMES B. MORAN

Opinion

[*359] MEMORANDUM AND ORDER

Plaintiff Verson Corporation brought this lawsuit alleging that defendants Verson International Group, Verson Wilkins Limited, and Verson International Limited violated a license agreement for intellectual property. Before us now is defendants' motion to dismiss plaintiff's amended complaint. For the reasons set forth below, the motion is denied.

[*360] BACKGROUND

Verson Corporation (Verson), the successor to Verson Allsteel Press Company (VASP) and the wholly-owned subsidiary of Allied Products Corporation, manufactures presses for the metal-forming industry. In the early 1980s VASP began experiencing financial difficulties. In order to ease through its financial downturn VASP and a group of its international managers entered into an agreement wherein the managers would buy out VASP's international operations with a newly formed independent company, Verson International Limited (collectively referred to herein, along with Verson Wilkins Limited and Verson International Limited, as "VIL"). VIL and VASP entered into a series of agreements to facilitate the management buyout **[**2]** (MBO), the most important for our purposes being the

VASP/VIL License Agreement (license agreement). In that agreement VASP agreed to turn over to VIL its patents and non-patented trade secrets, and allowed VIL to use this know-how. The license agreement called for both parties to turn over all newly developed know-how to the other for a period of five years. The parties also agreed to a series of restrictive covenants that gave VASP the exclusive right to market its products in the United States and Canada and gave VIL the exclusive right to market its products in the rest of the world. Both territorial restrictions were to last five years.

In the first lawsuit between the parties VIL sued VASP alleging that VASP¹ had violated the license agreement's restrictive covenants and seeking an injunction requiring Verson to turn over certain know-how. VASP argued that the territorial and durational restrictions violated state and federal antitrust laws. We enforced the restrictions only in part, finding that VIL was barred only from the use of VASP know-how in the United States and Canada, and that VASP was barred only from marketing its products in Europe. *Verson Wilkins Ltd. v. Allied [**3] Products Corp., 723 F. Supp. 1, 20 (N.D. Ill. 1989)*. We also required VASP to turn over the know-how covered under the license agreement. In 1990 the parties executed a settlement agreement disposing of the remaining disputes regarding exchange of the know-how.

Soon thereafter VIL entered into an agreement with Enprotech Mechanical Services, Inc. (Enprotech), a direct competitor of Verson in the North American market. In this agreement VIL turned over know-how it received from VASP in the 1985 license agreement and granted Enprotech the exclusive right to use this know-how to manufacture replacement parts for Verson presses.² This arrangement spawned the present lawsuit. In its complaint Verson alleged that VIL violated Article 16 of the 1985 license agreement which required VIL to obtain VASP's approval before licensing³ the know-how to another party, by turning over VASP know-how to Enprotech. Defendants moved to dismiss the complaint, claiming that Article 16 did not survive the termination of the agreement. We granted that motion on December 30, 1994. Verson moved for reconsideration of our order and for leave to amend its complaint, arguing that the Enprotech agreement, which Verson claims is an assignment, violated the license agreement's restriction on VIL's right to assign the know-how. Although this constituted a new line of attack for Verson, we allowed it to amend its complaint to more fully make out this claim. Verson has since amended its complaint to incorporate the assignment argument. Before us now is VIL's motion to dismiss the amended complaint. VIL argues that the 1990 settlement agreement prevents Verson from maintaining this action; that it is the co-owner of the know-how, not a licensee, and thus had the right to assign it to Enprotech; that the right to assign the know-how was implicit in the 1985 licensing agreement; that a perpetual ban on assignability would be an unreasonable restraint of trade; and that its transaction with Enprotech is a sublease⁴ rather than an assignment. ⁵ We will examine each of these arguments in turn.⁶

DISCUSSION

A. The 1990 Settlement Agreement

VIL argues that a settlement agreement executed in connection with the earlier case involving these⁷ parties bars Verson's action here. In the first lawsuit VIL obtained an injunction requiring Verson to turn over various types

¹ Actually, Allied had taken over VASP in 1986 and therefore was the named defendant in the first action. However, this distinction is immaterial for this brief recitation of the background.

² The parties dispute whether VIL assigned this know-how to Enprotech or merely licensed it. That argument will be addressed *infra*.

³ Verson claims that VIL's arguments are merely "rehashed" from its memorandum in opposition to Verson's motion for reconsideration and to amend its complaint, and that we rejected these arguments in granting Verson leave to amend its complaint. However, in allowing Verson to amend its complaint we did not rule on any of the arguments VIL advances here. Rather, our opinion focused exclusively on whether we should allow Verson to amend its complaint to present a different theory of recovery, and we concluded that Verson should have a second chance to present a cognizable claim. Verson has attempted to do so and VIL is now free to attack the complaint.

of know-how related to the licensing agreement. The case was still pending, however, because the parties disputed what documents needed to be produced and who was to pay for the copying. The parties entered into a settlement in which VIL accepted some of the disputed know-how in complete satisfaction of any claim for know-how it might have had under the licensing agreement, and Verson agreed not to challenge VIL's right to use this know-how.⁴ VIL argues that this action challenging VIL's assignment (or sublease) of the know-how to Enprotech is a restriction on the use of the know-how and thus violates the settlement agreement. Verson responds that VIL's right to assign or transfer the know-how remained as it was under the licensing agreement.

[**7] We agree with Verson that the 1990 settlement agreement does not prevent it from attempting to restrict VIL's right to assign the know-how. [HN1](#)⁵ In settlements, as in all contracts, every effort should be made to give force to the words employed by the parties and to not imply words that the parties could have used but did not. [Harris Bank Naperville v. Morse Shoe, Inc., 716 F. Supp. 1109, 1122 \(N.D.Ill. 1989\)](#). Through the settlement Verson agreed only not to restrict VIL's use of the know-how. The word "use" does not ordinarily also include sale, transfer, or assignment. This is especially so when dealing with the right to use intellectual property. One can use know-how, trade secrets, or patents freely, but still not transfer or assign that information. The right to the know-how at issue here could easily be separated into the right to use the know-how and the right to sell, transfer, or assign the know-how, and the parties' selection of the word "use" provides support for the view that they did not intend for the settlement agreement to grant VIL a right to assign the know-how that was not already granted under the terms of the license agreement. The parties could have added "transfer [**8] or assign" to "use," and the fact that they did not is probative of the issue.

Other sections of the settlement also provide some support for that view. Under a section entitled "Reservation of Rights," both parties reserved the right to sue each other for any breach of the licensing agreement. The fact that both parties sought to preserve their rights under the licensing agreement arguably indicates that the settlement was intended only to resolve the dispute as to what know-how Verson was required to turn over and who was to pay for the copying costs. VIL's reading of the reservation-of-rights clause, that the parties intended only to prevent public disclosure of the know-how, is strained, given that the parties could have easily drafted the clause to reflect that intent but did not. Therefore, we hold that the 1990 settlement agreement was not an unambiguous waiver of Verson's right to challenge [*362] VIL's assignment of the know-how.⁵

[9] B. Is VIL a Co-Owner of the Know-How Or Only a Licensee?**

The premise behind Verson's complaint is that VIL is a nonexclusive licensee of the know-how. In earlier orders we expressed some doubt regarding this proposition and left open the question whether VIL is a co-owner of the know-how. See [Verson Corp. v. Verson International Group, 1994 U.S. Dist. LEXIS 9736](#), No. 93 C 2996, WL 376278 at *3 (N.D.Ill. July 13, 1994). VIL seizes upon this language and presses the argument here.

The starting place for determining whether VIL is a co-owner of the know-how is the 1985 license agreement. The agreement states that "upon expiration of the term of this Agreement, subject to [confidentiality provisions], Licensee shall have the non-exclusive perpetual royalty free right to continue to exercise, use or practice the rights granted Licensee under Section 2.01 without limitation as to Territory" As we indicated above, the use of know-how can be readily distinguished from the ownership of the know-how. Thus, one meaning of the license agreement grants VIL only the right to use the know-how to compete with Verson worldwide. The language of this provision, or the other provisions in the agreement, [**10] do not necessarily indicate the parties intended for VIL to become co-owner of the know-how at the termination of the five-year period.

⁴ Specifically, the settlement agreement stated:

Allied agrees not to seek the return or to restrict the use of any know-how which it or its predecessor has transmitted to VIL, or which may be transmitted to VIL under this Settlement (collectively, the "Transmitted Know-How"). Allied hereby waives all claims and defenses relating to VIL's entitlement to the possession or use of the Transmitted Know-How.

⁵ Although VIL at one point argued that a mutual release signed by the parties in 1991 bars the action here, it has since made clear that it has abandoned that claim and instead focuses solely on the 1990 settlement.

Despite the lack of any express provision in the license agreement granting it co-ownership of the know-how, VIL presents four arguments to support its claim: first, that the amount it paid in connection with the MBO indicates that VIL would become co-owner of the know-how; second, that it developed some of the know-how itself; third, that the clear intent of the MBO and license agreement was to make VIL and Verson head-to-head competitors after five years; and, fourth, that VIL acquired property rights to the know-how when it acquired VASP's international operations.

We find that none of these four arguments helps VIL's cause here, even if we can entertain them in support of a motion to dismiss. First, the amount VIL paid in connection with the MBO does not by itself demonstrate anything about the parties' intent. The license agreement was just one part of a series of agreements executed in connection with the MBO. It is impossible to say as a matter of law that the consideration paid by VIL was to acquire ownership rights to the know-how after [\[**11\]](#) five years. VIL may be able to present evidence that the true value of what it received in the MBO could not come near the \$ 8 million it actually paid if ownership of the know-how were not included, and in such a situation we could find the consideration paid to be probative of the parties' intent. However, we cannot make that determination on a motion to dismiss.

Second, Verson disputes VIL's claim that it developed part of the know-how at issue here. It is clear that whether or not VIL did develop this know-how is a disputed question of fact that cannot be resolved on a motion to dismiss. Such a determination must await further development by the parties.

Third, we have repeatedly recognized that the goal of the MBO in general, and the license agreement in particular, was to place VIL and Verson as head-to-head competitors at the end of five years, as VIL argues. That proposition does not, however, establish VIL's ownership of the know-how. At the end of the agreement, VIL had every right to compete with Verson in any market in the world. In that respect the two firms were head-to-head competitors. Limiting VIL to the right to use, instead of assign, the know-how does not appear [\[**12\]](#) to frustrate this goal. All VIL is prevented from doing is assigning or selling the know-how to a competitor. This limitation has no effect on VIL's ability to compete with Verson in the manufacture, sale, or repair of presses.

Finally, it is not clear at this point what rights VIL acquired in the MBO when it took over VASP's international operations. Until now we have never been faced with determining [\[*363\]](#) exactly what rights VIL acquired in the MBO. Verson has submitted a number of the agreements involving VASP and its many subsidiaries, that purportedly demonstrate that VIL acquired only licensing rights, not ownership rights, to the know-how. VIL has not contradicted Verson's recitation of the corporate history. Accepting Verson's allegation that no ownership rights were transferred in the MBO -- an allegation supported by the submitted documents -- we hold that Verson has properly alleged that VIL was a mere licensee, not a co-owner, of the know-how.

C. Implied Right of Assignability

VIL does not dispute that there is no provision in the license agreement granting it an explicit post-termination right to assign the know-how. Yet it argues that despite this lack of [\[**13\]](#) express authority, authority to assign its rights under the agreement must be inferred from the circumstances and the parties' conduct.

Under well-established law [HN2](#) the holder of a nonexclusive patent license may not assign its license unless the right to assign is expressly provided for in the license agreement. See *Stenograph Corp. v. Fulkerson*, 972 F.2d 726, 729 n.2 (7th Cir. 1992) ("Patent licenses are not assignable in the absence of express language."); *Unarco Industries Inc. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir. 1972), cert. denied, 410 U.S. 929, 35 L. Ed. 2d 590, 93 S. Ct. 1365 (1973); *Gilson v. Republic of Ireland*, 252 U.S. App. D.C. 99, 787 F.2d 655, 658 (D.C. Cir. 1986); *In re CFLC, Inc.*, 174 Bankr. 119, 122 (N.D.Cal. 1994). Under this longstanding federal case law, patent licenses are treated as personal to the licenseholder and therefore are presumed to be not assignable. *Id.*

VIL argues that his presumption against assignability may be overcome by the circumstances and the conduct of the parties. As support, VIL cites *Farmland Irrigation Co. v. Dopplmaier*, 48 Cal. 2d 208, 308 P.2d 732 (Cal. 1957), and *Bowers v. Lake Superior Contracting* [\[**14\]](#) & *Dredging Co.*, 149 F. 983 (8th Cir. 1906). We seriously doubt whether these decisions survive the later developed line of cases refusing to imply a right of assignability of patent

licenses.⁶ Even if some vestige of *Farmland* and *Bowers* remains, we cannot overlook decades of precedent to the contrary. See [*Unarco Industries Inc.*, 465 F.2d at 1306](#). Therefore, we feel bound to require compelling evidence of the parties' intent before implying a right to assign. Such evidence is not presented here, nor may it be considered to resolve a motion to dismiss.

VIL points to two aspects of the parties' conduct to support its claim that a right of assignment should be inferred. First, it argues that the fact that the license [**15] agreement gave it broad authority to sublicense its rights without Verson's approval establishes conclusively that the parties did not believe that the patented rights were highly personable and therefore could be assigned. We disagree. VIL seeks to bootstrap its negotiated right to sublicense into a right to assign. Were VIL correct, every license granting a right to sublicense would also implicitly contain a right of assignment. That is clearly not the case. On the contrary, under the axiom of *expressio unius*, the presence of the provision on sublicensing indicates that the parties did not intend to allow assignments. Further, VIL cannot seriously maintain that Verson did not consider the know-how to be highly personable. The license agreement contained a strict confidentiality clause and every indication from the parties' conduct since the MBO is that the know-how is vital to successful competition in the industry. Therefore, it is clear that VIL's right to sublicense does not establish as a matter of law an intent to also allow it to assign its rights.

VIL also claims that Article 16 of the licensing agreement, which required VIL to first obtain Verson's approval before assigning [**16] its rights to a competitor, demonstrates that when the parties sought to restrict the right to assign they did so expressly, and the fact that there is no provision limiting VIL's right to assign post-termination establishes [**17] that no such limitations were intended by the parties. In addition, VIL argues that because our order of December 30, 1993, ruled that Article 16 did not survive the termination of the licensing agreement, preventing VIL from assigning its rights post-termination would mean that it had greater leeway to assign before the termination than after, which it asserts is an absurd result.

We are not persuaded that the presence of Article 16 overcomes [**HN3**](#)¹ the strong presumption against implying a right to assign licenses for intellectual property. Article 16 and a post-termination restriction on assignment are not, as VIL suggests, in hopeless conflict. It is reasonable for Verson to have allowed VIL greater leeway to assign its rights during the five-year period of the licensing agreement because VIL was prohibited by the agreement from competing with Verson in North America. After the termination of the agreement, however, VIL could compete directly with Verson in North America, which may have prompted Verson to restrict VIL's right to assign. In any event, we need not rule that this is what the parties intended. Rather, we conclude that the license agreement does not conclusively refute Verson's claim that the know-how cannot be assigned.

D. Restraint of Trade

VIL also argues that interpreting the agreement to require a perpetual ban on VIL's ability to assign its rights is an unreasonable restraint of trade that violates Illinois common law and Illinois and federal antitrust statutes. In doing so, it apparently seeks to advance the best argument it can in support of a concern expressed by this court and, probably, upon reflection, better left unexpressed.

VIL claims that since we have previously ruled that some of the agreement's territorial restrictions violated the antitrust laws, then, *a fortiori*, a perpetual ban on assignments does so as well.

VIL is incorrect in attempting to compare the anti-assignment issue here with the covenants not to compete that were at issue in the first lawsuit between these parties. The contract provision previously at issue divided up the worldwide market for Verson presses and prevented the [**18] contracting parties from entering various markets. Thus, by their very nature, the covenants not to compete restrained competition. We held that certain of the restrictions were overly broad and upheld the covenants only in part. Unlike the covenants not to compete, the limitation on assignments does not prevent VIL from competing in the market for Verson presses.

⁶The *Farmland* decision explicitly relied on state law to answer the question presented. In that the later federal cases hold that the assignability of patent licenses is a question of federal law, see [*Unarco*, 465 F.2d at 1306](#), VIL's reliance on *Farmland* may be misplaced.

VIL argues, however, that by preventing the assignment of the know-how, Verson is preventing other companies from entering the market. VIL's argument proves too much. Under VIL's view, any company possessing trade secrets or know-how vital to entry into an industry must turn over that know-how or risk violating the antitrust laws. That simply cannot be true, for [HN4](#)⁷ the very nature of a patent is a government-authorized monopoly in a certain market, and much of the law of intellectual property is designed to protect a company's innovations from competitors. VIL has failed to cite a single case finding an antitrust violation because of a patent license's restriction on the licensee's right to assign.⁷ In fact, the case law indicates that [HN5](#)⁸ restrictions in patent licenses are not per se violations of the antitrust laws. See [\[*19\] Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1577 \(Fed. Cir. 1990\); USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 513 \(7th Cir. 1982\)](#), cert. denied, 462 U.S. 1107, 103 S. Ct. 2455, 77 L. Ed. 2d 1334 (1983) ("Patent licensing agreements between competitors are sometimes struck down under antitrust laws, of course, but only upon proof of anti-competitive effect beyond that implicit in the grant of the patent"); [Moraine Products v. ICI America, Inc., 538 F.2d 134, 145](#) (7th Cir.), cert. denied, 429 U.S. 941, 50 L. Ed. 2d 310, 97 S. Ct. 357 (1976). Verson is simply not required by law to turn over the know-how, now or in the future, and it is not an unreasonable restraint of trade for it to prevent the know-how [\[*365\]](#) from falling into a competitor's hands through some other source.

E. [\[**20\] Assignment or Sublicense](#)

VIL's final argument is that its agreement with Enprotech is not an assignment at all, but rather is a sublicense, and since the license agreement granted VIL the authority to sublicense its rights, Verson's suit must fail.

Verson argues that intellectual property rights can be severed and assigned separately. That is, a patentee may assign the right to use a patent for sale of a product but retain the right to use the patent for other purposes. Support for this proposition can be found in tax cases, see [Cory v. Commissioner, 230 F.2d 941, 944](#) (2d Cir.), cert. denied, 352 U.S. 828, 1 L. Ed. 2d 50, 77 S. Ct. 43 (1956), and in some of the cases dealing with who has standing to sue for patent infringement. See [Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A., 944 F.2d 870, 875](#) (Fed. Cir. 1991) (recognizing patent rights as constituting a bundle of rights). Under this view the answer depends on whether the patentee has transferred all its rights in a particular market (an assignment) or has transferred only some of those rights, retaining others for itself (a license). During the course of this litigation VIL has retreated from its [\[*21\]](#) earlier opposition to this principle and now seems content to argue that, even if that were the law, the Enprotech agreement still cannot be considered an assignment.⁸

Verson claims that the Enprotech agreement is an assignment rather than a sublicense because VIL transferred all the rights associated with the after-market for Verson presses. Specifically, the Enprotech agreement states:

[VIL] (i) grants and assigns to [Enprotech] (1) the exclusive (as between Licensor and Licensee), royalty free [\[**22\]](#) right and license to utilize the Proprietary Rights in the Territory for the manufacture and sale of Verson Parts and for the rebuilding and modernization of Verson Presses and subject to the reserved rights of [VIL], the maintenance and repair of Verson Presses, and (2) the right and license to use the Trademark in connection with the manufacture and sale of Verson Parts and, subject to the review and consent of [VIL], which consent will not be unreasonably withheld, the maintenance, repair, rebuilding and modernization of Verson Presses and (ii) sells to Enprotech the Technical Information and Other Information subject to the terms and conditions of this Agreement.

The "territory" is defined to include certain countries in North America and Central America. "Proprietary rights" and "technical information" basically entail the Verson technology that VIL received under the licensing agreement.⁹

⁷ Indeed, were VIL correct, the long-established federal rule against the implied right to assign patent licenses, see [Unarco Industries Inc., 465 F.2d at 1306](#), would open every patent holder to an antitrust lawsuit.

⁸ Although the Supreme Court in [Waterman v. Mackenzie, 138 U.S. 252, 34 L. Ed. 923, 11 S. Ct. 334 \(1981\)](#) created a three-part test to determine whether a patentee has assigned or licensed his right for the purposes of determining who may sue for patent infringement, neither party argues that the *Waterman* test should be employed here. In that the only issue addressed by *Waterman* is whether the plaintiff had standing, we agree that rigid application of that case here would be inappropriate.

[**23] VIL counters that it has retained sufficient rights to the after-market to render the Enprotech agreement a sublicense rather than an assignment. It identifies five such rights: (1) the right to make replacement parts in connection with the sale of new presses; (2) the exclusive right to provide service for the enhancement retrofit of Verson presses; (3) the exclusive right to provide service work for the maintenance and repair of Verson presses; (4) a fifty-year period for the agreement; and (5) a parts supply agreement requiring Enprotech to purchase spare parts from a corporation affiliated with VIL.

We can quickly dispense with VIL's argument that rights two and three render the agreement a sublicense. Those rights do not limit the agreement's grant to Enprotech of an exclusive right to manufacture replacement [*366] parts; the issue of repair service does not limit Enprotech's ability to use the know-how in the replacement parts market.

Similarly, the fifty-year period does not, as a matter of law, render the agreement a sublicense. Verson has alleged that the fifty-year period far exceeds the useful life of any of the knowhow, given the normal rate of change in technology in the [**24] industry, and thus the fifty-year period does not serve as any practical restraint on Enprotech's rights under the agreement. Since VIL has not demonstrated that this well-pleaded allegation is incorrect as a matter of law, we must accept it as being true for the purposes of this motion to dismiss.

Nor does the parts supply agreement, as a matter of law, render the Enprotech agreement a sublicense. Although Enprotech is required to purchase certain products from a VIL-affiliated corporation, the agreement states that Enprotech's failure to abide by the parts supply agreement does not affect its exclusive rights granted elsewhere in the agreement. Therefore, the parts supply agreement need not be read to limit Enprotech's right to the use the know-how in the parts market.

That leaves the Enprotech agreement's provision granting VIL the right to manufacture replacement parts in connection with the sale of new presses. It is too early at this juncture to determine as a matter of law that VIL's retention of this right limits Enprotech's interest to a mere sublicense rather than an assignment. VIL may be able to demonstrate that its retained right to provide replacement parts as part [**25] of contracts for the sale of new presses represents a sufficiently large portion of the replacement part market to make the Enprotech agreement a sublicense, but we are not in a position to make that determination here.¹⁰ Since VIL has failed to demonstrate that the Enprotech agreement is a license as a matter of law, we must deny its motion to dismiss. VIL is free to renew this argument at a later stage if it can present extrinsic evidence clarifying the ambiguity in the Enprotech agreement.

[**26] CONCLUSION

VIL may well prevail on one or more of its arguments when the record is fully developed. Given, however, the limitations of a motion to dismiss, it cannot now prevail. For the reasons outlined above, VIL's motion to dismiss the amended complaint is denied.

JAMES B. MORAN,

⁹ Although the parties are delineated as "Licensor" and "Licensee," and the agreement is denominated a "License," these HN6[
↑] labels are not dispositive of our inquiry here. *Waterman*, 138 U.S. at 255. Rather, the focus should be on the substantive rights conferred by the agreement. *Id.*

¹⁰ Deciding this issue as a matter of law is even less appropriate when considering the language used in the Enprotech agreement. In the agreement VIL "assigns" to Enprotech its intellectual property and "sells" to it the know-how. This language is much more consistent with an assignment than with a transfer of a mere license. Indeed, the Federal Circuit has held that HN7[
↑] "the term 'assignment' has a particular meaning in patent law implying formal transfer of title." *Vaupel Textilmaschinen KG*, 944 F.2d at 875. Moreover, in the agreement, VIL warrants that it has good title to the know-how and is free to assign it. Again, this provision is more consistent with an assignment than a license.

899 F. Supp. 358, *366 1995 U.S. Dist. LEXIS 10106, **26

Senior Judge, U.S. District Court

July 17, 1995.

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Leak v. Grant Medical Ctr.

United States District Court for the Southern District of Ohio, Eastern Division

July 18, 1995, FILED

Case No. C-2-94-117

Reporter

893 F. Supp. 757 *; 1995 U.S. Dist. LEXIS 10070 **; 1995-2 Trade Cas. (CCH) P71,129

W. David Leak, et al., Plaintiffs, -V- Grant Medical Center, et al., Defendants.

Core Terms

antitrust, summary judgment, anti trust law, privileges, pain, staff privileges, plaintiffs', Anesthesia, antitrust claim, exclusive contract, medical staff, anesthesiologists, defendants', cases, nonmoving party, Sherman Act, summary judgment motion, lack standing, material fact, medicine, patients, peer

LexisNexis® Headnotes

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

HN1 [down arrow] **Summary Judgment, Entitlement as Matter of Law**

The procedure for granting summary judgment is found in [Fed. R. Civ. P. 56\(c\)](#).

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

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

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

HN2 [down arrow] **Discovery, Methods of Discovery**

See [Fed. R. Civ. P. 56\(c\)](#).

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

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

HN3 **Summary Judgment, Evidentiary Considerations**

With respect to a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Summary judgment will not lie if the dispute about a material fact is genuine; that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Summary judgment is appropriate, however, if the opposing party 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.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

HN4 **Summary Judgment, Entitlement as Matter of Law**

Complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

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

HN5 **Summary Judgment, Evidentiary Considerations**

In responding to a summary judgment motion, the nonmoving party cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. It is not sufficient for the nonmoving party to merely show that there is some metaphysical doubt as to the material facts. Moreover, a trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

Antitrust & Trade Law > Sherman Act > General Overview

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HN6 [blue download icon] Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1.](#)

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7 [blue download icon] Regulated Practices, Monopolies & Monopolization

See [15 U.S.C.S. § 2.](#)

Antitrust & Trade Law > Regulated Industries > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Public Health & Welfare Law > Healthcare > General Overview

HN8 [blue download icon] Antitrust & Trade Law, Regulated Industries

The health care profession is not immune from scrutiny under federal antitrust laws. Nor can it fairly be said that a health care professional cannot under any circumstances state a cause of action under the Sherman Act against a hospital review committee for denial of staff privileges.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN9 [blue download icon] Clayton Act, Remedies

The civil remedies provision of federal antitrust laws is set forth in § 4 of the Clayton Act, [15 U.S.C.S. § 15.](#)

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

Antitrust & Trade Law > Clayton Act > General Overview

HN10 [blue download icon] Private Actions, Remedies

See [15 U.S.C.S. § 15.](#)

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN11[**Private Actions, Remedies**

Despite the broad language "any person" in [15 U.S.C.S. § 15](#), courts have not allowed every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. 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 acts made possible by the violation. It is not enough, however, that plaintiffs can show that defendants' conduct caused them injury. Plaintiffs also must show that their injuries were sufficiently direct and that they would be efficient enforcers of the antitrust laws.

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

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

HN12[**Private Actions, Standing**

It is virtually impossible to announce a black letter rule that will dictate the result in every case to determine whether a plaintiff has antitrust standing. Nevertheless, the following factors have been identified for examining whether a plaintiff has antitrust standing: 1. the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; 2. the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; 3. the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; 4. the potential for duplicative recovery or complex apportionment of damages; and 5. the existence of more direct victims of the alleged antitrust violation. Hence, to have antitrust standing, a plaintiff must show: (1) antitrust injury, and (2) under the factors set forth above, that the directness of the injury was such that he would be an efficient enforcer of the antitrust laws.

Counsel: [**1] For W DAVID LEAK, MD, PAIN CONTROL CONSULTANTS INC, plaintiffs: Donald Joseph McTigue, McTigue & Brooks - 2, Columbus, OH.

For GRANT MEDICAL CENTER, BHAGWAN SATIANI, MD, PAUL ADDESSI, MD, defendants: John Hamrick Burtch, Baker & Hostetler - 2, Columbus, OH.

For GRANT ANESTHESIA ASSOCIATES INC, JAMES HIGHLY, DO, SAMBIT K BARUA, MD, M FARID EDWARDS, MD, MICHAEL MCKAY, MD, CHANG KIM, MD, LEE K ROH, MD, KAREN LOGAN, MD, JON T PRESTON, MD, BRADLEY GETZ, MD, defendants: Douglas Eric Graff, Graff & Associates - 2, Columbus, OH.

Judges: GEORGE C. SMITH, JUDGE, UNITED STATES DISTRICT COURT

Opinion by: GEORGE C. SMITH

Opinion

Plaintiffs bring this action under federal antitrust laws ¹ and state law ² asserting, *inter alia*, that defendants improperly denied plaintiff David Leak, M.D., medical staff privileges at Grant Medical Center. This matter is before the Court on defendants' motions for summary judgment (Docs. 19 and 20). Defendants argue that they are entitled to summary judgment in their favor because plaintiffs have not suffered antitrust injury and therefore lack standing to bring federal antitrust claims. For the following reasons the Court grants defendants' **[**2]** summary judgment motions.

I.

Plaintiff Dr. Leak is a licensed physician who specializes in pain medicine. Plaintiff Pain Control Consultants, Inc. ("PCC") is an Ohio corporation in the business of operating a comprehensive pain treatment center. Dr. Leak is the Director and sole shareholder of PCC.

Defendant Grant Medical Center ("Grant") is an Ohio corporation in the business of operating a hospital in Columbus, Ohio. Defendant Grant Anesthesia Associates, Inc. ("GAA") is an Ohio corporation engaged in the business of providing anesthesia services to Grant under an exclusive contract.

Defendants Bhagwan Satiani, M.D., M. Farid Edwards, M.D., James Highly, O.D., Sambit K. Barua, M.D., Bradley Getz, M.D., Michael McKay, M.D., Chang **[**3]** Kim, M.D., Lee K. Roh, M.D., Karen Logan, M.D., and Jon T. Preston, M.D. are all members of the Grant medical staff and GAA. Defendant Paul Addessi, D.O. was a member of the Grant medical staff.

Since 1988 Dr. Leak periodically has sought and obtained medical staff privileges at Grant on a case-by-case basis. On July 1, 1991, Dr. Leak applied for medical staff privileges at Grant. Dr. Leak specified Anesthesia and Surgery as the departments for which he sought privileges because the application had no category for pain medicine.

In April 1992 the Grant Anesthesia Department recommended granting Dr. Leak provisional privileges on the condition that Dr. Leak would serve as an on-call anesthesiologist to provide anesthesia services to patients. The Grant Anesthesia Department Bylaws require anesthesiologists to provide on-call services as a condition to obtaining **[*760]** privileges within the department. Dr. Leak did not submit to Grant an on-call schedule, although he avers that he made several attempts to contact the Chairperson of the Anesthesia Department Credentials Committee to discuss the schedule.

On February 26, 1993, Grant entered into an exclusive contract with GAA for the provision **[**4]** of anesthesia services to the hospital's patients. The contract provided that comprehensive pain management ³ was within the range of anesthesia services GAA would offer.

Dr. Leak sent a letter to the president of Grant on March 18, 1993, discussing Dr. Leak's qualifications and asking to meet with the president to discuss his application for privileges. On March 25, 1995, defendant Dr. Edwards sent a letter to Dr. Leak informing him that Grant was unable to process his application for privileges because of the exclusive contract with GAA.

In August 1993 Grant advised Dr. Leak that GAA was seeking a Director of Pain Management. It is unclear whether Dr. Leak followed up on this information.

¹ Plaintiffs assert claims under [Sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1 and 2](#).

² Plaintiffs assert state law claims of breach of contract, tortious interference with contractual relations, racial discrimination, and violation of Ohio's Valentine Act.

³ Dr. Leak draws a sharp distinction between pain medicine and pain management. He avers that pain medicine, in contrast to pain management, seeks long term rather than temporary solutions to pain. Dr. Leak affidavit para. 25.

It is undisputed that Dr. Leak has medical staff privileges at two other Columbus-area hospitals: [**5] Park Medical Center and Columbus Community Hospital.

II.

HN1[] The procedure for granting summary judgment is found in [Fed. R. Civ. P. 56\(c\)](#), which provides:

HN2[] The judgment sought 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 judgment as a matter of law.

HN3[] The evidence must be viewed in the light most favorable to the nonmoving party. [Adickes v. Kress & Co., 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 \(1970\)](#). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). Summary judgment is appropriate, however, if the opposing party 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, 1**61 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#); see also [Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. [Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 \(6th Cir. 1989\)](#). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, **HN4**[] complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. [Id. at 1479](#).

In addition, **HN5**[] in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting [Liberty Lobby, 477 U.S. at 257](#)). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient [**7] for the nonmoving party to merely "show that there is some metaphysical doubt as to the material facts." *Id.* (quoting [Matsushita, 475 U.S. at 586](#)). Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, [*761] the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III.

Plaintiffs assert eight counts of federal antitrust violation. Counts one through five set forth alleged violations of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#).⁴ Specifically, Count One asserts that defendants engaged in a group boycott by denying Dr. Leak staff privileges; Count Two maintains that Grant is an essential facility and failure to allow Dr. Leak to share the facility therefore constitutes a *per se* violation of [§ 1](#); Count Three maintains that the exclusive contract with GAA is an unlawful tying arrangement; Count Four alleges that defendants engaged in unfair

⁴ [Section 1](#) of the Sherman Act states in pertinent part:

HN6[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

acts with the intent of eliminating competition from Dr. Leak; and Count Five asserts that **[**8]** defendants' actions unreasonably restrained trade under the rule of reason theory.

Counts Six through Eight allege violations of Section 2 of the Sherman Act, 15 U.S.C. § 2.⁵ These Counts claim that defendants have monopolized, attempted to monopolize, and conspired to monopolize, the market for in-hospital diagnosis and treatment of acute and chronic pain within the relevant geographic market.

[9]** Defendants argue that they are entitled to summary judgment in their favor on all of plaintiffs' federal claims because plaintiffs have not suffered antitrust injury and therefore lack standing.

Plaintiffs also assert state law claims. Defendants contend that because plaintiffs' federal claims must be dismissed, the Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims. 28 U.S.C. § 1337(c)(3); United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966).

The Court will proceed to address whether plaintiff has suffered antitrust injury.

IV.

There is no lack of case law discussing antitrust claims by health care professionals against those who have denied them medical staff privileges at hospitals. Numerous legal scholars have compiled and analyzed the legion of decisions on this subject. See, e.g., *ABA Antitrust Section, Annual Review of 1993 Antitrust Law Developments* at 287-95 (1994) (concise overview); Michael G. Macdonald, Kathryn C. Meyer & Beth Essig, *Health Care Law: A Practical Guide* § 9.03[1] (1994) (concise overview); William S. Brewbaker, III, *Antitrust Conspiracy Doctrine and the [**10] Hospital Enterprise*, 74 B.U. L. Rev. 67 (1994) (advocating antitrust scrutiny of medical review board decisions and adoption of mechanisms to ensure that governing bodies' decisions are independent); Josephine M. Hammack, *The Antitrust Laws and the Medical Peer Review Process*, 9 J. Contemp. Health L. & Pol'y 419 (1993) (discussing recent cases and ways hospitals can preserve peer review but reduce threat of antitrust litigation); Tim A. Thomas, Annotation, *Denial by Hospital of Staff Privileges or Referrals to Physician or Other Health Care Practitioner as Violation of Sherman Act*, 89 A.L.R. Fed. 419 (1994) (topical digest of cases); see also BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n, 36 F.3d 664, 667-68 (7th Cir. 1994) (exhaustive list of decisions with comment that in a vast majority of cases the plaintiff physicians have ultimately been denied relief).

The above authorities offer helpful background on the many theories of liability and **[*762]** defenses in this area of the law. The issue before the Court, however, is a narrow one: whether plaintiffs have standing to assert claims under Sections 1 and 2 of the Sherman Act.

We begin with the general proposition **[**11]** that HN8[↑] the health care profession is not immune from scrutiny under federal antitrust laws. See FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 465-66, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986) (upholding FTC's ruling that dentists violated antitrust laws by agreeing to withhold x-rays from insurers); Jefferson Parish Hosp. Dist No. 2 v. Hyde, 466 U.S. 2, 29-31, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) (upholding exclusive contract between anesthesiologists and hospital); Arizona v. Maricopa Medical Soc'y, 457 U.S. 332, 348-49, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982) (finding physicians' price-fixing agreement violative of antitrust laws). Nor can it fairly be said that a health care professional cannot under any circumstances state a cause of

⁵ Section 2 of the Sherman Act provides in pertinent part:

HN7[↑] 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.

action under the Sherman Act against a hospital review committee for denial of staff privileges. [Summit Health Ltd. v. Pinhas](#), [500 U.S. 322, 332, 114 L. Ed. 2d 366, 111 S. Ct. 1842 \(1991\)](#) (holding that physician's claim against peer review committee satisfied the interstate commerce jurisdictional requirements of the Sherman Act); cf. Health Care Quality Improvement Act of 1986, [42 U.S.C. §§ 11101-11152](#) (providing limited immunity [**12] to medical peer review process).

HN9[]

The civil remedies provision of federal antitrust laws is set forth in Section 4 of the Clayton Act, [15 U.S.C. § 15](#), which states in part as follows:

HN10[]

Any person who shall be injured in his business or his property by reason of anything forbidden in the antitrust laws may sue . . . and recover threefold the damages by him sustained . . .

HN11[]

Despite the broad language "any person," courts have not allowed "every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." [Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters](#), [459 U.S. 519, 535, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#) (quoting [Blue Shield of Virginia v. McCready](#), [457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 \(1982\)](#)).

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 acts made possible by the violation.

[Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.](#), [I**13\] 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#) (emphasis in original). It is not enough, however, that plaintiffs can show that defendants' conduct caused them injury. [Associated Gen. Contractors](#), [459 U.S. at 535 n.31](#). Plaintiffs also must show that their injuries were sufficiently direct and that they would be efficient enforcers of the antitrust laws. See *id.*

HN12[]

"It [is] virtually impossible to announce a black letter rule that will dictate the result in every case" to determine this second requirement. [Id. at 536](#). Nevertheless, the following factors have been identified for examining whether a plaintiff has antitrust standing:

1. the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
2. the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
3. the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;
4. the potential for duplicative recovery or complex apportionment of damages; and
5. the existence of more direct victims of the [**14] alleged antitrust violation.

[Southaven Land Co. v. Malone & Hyde, Inc.](#), [715 F.2d 1079, 1085 \(6th Cir. 1983\)](#) (citing [Associated Contractors](#), [459 U.S. at 537-44](#)). Hence, to have antitrust standing, a plaintiff must show: (1) antitrust injury, and (2) under the factors set [**763**] forth above, that the directness of the injury was such that he would be an efficient enforcer of the antitrust laws.

Defendants cite several cases in which courts have held that health care professionals lacked standing to assert antitrust claims. See [Balaklaw v. Lovell](#), [14 F.3d 793 \(2nd Cir. 1994\)](#) (affirming district court's summary judgment, holding that anesthesiologist lacked antitrust standing to challenge exclusive contract awarded to competing group of anesthesiologists); [Oksanen v. Page Memorial Hosp.](#), [945 F.2d 696 \(4th Cir. 1991\)](#) (affirming district court's summary judgment, holding that physician whose privileges were revoked did not establish antitrust injury); [Levine v. Central Fla. Med. Affiliates, Inc.](#), [864 F. Supp. 1175 \(M.D. Fla. 1994\)](#) (granting summary judgment, holding that internist lacked standing to assert antitrust claims challenging denial of staff privileges); [****15**] [Rooney v. Med. Ctr. Hosp.](#), [1994 U.S. Dist. LEXIS 7420](#) (S.D. Ohio Mar. 30, 1994) (Beckwith, J.) (granting summary judgment, holding

that peer review was protected by Health Care Quality Improvement Act and that physician in any event lacked antitrust standing to challenge revocation of staff privileges).

Defendants argue that under the above authorities, plaintiffs cannot, as a matter of law, establish either antitrust injury or that they would be the most efficient enforcers of the antitrust laws. In particular, defendants point out that Dr. Leak has staff privileges at two other Columbus area hospitals, and that Dr. Leak has therefore not been hindered from competing in the market.

Plaintiffs acknowledge that Dr. Leak has staff privileges at other hospitals. They contend that they have nonetheless suffered antitrust injury. Plaintiffs argue, *inter alia*, that they have been foreclosed from offering services to that segment of patients whose managed care insurance plans limit them to using Grant.

The Court does not find, and defendants do not argue, that the above authorities establish a *per se* rule that a health care professional could never have standing to assert antitrust [**16] claims arising from the denial of hospital staff privileges. In the circumstances presented in this case, however, the Court finds that plaintiffs have not suffered the kind of injury that antitrust laws were designed to prevent. Dr. Leak has staff privileges at two other Columbus area hospitals. Plaintiffs are therefore fully able to compete with others offering pain-related medical services in the Columbus area, including GAA and its members.

That some patients' managed care insurance plans may effectively limit them to services offered at Grant does not alter this conclusion. If plaintiffs' practice of pain medicine is, as Dr. Leak avers, truly more cost effective than traditional pain management used by anesthesiologists, then both the hospitals at which plaintiffs have privileges and plaintiffs have a competitive advantage over the defendant anesthesiologists. See Dr. Leak affidavit para. 24 & exhibit D. If pain medicine is more cost-effective than traditional pain management, then in an open and competitive marketplace managed care insurance plans should eventually be more inclined to designate those hospitals at which pain medicine is practiced. See *Capital Imaging Assoc.*, [**17] [P.C. v. Mohawk Valley Medical Assoc., Inc., 725 F. Supp. 669, 673 \(S.D.N.Y. 1989\)](#) (recognizing that the selective nature of managed care insurance plans is pro-competitive and reduces health care costs).⁶ In these circumstances, the Court concludes that plaintiffs have failed to allege, or adduce evidence of,⁷ [**18] the kind of injury that antitrust [*764] laws were designed to protect.⁸

The finding that plaintiffs have not suffered antitrust injury is dispositive. With respect to the second requirement for standing, however, it is worth noting that there are "at least two more easily imagined efficient enforcers . . . patients and the government." [Rooney, 1994 U.S. Dist. LEXIS 7420](#) at *17 (quoting [Robles v. Humana Hosp. of Cartersville, 785 F. Supp. 989, 999 \(N.D. Ga. 1992\)](#)).

For the above reasons the Court holds that plaintiffs lack standing to assert antitrust claims arising from defendants' failure to grant him staff privileges and their use of an exclusive contract. Defendants are therefore entitled to summary judgment in their favor on plaintiffs' federal antitrust claims.

⁶ The court of appeals affirmed the district court's later decision granting summary judgment in favor of the defendants. [791 F. Supp. 956 \(S.D.N.Y. 1992\)](#), aff'd, [996 F.2d 537](#) (2d Cir.), cert. denied, [114 S. Ct. 388, 126 L. Ed. 2d 337 \(1993\)](#).

⁷ The Court reaches the same conclusion whether it examines the complaint, accepting as true all well pleaded facts, or whether it construes plaintiffs' evidence in the most favorable light. There appears to be some tension concerning the proper procedural posture for the antitrust standing inquiry. For example, in *Rooney*, the learned judge stated that standing is determined from the complaint, but went on to conclude that plaintiffs had not adduced sufficient evidence on the standing issue to withstand summary judgment. [1994 U.S. Dist. LEXIS 7420](#) at *16-18; see also [BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n, 36 F.3d at 669](#) (dissenting opinion by Cudahay, J., criticizing the majority for upholding dismissal on the pleadings alone). The Court finds that adequate discovery took place in the instant case to determine standing. See [Fed. R. Civ. P. 56\(f\)](#).

⁸ The Court agrees with defendants that plaintiffs lack standing to seek treble damages as well as injunctive relief.

V.

Having determined that defendants are entitled to summary judgment on plaintiffs' federal claims, the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claims. [28 U.S.C. § 1337\(c\)\(3\); United Mine Workers v. Gibbs, 383 U.S. 715, \[**19\] 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\).](#)

VI.

Based on the above, the Court **GRANTS** defendants' summary judgment motions (Docs 19 and 20).

The Clerk shall enter a final judgment in favor of defendants, and against plaintiffs, dismissing plaintiffs' federal antitrust claims with prejudice and dismissing plaintiffs' state law claims without prejudice.

The Clerk shall remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED.

GEORGE C. SMITH, JUDGE

UNITED STATES DISTRICT COURT

End of Document



Israel Travel Advisory Serv. v. Israel Identity Tours

United States Court of Appeals for the Seventh Circuit

January 9, 1995, Argued ; July 20, 1995, Decided

Nos. 94-1451, 94-1554, 94-1815, 94-1816

Reporter

61 F.3d 1250 *; 1995 U.S. App. LEXIS 18607 **; 1995-2 Trade Cas. (CCH) P71,063

ISRAEL TRAVEL ADVISORY SERVICE, INC., CELIA SHAR, and MARILYN ZIEMKE, Plaintiffs-Appellants, Cross-Appellees, v. ISRAEL IDENTITY TOURS, INC., LARRY RITTER, and MARLENE RITTER, Defendants-Appellees, Cross-Appellants.

Subsequent History: [\[**1\]](#) Rehearing Denied August 16, 1995, Reported at: [1995 U.S. App. LEXIS 22434](#). Certiorari Denied May 28, 1996, Reported at: [1996 U.S. LEXIS 3439](#).

Prior History: Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 92 C 2379. Suzanne B. Conlon, Judge.

Disposition: AFFIRMED

Core Terms

customers, rivals, deposition, consumers, damages, district judge, travel, district court, antitrust, believes, Lanham Act, firms, tours, potential customer, summary judgment, defamation, mail, counterclaims, discovery, prices, anti trust law, bar mitzvah, common law, celebrant, documents, punitive, package, parties, costs

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

[HN1](#)[] Harmless & Invited Errors, Harmless Error Rule

Harmless errors do not vitiate verdicts.

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

[HN2](#)[] Regulated Practices, Trade Practices & Unfair Competition

Wanting harm, even bankruptcy, to come to one's business rivals is not actionable; hatred is a spur to competition, which serves consumers' interests. Entrepreneurs are privileged to compete because any effort to separate pure from impure motives would in the end undercut the power of rivalry to promote consumers' welfare.

Civil Procedure > Appeals > Standards of Review > General Overview

HN3 Appeals, Standards of Review

The question for a court of appeals is whether a reasonable juror could find the evidence sufficient under a preponderance standard.

Torts > Intentional Torts > Defamation > General Overview

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN4 Intentional Torts, Defamation

General damages are available in the law of defamation.

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

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN5 Price Fixing & Restraints of Trade, Vertical Restraints

Some antitrust offenses do not depend on proof of market power. Price fixing and market allocation, for example, are illegal per se whether or not the firms have any hope of success.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN6 Regulated Industries, Sports

Acts harmful to business rivals generally help consumers. A merger unlawful because of its tendency to increase prices aids rivals; conversely, a claim by the rival of the merged firms that the merger has intensified competition shows how the rival suffers injury, but not how consumers lose. Such a rival has actual injury but does not suffer from the effect that makes the transaction unlawful under the antitrust laws and therefore cannot invoke the antitrust laws. The antitrust injury doctrine applies with full vigor to the per se offenses. The antitrust injury doctrine rejects claims based on injury caused by defecting employees who set up rivals.

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

HN7 **Private Actions, Racketeer Influenced & Corrupt Organizations**

A producer injured by a campaign of misinformation directed at its customers suffers an injury compensable under the law of torts; it is not cut off by the proximate causation and foreseeability requirements. The Racketeer Influenced and Corrupt Organizations Act similarly allows suits when the predicate offenses influence customers and, derivatively, injure business rivals.

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

HN8 **Regulated Practices, Trade Practices & Unfair Competition**

An entrepreneur can recover under the common law of unfair competition when a rival tells fibs to potential customers, because the rule against fraud has been crafted for the benefit of both seller and customer.

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

HN9 **Private Actions, Racketeer Influenced & Corrupt Organizations**

Business rivals may not use the Racketeer Influenced and Corrupt Organizations Act to complain about injuries derivatively caused by mail frauds perpetrated against customers, because only the customers are the beneficiaries of the statutory protection.

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

HN10 **Fraud Against the Government, Mail Fraud**

Lost business opportunities are property as [18 U.S.C.S. § 1341](#) used that term before the amendment. The essential point is that the victims of the fraud are the object of solicitude; [§ 1341](#) does not establish a regimen of truth-telling without regard to details like who is losing out and why.

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

Governments > Agriculture & Food > Animal Protection

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

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

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

HN11 **Racketeer Influenced & Corrupt Organizations, Claims**

A plaintiff claiming injury by the defendant's violation of a statute must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law. Thus violation of a law requiring animals to be kept in pens on shipboard does not lead to liability if the animals are washed overboard; the function of the law was to curb disease, not to reduce the effects of storms. In federal administrative law, this principle is known as the zone of interests requirement. It carries over to criminal law. So too with civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) now that common law approaches have been adopted to decide when RICO authorizes recovery for derivative injuries. [18 U.S.C.S. § 1341](#) does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO.

Civil Procedure > Sanctions > General Overview

[**HN12**](#) [L] Civil Procedure, Sanctions

A sanction should be proportional to the wrong. Omission of an unimportant detail, like a misspelling of the witness's name, should not lead to the exclusion of vital evidence.

Evidence > ... > Procedural Matters > Objections & Offers of Proof > General Overview

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

[**HN13**](#) [L] Procedural Matters, Objections & Offers of Proof

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context. [Fed. R. Evid. 103\(a\)\(2\)](#).

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

[**HN14**](#) [L] Jury Trials, Province of Court & Jury

Drawing inferences from ambiguous events is the province of the trier of fact.

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For ISRAEL IDENTITY TOURS, INCORPORATED OF NEW YORK, a New Jersey corporation, LARRY RITTER, a New Jersey resident, Defendants - Appellants (94-1554): Ronald M. Brown, Mitchell A. Cohen, Dennis M. Sbertoli, BROWN & SHINITZKY, Chicago, IL. David A. Axelrod, Lori F. Chacos, SCHOENBERG, FISHER & NEWMAN, Chicago, IL.

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For CELIA SHAR, MARILYN ZIEMKE, Defendants - Appellees (94-1815): Donald B. Levine, Corri D. Fetman, LEVIN & GINSBURG, Chicago, IL.

Judges: Before FLAUM and EASTERBROOK, Circuit Judges, and Paine, District Judge. *

Opinion by: EASTERBROOK

Opinion

[*1252] EASTERBROOK, *Circuit Judge*. Bar mitzvah tours of Israel. That is the market defined for the antitrust claim in this case. It is an absurd market definition. For a market is defined to aid in identifying any ability to raise price by curtailing output. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1335-37 [[*1253](#)] (*7th Cir. 1986*). These litigants do not own or control the assets that produce output in a travel market: fleets of airplanes, chains of hotels, Israel and its history. Anyone can buy tickets, rent rooms, and conduct tours. If these firms were to vanish tomorrow production would be unaffected. Their principal assets--skills as marketers and guides--would survive. People rather than firms hold expertise (economists call it "human capital" for good reason), and they can change affiliation. Output often grows [*2] in the process as competition intensifies. That is not only an economic theory but also the genesis of this case. Israel Travel Advisory Service (ITAS) specializes in bar and bat mitzvah tours of Israel. Families tour historical sites, with a celebration arranged at a place of religious significance. Israel Identity Tours (IIT), founded by disaffected employees of ITAS, began vigorous competition. ITAS remains the larger firm and has increased its sales consistently--though ITAS accuses IIT of monopolization!--but begrudges IIT even a single customer. The competition, like the litigation, is marred by charges of deception and defamation. We have a spite match, and as in many such contests the parties have raised every imaginable claim and others that exceed the bounds of imagination. To make this opinion tractable, we simplify greatly.

Celia Shar and Marilyn Ziemke founded ITAS in 1970. Parents who want to arrange religious celebrations for their children in Israel as part of a package tour are a select market, and ITAS (like its rivals) is an in-home operation. Shar and Ziemke recruited experienced guides in Israel; they relied on a combination of ads and word-of-mouth to obtain clients [*3] in the United States. The best promoters are persons well known and respected in the Jewish community. Ilene Wallerstein represented ITAS in Chicago, and by all accounts she was successful in obtaining business. Eventually she had a falling-out with Shar and Ziemke. Wallerstein quit in 1990 and set up a rival in Illinois; Karen Kaplan, ITAS's sales representative in Boston, also quit. Ami Ben Geller, one of ITAS's former tour leaders in Israel, persuaded his friend Larry Ritter to set up a bar mitzvah travel service in New Jersey. Geller agreed to be the guide; Transglobal Travel, ITAS's former land facilitator in Israel, also switched allegiances. The IIT in the caption of this case is Larry Ritter's operation; Wallerstein's firm, incorporated in Illinois, used the identical name (which to reduce confusion we call IIT-Illinois). Wallerstein, Kaplan, and Ritter cooperated, and their ads implied that the two corporations are a single firm. One of the issues in the case is how close that cooperation became.

Ilene Wallerstein began to slander ITAS, telling potential customers that it was on the verge of bankruptcy--a serious charge, because travelers do not want to hand over thousands [*4] of dollars to a firm that may furnish a chose in action rather than travel. Being stranded with worthless vouchers is no one's idea of a good trip. ITAS sued IIT-Illinois and Wallerstein, who settled. But if IIT was a joint venture or conspirator with IIT-Illinois, then IIT is jointly liable for Wallerstein's words. ITAS has numerous other gripes. Ads for IIT trumpeted 33 years' experience; ITAS says that this is a lie because IIT had just commenced business, while IIT says that the number referred to Geller's long experience as a guide, although one of the ads did not name Geller. IIT implied that Joel Leibowitz was affiliated with the firm, which ITAS says he was not. ITAS also wants to hold IIT liable for disparaging comments Leibowitz made, on the theory that he had apparent if not actual authority to represent IIT. When ITAS began to offer a "free" tour of Israel to the bar or bat mitzvah celebrant, IIT responded by advertising "free" tours of

* Hon. James C. Paine, of the Southern District of Florida, sitting by designation.

its own; ITAS believes that these ads and corresponding oral statements to potential customers were false, or at least misleading, because IIT offered only "free" land arrangements, while ITAS included air fare too. (We put "free" in quotations **[**5]** because neither firm offered anything for free; money from the sale of travel arrangements to the celebrants' parents and siblings covered the costs.) Then there is a claim that Marlene Ritter, Larry's wife, told one potential customer that ITAS and IIT are "the same thing." All of this, according to ITAS, violated the common law of defamation and unfair competition, consumer protection laws in Illinois and New **[*1254]** Jersey, the Sherman Antitrust Act, the Lanham Trademark Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO). For its part, IIT filed a counterclaim seeking relief on nine theories.

The district court carved several claims and parties from the case by partial summary judgment. What was left was tried to a jury--although the judge resolved some additional claims in mid-trial under [Fed. R. Civ. P. 50](#). The jury concluded that IIT (but not Larry Ritter) had slandered ITAS. It awarded \$ 75,000 in compensatory and \$ 102,945 in punitive damages for this tort. The jury rejected every other claim presented to it, and the judge rejected all efforts to upset the verdict. [1994 U.S. Dist. LEXIS 751](#). Now we have cross-appeals. IIT believes that it should have prevailed **[**6]** on the defamation theory and counterclaims, while ITAS thinks that it is entitled to a larger recovery, and from the Ritters personally as well as from their corporation. We start with IIT's argument that it should be ITAS's judgment creditor rather than its judgment debtor.

Wallerstein made the defamatory remarks that led to this verdict. IIT could be responsible for them only if the two IITs were joint adventurers. Firms do not act by themselves; people are responsible for their deeds, so IIT could be responsible only if Larry or Marlene Ritter made common cause with Wallerstein. The district judge granted summary judgment in Marlene's favor, and the jury ruled in Larry's. Yet if neither Ritter was responsible, how can IIT, whose liability is vicarious, be responsible? How can a corporation be ordered to pay punitive damages when no natural person has committed a tort? Perhaps IIT's liability depends exclusively on Leibowitz's statements, but these would be slender support for a verdict of the size the jury returned. Perhaps the jury's verdicts are simply inconsistent. As it happens, IIT did not point out the inconsistency to the district judge, and it has not argued to us that **[**7]** the jury's absolution of Larry Ritter calls for a new trial--the right way to deal with such problems, for neither of the inconsistent verdicts has priority. [American Casualty Co. v. B. Cianciolo, Inc., 987 F.2d 1302, 1305 \(7th Cir. 1993\)](#). We do not invent arguments for the parties in civil litigation and therefore pass to the contentions IIT presses.

What IIT does argue is that it lacked an adequate opportunity to develop its defense. It wanted to take depositions of Shar and Ziemke, ITAS's principals. The district court refused to compel Shar and Ziemke to attend the depositions IIT noticed, a step that IIT believes entitles it to another trial. We don't see why. [HN1](#) Harmless errors do not vitiate verdicts, and IIT does not explain how the lack of discovery injured it. It does not say that any surprising evidence came out at trial or that depositions would have assisted in the exploration of a material issue or influenced trial strategy. At all events, the district court did not err. The discovery cutoff was March 15, 1993. Having twice extended this date, the district judge told the parties that she would not do so a third time. On March 3, 1993, IIT mailed four notices of deposition; **[**8]** ITAS received them on March 8. They called for the deposition of Shar and Ziemke in Chicago on March 11 and 12; IIT wanted to take depositions of other witnesses in New Jersey on the same dates. Before mailing these notices, IIT had received ITAS's notices of third-party depositions for upstate New York on March 11 and 12. It cannot have come as much surprise to IIT that the judge refused to compel ITAS's lead counsel to rearrange his schedule--or to be in three places at once--when IIT had waited until the end of discovery to schedule the depositions of its adversaries. ITAS had offered to make Shar and Ziemke available earlier, but IIT was not interested. The district court did not commit clear error; to the contrary, her decision was clearly correct.

Gamersmanship had greater costs for IIT. Throughout discovery IIT was less than forthcoming in producing documents ITAS sought. Three times the district judge granted ITAS's motions to compel. The judge characterized IIT's conduct as "continued testing of the bounds of permissible discovery," [1993 U.S. Dist. LEXIS 7433](#), * 2, followed by conduct beyond permissible bounds--flouting the court's orders. The court directed IIT to produce **[**9]** certain documents, which counsel said they could not find, only to be **[*1255]** embarrassed by Larry Ritter's admissions (a) that counsel had never asked him to locate the documents, and (b) that he had destroyed pertinent documents, including correspondence with Wallerstein, after ITAS had filed motions to compel. The judge also

ordered IIT to produce all financial records by February 13, 1993, on pain of default judgment. On March 3, 1993, ITAS took the deposition of IIT's accountant, who revealed that certain financial records had been prepared and given to IIT. (In fairness to IIT's current lawyers, we add that IIT changed counsel after these episodes.) When ITAS found that these had not been produced, it moved for sanctions. Instead of following through on her threat to write finis to the whole case, as she could have done, see [Fed. R. Civ. P. 37\(b\)\(2\)\(C\)](#), the judge chose a milder sanction: she dismissed IIT's counterclaims. [1993 U.S. Dist. LEXIS 4435](#). On the counterclaims IIT was the plaintiff, and a plaintiff who does not cooperate in discovery must expect to lose. [Otis v. Chicago, 29 F.3d 1159, 1168 \(7th Cir. 1994\)](#) (en banc); [Newman v. Metropolitan Pier & Exposition Authority, 962 F.2d \[**10\] 589 \(7th Cir. 1992\)](#); [Metropolitan Life Insurance Co. v. Cammon, 929 F.2d 1220 \(7th Cir. 1991\)](#).

Our review is deferential, and the judge did not abuse her discretion. The judge gave ample warning, and the sanction was proportional to the wrong. See [United States v. Golden Elevator, Inc., 27 F.3d 301 \(7th Cir. 1994\)](#); [Ball v. Chicago, 2 F.3d 752 \(7th Cir. 1993\)](#). IIT proffered excuses, but the judge did not have to accept them. Ordered to disclose "all corporate records," IIT did not turn over its checking account records. Why, nothing in the order mentioned checks, it contends. Come, come. A lawyer who makes such an argument can't expect anything else he says in the litigation to be believed.

We have dropped a discussion of the counterclaims into the midst of assessing IIT's request for a new trial because Ritter's destruction of documents influences another of IIT's contentions: that the evidence does not show that Ritter and Wallerstein were in league against ITAS. Destruction of evidence can support a contrary inference, and there was more. Larry Ritter told his friends that the only reason he was in the travel business was to destroy ITAS. [HN2](#)[¹] Wanting harm, even bankruptcy, to come [\[**11\]](#) to one's business rivals is not actionable; hatred is a spur to competition, which serves consumers' interests. Entrepreneurs are privileged to compete because any effort to separate pure from impure motives would in the end undercut the power of rivalry to promote consumers' welfare. See Oliver Wendell Holmes, *Privilege, Malice & Intent*, 8 Harv. L. Rev. 1 (1894), reprinted in 3 *Collected Works of Justice Holmes* 371, 373-74 (Sheldon M. Novick ed. 1995). Although the motive for going into business is not actionable, the mind may illuminate the means, may disambiguate borderline practices. ITAS's theory is that Ritter engaged in cooperative advertising with Wallerstein and referred potential clients to her for advice, knowing that she would impugn ITAS's solvency, to the advantage of both IIT firms. Several customers testified to both the referrals and the defamation. Perhaps they were stretching matters; or perhaps, as IIT argued, ITAS really was in financial straits, but the jury could credit these witnesses and accept the inferences ITAS pressed. Pace IIT, that we review without deference the district judge's decision refusing to grant judgment as a matter of law does not imply that [\[**12\]](#) we review the evidence *de novo*. [HN3](#)[²] The question for a court of appeals is whether a reasonable juror could find the evidence sufficient under a preponderance standard. [Mayer v. Gary Partners & Co., 29 F.3d 330 \(7th Cir. 1994\)](#). The answer is yes.

As for damages: general damages were permissible, and the award of \$ 75,000 was proper under the circumstances. A reasonable jury could conclude that the defamatory statements misled some travelers, inducing them to use IIT when, with correct information, they would have used ITAS. Quantifying the loss was exceedingly difficult; how does ITAS prove a counterfactual proposition about the behavior of persons who bought IIT's services? ITAS was able to prove that lies had been told, but the extent of their effect was bound to be problematic. That's why [HN4](#)[³] general damages are available in the law of defamation. See *Prosser & Keeton on Torts* 791 & n.80, 843 (5th ed. 1984). IIT stresses that all of the witnesses at trial eventually got their facts straight and used ITAS's services, but this says more about the way parties find witnesses in litigation than about the effects of the slander. The people most likely to report to ITAS that they had been told [\[**13\]](#) unpleasant things by IIT are the ones who doubted IIT's statements and sought more information; the ones taken in would not have come to ITAS's attention. The evidence did enough to demonstrate malice that punitive damages were available. The ratio of punitive to actual damages is not excessive, and IIT's slim net worth did not preclude the award. A large net worth is a bad reason to award punitive damages, [Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508-09 \(7th Cir. 1992\)](#), and a small net worth is a bad reason to let the wrongdoer off the hook.

ITAS believes that it is entitled to more than the jury awarded. It invokes two statutes, RICO and the Sherman Act, that provide for treble damages and attorneys' fees. The district judge granted summary judgment to IIT on the

RICO claim, and it threw out the antitrust claim at the close of ITAS's case. The latter decision is obviously correct. We have explained already what is wrong with ITAS's market definition--and, if "bar mitzvah tours of Israel by families who live in New Jersey or near Chicago or Boston" (the full "definition") were indeed a market, then the dominant firm would be ITAS itself, a monopolist by its own admission until [**14] 1990. IIT's entry upset the larger firm, but the antitrust laws encourage such upsets. It is an abuse of the antitrust laws to invoke them to stifle nascent competition. [Stamatakis Industries, Inc. v. King, 965 F.2d 469 \(7th Cir. 1992\)](#). Although ITAS believes that IIT's "free" land tours for celebrants amounted to predatory pricing because IIT lost money, it has not begun to satisfy the requirements of a predatory-pricing case. Chief among these is the need to show that the "victor" in the price war can recoup its losses by charging supracompetitive prices. [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578 \(1993\)](#); [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#); [A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 \(7th Cir. 1989\)](#). Unless the "predator" can recoup, consumers are net beneficiaries. IIT has not achieved a dominant position in the market (ITAS remains much larger), and because rivals could freely enter if IIT drove out ITAS, recoupment would be impossible. So if IIT indeed charged less than its costs, there is no reason to get excited; IIT was giving money away to consumers rather than injuring them by curtailing [**15] output and charging monopoly prices. Cf. [Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\)](#) ("dangerous probability of success" is an essential element in a § 2 case). More likely it was discounting to get established in the market, also a lawful step, see Phillip Areeda & Donald F. Turner, 3 [Antitrust Law](#) P 716 (1978), but we need not pursue the subject.

HN5 Some antitrust offenses do not depend on proof of market power. Price fixing and market allocation, for example, are illegal *per se* whether or not the firms have any hope of success. [Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 \(1990\)](#); [FTC v. Superior Court Trial Lawyers, 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768 \(1990\)](#); [Blackburn v. Sweeney, 53 F.3d 825 \(7th Cir. 1995\)](#); [15 U.S.C. § 1](#). Let us suppose that IIT and IIT-Illinois conspired to fix prices. How does this injure ITAS? If the IIT firms raised their price (the concern with price fixing), then ITAS would have been the beneficiary and could raise its own prices. **HN6** Acts harmful to business rivals generally help consumers; this fact is the basis of the antitrust injury rule of [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#). A merger unlawful because of its tendency to increase prices [**16] aids rivals; conversely, a claim by the rival of the merged firms that the merger has intensified competition shows how the rival suffers injury, but not how consumers lose. Such a rival has actual injury but does not suffer from the effect that makes the transaction unlawful under the antitrust laws and therefore, *Brunswick* held, cannot invoke the antitrust laws. See also [Cargill, Inc. v. Monfort of Colorado, 1*12571 Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#); [Chicago Professional Sports Limited Partnership v. National Basketball Ass'n, 961 F.2d 667, 670 \(7th Cir. 1992\)](#); [Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 \(7th Cir. 1989\)](#); [Zinser v. Rose, 868 F.2d 938 \(7th Cir. 1989\)](#). We know from [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#), that the antitrust injury doctrine applies with full vigor to the *per se* offenses. ITAS cannot show how price fixing by the two IITs injured both producers and consumers. As we held in *Stamatakis*, the antitrust injury doctrine KOs claims based on injury caused by defecting employees who set up rivals. This antitrust claim was stillborn, and the district judge's only error was waiting as long as she did to scotch it.

The RICO claim is more [**17] substantial. The district judge granted summary judgment against ITAS because the predicate offenses, mail fraud, involved consumers rather than ITAS itself. The judge believed that indirect injury is insufficient after [Holmes v. SIPC, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 \(1992\)](#). [1993 U.S. Dist. LEXIS 6141](#), rehearing denied, [1993 U.S. Dist. LEXIS 8744](#). Yet the Supreme Court observed, [503 U.S. at 272-73 n.20](#), that it did not mean to preclude all possibility of recovery for injury that was transmitted indirectly; the holding of *Holmes* is no more than that common law ideas about proximate causation inform the understanding of RICO. *Holmes* explicitly refrained from importing a theory akin to the antitrust-injury doctrine into the law of RICO. [Id. at 269 n.15](#). Sometimes a recovery for a derivative injury would undermine RICO's own purposes, or those of other statutes; the Court gave as one illustration our holding in [Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333 \(7th Cir. 1989\)](#), that shareholders cannot use RICO to recover for injury done to their corporation. Such a process would create unnecessary complexities in apportioning recoveries, and at the same time would undermine the interest of [**18] the corporation's creditors in collecting their debts. (The shareholders wanted to bypass the

corporation precisely because it was insolvent, and its creditors would have reaped most of the benefit.) *Holmes* dealt with a similar claim, by one of a corporation's creditors rather than an equity investor. A fraudulent scheme injured the corporation and its clients, causing the Securities Investor Protection Corp. to advance money to protect the clients. The corporation had other debts--and other sources of financial distress. The Supreme Court concluded that the clients and the injured corporation were the proper plaintiffs; whatever the corporation obtained would inure to the benefit of its creditors, including SIPC, according to their priorities in bankruptcy.

Our case does not present a similar apportionment problem, and there is no risk of multiple recoveries. The "direct" victims--as the district court understood things, the readers of IIT's ads--got what they paid for and are not complaining. *Holmes* called for the use of common-law analogies under [18 U.S.C. § 1964\(c\)](#), and there is no doubt that [HN7](#)[↑] a producer injured by a campaign of misinformation directed at its customers suffers [\[**19\]](#) an injury compensable under the law of torts; it is not cut off by the proximate causation and foreseeability requirements. *Prosser & Keeton on Torts* at 1013-20. After giving thoughtful treatment to *Holmes*, the fourth circuit held in [Mid Atlantic Telecom Inc. v. Long Distance Services, Inc.](#), [18 F.3d 260 \(4th Cir. 1994\)](#), that RICO similarly allows suits when the predicate offenses influence customers and, derivatively, injure business rivals. A conflict among the circuits on such a question would be regrettable, and we therefore accept *Mid Atlantic*. (The district court's alternate holding that ITAS cannot show how it relied on the misrepresentations made to its potential customers just restates the conclusion that derivative injury is never cognizable under RICO; it does not require separate analysis.)

Like a troll under the bridge, another problem lies in wait for a litigant that has come this far. [HN8](#)[↑] An entrepreneur can recover under the common law of unfair competition when a rival tells fibs to potential customers, because the rule against fraud has been crafted for the benefit of both seller [\[*1258\]](#) and customer. Can one say the same about the federal mail fraud statute, [18 U.S.C. § 1341](#), [\[**20\]](#) the only criminal predicate act in IIT's supposed "pattern of racketeering"? Only one court of appeals has addressed this question, and it answered "no." [Lancaster Community Hospital v. Antelope Valley Hospital District](#), [940 F.2d 397, 405-06 \(9th Cir. 1991\)](#). *Lancaster Community Hospital* held that [HN9](#)[↑] business rivals may not use RICO to complain about injuries derivatively caused by mail frauds perpetrated against customers, because only the customers are the beneficiaries of the statutory protection. We are no more inclined to create a conflict on this question than we were on the Mid Atlantic issue--especially not after [Jepson, Inc. v. Makita Corp.](#), [34 F.3d 1321, 1327 \(7th Cir. 1994\)](#), indicated tentative agreement with *Lancaster Community Hospital*. Tentative now becomes definitive. *Lancaster Community Hospital* relied in part on [McNally v. United States](#), [483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 \(1987\)](#), which jettisoned the intangible rights doctrine in mail fraud cases. The ninth circuit thought that preservation of market share is an intangible right outside the scope of [§ 1341](#). Congress has reinstated the intangible rights approach, [18 U.S.C. § 1346](#), but we do not think that this changes anything. [HN10](#)[↑] Lost business [\[**21\]](#) opportunities, the subject of both *Lancaster Community Hospital* and this case, are property as [§ 1341](#) used that term before the amendment. See [Carpenter v. United States](#), [484 U.S. 19, 98 L. Ed. 2d 275, 108 S. Ct. 316 \(1987\)](#). The essential point, rather, is that the victims of the fraud are the object of solicitude; [§ 1341](#) does not establish a regimen of truth-telling without regard to details like who is losing out and why. See [United States v. Walters](#), [997 F.2d 1219 \(7th Cir. 1993\)](#).

Such a limitation is common in tort law. [HN11](#)[↑] A plaintiff claiming injury by the defendant's violation of a statute must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law. *Prosser & Keeton on Torts* at 225-26. Thus violation of a law requiring animals to be kept in pens on shipboard does not lead to liability if the animals are washed overboard; the function of the law was to curb disease, not to reduce the effects of storms. *Gorris v. Scott*, 9 Ex. 125 (1874). In federal administrative law, this principle is known as the "zone of interests" requirement. [Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.](#), [131 L. Ed. 2d 160, 115 S. Ct. 1278, 1283-84 \(1995\)](#); [Clarke v. Securities Industry](#) [\[**22\]](#) Ass'n, [479 U.S. 388, 395-96, 93 L. Ed. 2d 757, 107 S. Ct. 750 \(1987\)](#); [Association of Data Processing Service Organizations, Inc. v. Camp](#), [397 U.S. 150, 153, 25 L. Ed. 2d 184, 90 S. Ct. 827 \(1970\)](#). See also [Holmes](#), [503 U.S. at 287-88](#) (Scalia, J., concurring). It carries over to criminal law. For example, in determining the "loss" from IIT's ad campaign under the Sentencing Guidelines (if indeed IIT committed mail fraud, a subject we do not broach), a court would not inquire how much ITAS lost; it would ask only what the travelers lost. [U.S.S.G. § 2F1.1 Application Note 7\(a\), \(c\)](#); see also § 3D1.2 Application Note 2; [United States v. Marlatt](#), [24 F.3d 1005 \(7th Cir. 1994\)](#). So too with civil RICO now that *Holmes* has adopted commonlaw approaches to decide when RICO authorizes recovery for derivative injuries. [Section](#)

[1341](#) does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO.

ITAS won under the common law, and it lost under the Lanham Act. The jury decided that neither IIT nor Larry Ritter had violated that statute. The verdict drains all significance from several of ITAS's arguments. Consider, [\[**23\]](#) for example, the contention that Marlene Ritter should have been among the defendants at trial. Only one accusation has been leveled against her: that she told a potential customer that ITAS and IIT are the same thing. The customer related calling the IIT business number (whichs in the Ritter home) and talking with a woman. ITAS's argument depends on the fact that Marlene Ritter is the most logical woman. The district court granted summary judgment against ITAS, ruling that it had not excluded the possibility that some other woman took the call. [\[*1259\] 1993 U.S. Dist. LEXIS 6141](#), * 16-17. Yet litigants need not surmount such a hurdle. If a reasonable juror could infer that Marlene Ritter spoke with the customer, then summary judgment was inappropriate. ITAS could meet this burden by showing that IIT lacked other female call-takers. But so what? The person who was told that ITAS and IIT are the same entity took a tour with ITAS. Proof of this incident at trial therefore could not have affected the quantum of damages, and ITAS does not argue that it needs Marlene Ritter on the judgment to improve its chances of collection. As things developed at trial--including the fact that the jury heard [\[**24\]](#) via deposition the tale of the customer who believes that she spoke with Marlene Ritter--the order removing her from the case was inconsequential.

So too with claims ITAS presents under the Illinois Consumer Fraud Act, [815 ILCS 505/1 to 505/11a](#), the Illinois Deceptive Trade Practices Act, [815 ILCS 510/1 to 510/7](#), and the New Jersey Consumer Fraud Act, [N.J. Rev. Stat. 56:8-1 to 56:8-20](#). The district court removed these from the case by summary judgment. [1993 U.S. Dist. LEXIS 6141](#), * 11-13, [1993 U.S. Dist. LEXIS 8744](#), * 19-28, [1994 U.S. Dist. LEXIS 751](#), * 11. ITAS says that this was error. Who cares? ITAS lost under the Lanham Act. The jury therefore must have believed that IIT did not make any false statement likely to cause confusion among consumers. See [15 U.S.C. § 1125\(a\)\(1\)](#). (Though commercial defamation can violate the Lanham Act, see [§ 1125\(a\)\(1\)\(B\)](#), we reiterate the point that IIT has not asked for a new trial on account of inconsistent verdicts.) What would rephrasing the claims under the state laws have added? Throughout its lengthy briefs, ITAS never tackled this question. At oral argument ITAS argued that it is a little easier to prevail under the Illinois Consumer Fraud [\[**25\]](#) Act than under the Lanham Act, but it did not supply details. The place for such arguments is in the briefs; it is too late to advance them for the first time on one's feet, after the other side's submissions are in. We therefore have nothing to say about the question whether the district court should have allowed claims based on these three statutes to go to the jury.

This analysis assumes, however, that the verdict on the Lanham Act stands. ITAS wants it set aside for two reasons. First, it believes that the district judge erred in preventing Toby Katz from testifying. Second, ITAS contends that the judge should have permitted Marilyn Ziemke to relate what potential customers told her on the telephone.

Katz appeared in ITAS's witness list in the final pretrial order. According to ITAS's list, Katz was one of its employees or agents. ITAS did not provide Katz's telephone number or address, and IIT did not attempt to contact her to learn what she might say. (The telephone number was in an exhibit.) Come the trial, IIT asked the judge to forbid Katz from testifying because the omission of her address violated N.D. Ill. Rule 5.00. The judge agreed and kept Katz off the stand. [1994 \[**26\] U.S. Dist. LEXIS 751](#), * 7. This mechanical application of Local Rule 5.00 is untenable under [Grove Fresh Distributors, Inc. v. New England Apple Products Co.](#), 969 F.2d 552, 558-60 (7th Cir. 1992). Like many of our cases, *Grove Fresh Distributors* invokes the principle that [HN12](#)[] a sanction should be proportional to the wrong. See also, e.g., [Okaw Drainage District v. National Distillers & Chemical Corp.](#), 882 F.2d 1241, 1248 (7th Cir. 1989). Omission of an unimportant detail, like a misspelling of the witness's name, should not lead to the exclusion of vital evidence. The district court observed that *Grove Fresh Distributors* involved a rebuttal witness, while Katz was to testify in ITAS's case-in-chief. True, but irrelevant. The principle of proportionality is what matters, and it is applicable to all witnesses--and all sanctions. IIT had an opportunity to take Katz's deposition but declined; it is therefore difficult to see why Katz should have been prevented from testifying. Although IIT observes that ITAS's incorrect assertion that Katz was still ITAS's employee dissuaded IIT's lawyers from calling her phone number, the foregone opportunity to take her deposition cannot be so easily explained [\[**27\]](#) away.

[*1260] ITAS believes that an error in preventing a witness from testifying entitles it to a new trial. Yet there is a harmless-error rule to reckon with. Whether the error was harmless depends on what Katz would have added to the information placed before the jury. ITAS assures us that Katz's testimony was vital. Apparently ITAS expects us to take that representation on faith, because ITAS did not make an offer of proof. Too bad for ITAS; the omission is fatal. [HN13](#)[↑] "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context". [Fed. R. Evid. 103\(a\)\(2\)](#). Beyond ITAS's assertion that Katz would have supplied "critical" testimony relevant to damages, we know nothing and therefore are in no position to conclude that the exclusion affected a substantial right. The party aggrieved by exclusion must supply details; ITAS has volunteered only rhetoric.

Ziemke's proposed testimony is less of a mystery; ITAS made a formal offer outlining the excluded testimony. Ziemke took many [**28] of the calls made to ITAS's telephone number and wanted to testify that after IIT went into business she began to receive inquiries such as: "They're offering the same thing you're offering. What's the big deal?" and "Doesn't IIT have the same free bar mitzvah?" Ziemke added: "Practically every phone call that ITAS got in which people were comparing [ITAS] to IIT, every one of those people asked 'what's the big deal? They have the same thing you have.' " The district judge excluded this testimony as hearsay, a step that she conceded in post-trial proceedings had been a blunder. [1994 U.S. Dist. LEXIS 751](#), * 4. ITAS offered this testimony not for its truth--to show that IIT was offering the same "free" package as ITAS--but to show that customers were confused. For that purpose it was not hearsay. [Fed. R. Evid. 801\(c\)](#). Evidence about what customers say to vendors is a staple of trademark and business tort litigation. [International Kennel Club of Chicago v. Mighty Star, Inc.](#), 846 F.2d 1079, 1089-90 (7th Cir. 1988). Nonetheless, the district judge denied ITAS's post-trial motion, explaining that the inquiries that Ziemke would have related at trial did not show consumer confusion. Instead, [**29] the judge believed, they showed customers making inquiries to obtain information.

Informed by hindsight, we think that the evidence should have been admitted. The line the district judge drew is difficult to maintain. Perhaps the principal inference from the inquiries is that competition had begun. No longer the sole packager of bar mitzvah tours of Israel, ITAS started to receive inquiries by customers asking about the differences between available options. On this understanding, there is no problem under the Lanham Act. There is only competition, to be encouraged. Another possible inference, however, is that some of these customers were calling because they had been misled by the implication of the IIT ads that the two firms' "free" packages were identical. Ziemke explained the difference to those who called; but some travelers would have signed with IIT without calling. [HN14](#)[↑] Drawing inferences from ambiguous events is the province of the trier of fact, here a jury. That said, however, we do not think that the error was sufficiently grave to require a new trial. The jury was floating in evidence about IIT's representations. Jurors knew the difference between ITAS's package and IIT's [**30] and were well able to determine whether consumers would have been confused. Ziemke's testimony would have added evidence in the lists on one side, but it was so much to be expected--many calls of the kind she described in the offer of proof were inevitable even if IIT's ads had included elaborate and complete narrations--that the exclusion does not require the entire trial to be redone. Not when it is so hard to see what damages the Lanham Act (or for that matter the state consumer-protection laws) could have added to the award ITAS received for defamation. Attorneys' fees maybe, but they are hardly automatic. ITAS think that it could have collected extra money for corrective advertisements, but this misunderstands the nature of such claims. See [Zazu Designs](#), 979 F.2d at 506-07. Altogether, the probable effect on the award was sufficiently [*1261] small, and the probable effect on the outcome sufficiently problematic, that the error was harmless.

Only one issue remains: costs. The district judge ordered each side to bear its own. ITAS believes that this was an abuse of discretion because it prevailed. So it did, but only in part. It lost outright against Larry Ritter. Marlene Ritter won in [**31] advance of trial. The Ritters beat back ITAS's demands and therefore have a better claim for costs--although the Ritters lost their counterclaims. ITAS peppered the judge with woebegone theories, such as the antitrust claim, and pointless ones, such as the demands under the state consumer-deception laws. These took up time and IIT's money without producing anything in return. Under the circumstances, declining to shift costs was a wise decision, certainly not an abuse of discretion. [Landau & Cleary, Ltd. v. Hribar Trucking, Inc.](#), 807 F.2d 91, 94 (7th Cir. 1986).

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AFFIRMED

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K.M.B. Warehouse Distrib. v. Walker Mfg. Co.

United States Court of Appeals for the Second Circuit

January 19, 1995, Argued ; July 21, 1995, Decided

Docket Nos. 94-7672, 94-7720

Reporter

61 F.3d 123 *; 1995 U.S. App. LEXIS 19698 **; 1995-2 Trade Cas. (CCH) P71,068

K.M.B. WAREHOUSE DISTRIBUTORS, INC. and KMB/CT, INC., Plaintiffs-Appellants-Cross-Appellees, v.
WALKER MANUFACTURING COMPANY, PRIME AUTOMOTIVE PARTS CO., INC., WOODBURY AUTOMOTIVE
WAREHOUSE ENTERPRISES, INC., and MOTOR AGE, INC., Defendants-Appellees-Cross-Appellants.

Prior History: [\[**1\]](#) Appeal by plaintiffs from summary judgment before the United States District Court for the Southern District of New York (Sand, J.) on the grounds that the district court erred in (1) concluding that plaintiffs failed to show adverse effect for the purposes of its Sherman Act claim and (2) dismissing plaintiffs' state law claims for lack of jurisdiction. Cross-appeal from the district court's refusal to impose sanctions against plaintiffs.

Disposition: Affirmed.

Core Terms

market power, adverse effect, district court, defendants', distributors, intrabrand, products, anticompetitive, sanctions, exhaust, interbrand, antitrust, summary judgment, state law claim, prices, diversity of citizenship, market share, automotive, customers, diversity

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

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

[**HN2**](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The court analyzes alleged anticompetitive practices such as a vertical conspiracy that does not involve price-fixing according to the rule of reason. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited.

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

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

Establishing a violation of the rule of reason involves three steps. Plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. If the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.

Antitrust & Trade Law > Sherman Act > General Overview

HN4 Antitrust & Trade Law, Sherman Act

To meet its initial burden of showing an actual adverse effect on competition as a whole in the relevant market, the plaintiff must show more than just that he was harmed by defendants' conduct.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5 Antitrust & Trade Law, Sherman Act

To prevail on a Sherman Act, [15 U.S.C.S. § 1](#), claim, a plaintiff must also show more than just an adverse effect on competition among different sellers of the same product, intrabrand competition. Restrictions on intrabrand competition can actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product. Because the focus of the inquiry is the relevant market as a whole, restriction of intrabrand competition must be balanced against any increases in interbrand competition. The overarching standard is whether defendants' actions diminish overall competition, and hence consumer welfare.

Antitrust & Trade Law > Sherman Act > General Overview

HN6 Antitrust & Trade Law, Sherman Act

Isolated statements of preference are not a sufficient empirical demonstration concerning the adverse effect of an arrangement on price or quality to state a Sherman Antitrust Act, [15 U.S.C.S. § 1](#), claim.

Antitrust & Trade Law > Sherman Act > General Overview

HN7 Antitrust & Trade Law, Sherman Act

The fact that a competitor is not permitted to compete in the market does not alone prove an adverse effect on intrabrand competition.

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

HN8 **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The proper role of market power in the Sherman Antitrust Act, [15 U.S.C.S. § 1](#), rule of reason analysis has been characterized differently by the various circuits. Some courts require that a plaintiff always show the defendant's market power in order to state a [§ 1](#) claim.

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

HN9 **Regulated Practices, Market Definition**

The court has not made a showing of market power a prerequisite for recovery in all Sherman Antitrust Act, [15 U.S.C.S. § 1](#), cases. If a plaintiff can show an actual adverse effect on competition, such as reduced output, the court does not require a further showing of market power. However, where the plaintiff is unable to demonstrate such actual effects, it must at least establish that defendants possess the requisite market power and thus the capacity to inhibit competition market-wide.

Antitrust & Trade Law > Regulated Practices > Market Definition > 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

HN10 **Regulated Practices, Market Definition**

A plaintiff wishing to show adverse effect through indirect means must at least establish that defendants possess the requisite market power, meaning that a showing of market power, while necessary to show adverse effect indirectly, is not sufficient. There must be other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherent anticompetitive nature of defendant's behavior or the structure of the interbrand market. This position is consistent with the approach of courts that require a showing of market power, but only as one of several steps necessary to establish adverse effect.

Antitrust & Trade Law > Sherman Act > General Overview

HN11 **Antitrust & Trade Law, Sherman Act**

Intent is relevant to the reasonableness inquiry, but only to help courts interpret the effects of defendants' actions. Like market power, anticompetitive intent is not by itself sufficient to meet the adverse-effect requirement. Without some evidence of an adverse impact on competition in either the interbrand or intrabrand market, the fact that customers induce a seller to refrain from dealing with another potential customer in order to limit competition does not satisfy a plaintiff's initial burden under the Sherman Antitrust Act, [15 U.S.C.S. § 1](#).

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

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

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

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

HN12 [blue icon] **Jurisdiction, Jurisdictional Sources**

[28 U.S.C.S. § 1367\(c\)\(3\)](#) explicitly provides that a district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

HN13 [blue icon] **Diversity Jurisdiction, Citizenship**

Even though a plaintiff does not raise diversity as a basis for jurisdiction until appeal, the court may consider its argument in order to avoid a miscarriage of justice.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN14 [blue icon] **Standards of Review, Abuse of Discretion**

A district court's decision whether to impose sanctions should only be reversed for abuse of discretion. Sanctions should only be imposed if it is patently clear that a claim has absolutely no chance of success, and all doubts should be resolved in favor of the signing attorney.

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Judges: Before: WALKER, JACOBS, and LEVAL, Circuit Judges.

Opinion by: WALKER

Opinion

[*126] WALKER, Circuit Judge:

Plaintiffs K.M.B. Warehouse Distributors, Inc. and KMB/CT, Inc. (together "KMB"), distributors of automotive parts, brought this action against Walker Manufacturing Company ("Walker"), a manufacturer of automobile exhaust equipment, and three distributors of Walker equipment. KMB claims that defendants' actions that were taken in order to prevent KMB from becoming a distributor of Walker products constitute a violation of § 1 of the Sherman Antitrust Act, breach of contract, and tortious interference with contractual business relations. Plaintiffs appeal from summary judgment in favor of defendants entered in the United States District Court for the Southern District of New York (Leonard B. Sand, District Judge). Defendants cross-appeal from the district court's denial of their motion for sanctions against KMB.

We affirm for the reasons stated below and the grounds set forth in Judge Sand's thoughtful opinion.

BACKGROUND

KMB is a distributor of automotive repair parts in the New York, New Jersey, and Connecticut "Tri-state" area. As a distributor, KMB sells its [**3] products to independent auto-parts stores, also known as "jobbers." Like most distributors, KMB finds it commercially feasible to carry only one line of exhaust equipment. In 1991, KMB carried exhaust equipment made by AP Parts Marketing Company ("AP"). But, because it considered Walker exhaust systems both superior in quality and more popular with jobbers, KMB wanted to replace its AP exhaust line with Walker's.

In July of 1991, KMB first contacted Walker to arrange to carry the Walker line. In the following weeks, the two companies negotiated the details of a changeover to Walker products and scheduled the change for the week of October 20, 1991. By September, however, several Walker distributors -- competitors of KMB -- got wind of Walker's plan to supply KMB and expressed their strong disapproval. In particular, defendant Prime Automotive Parts ("Prime") met with Walker on September 20, 1991 to discuss rumors of a KMB changeover. Prime complained that KMB offered more frequent deliveries to customers and expressed concern that KMB would take business away from Prime. It warned that an arrangement between KMB and Walker might affect Prime's relationship with the latter and that [**4] Prime would "have to see what happens to [its] business and act accordingly." Other distributors voiced similar concerns. Faced with this pressure, in late September Walker put KMB "on hold."

On November 15, 1991, KMB and Walker met to discuss Walker's concerns about the changeover. Possibly in anticipation of litigation, KMB recorded much of the meeting, at which Walker officers Frank Grosser and Thomas Fontana conveyed the complaints they had received from Walker distributors about KMB's sales tactics, specifically KMB's high discounts. Grosser and Fontana described Walker's existing distributors as "a fraternity" and cautioned that "people have to get along, otherwise they'll murder each other." Noting that "there's no formal way to do this because . . . it's not legal," Grosser explained to KMB that Walker was "trying to make sure there's a reasonable chance that everybody can survive and make a profit in this market." Walker then told KMB that it would not supply Walker products to KMB.

KMB filed suit in February of 1992. It claimed that Walker's decision not to supply KMB in the face of the pressure exerted by its distributors amounted to an antitrust violation, [*127] as well as [**5] state law breach of contract and tortious interference with contract. By May 4, 1992, each defendant had filed a motion for summary judgment. The district court granted defendants' motions in June, 1994 and dismissed the case. Plaintiffs appealed. Defendants cross-appealed from the district court's refusal to award sanctions.

DISCUSSION

The district court granted summary judgment in defendants' favor after concluding that KMB failed to show that defendants' actions had an anticompetitive effect as required for the antitrust claim. Having dismissed the antitrust claim, the district court concluded that it lacked jurisdiction to entertain KMB's state law claims. We agree with Judge Sand's excellent opinion, [K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co., No. 92 Civ 1167, 1994 U.S. Dist. LEXIS 7253, 1994 WL 250115](#) (S.D.N.Y. June 1, 1994), and affirm for the reasons stated therein.

I. Actual Adverse Effect on Competition

HN1[] Under [§ 1](#) of the Sherman Antitrust Act, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C. § 1](#). KMB alleges that [**6] defendants violated [§ 1](#) by stifling service and price competition in the Tri-state market for exhaust products. **HN2**[] We analyze this sort of allegedly anticompetitive practice -- a vertical conspiracy that does not involve price-fixing -according to the "rule of reason." [See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). Under this rule, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited." [Id. at 49](#).

HN3[] Establishing a violation of the rule of reason involves three steps. "Plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market . . ." [Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 543](#) (2d Cir.), cert. denied, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993). If the plaintiff succeeds, the burden shifts to the defendant to establish the "pro-competitive 'redeeming virtues'" of the action. [Id.](#) Should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive [**7] of competition. [Id.; Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413](#) (9th Cir.), cert. denied, 502 U.S. 994, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991).

A. The Test for Proving Adverse Effect

The district court in this case concluded that KMB failed **HN4**[] to meet its initial burden of showing an "actual adverse effect on competition as a whole in the relevant market." In order to fulfill this requirement, the plaintiff must show more than just that he was harmed by defendants' conduct. [See Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133-34](#) (2d Cir.) (That another customer of the defendant convinced the defendant to cease dealings with plaintiff did not suffice to show anti-competitive effect.), cert. denied, 439 U.S. 946, 58 L. Ed. 2d 338, 99 S. Ct. 340 (1978); [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#) ("The antitrust laws . . . were enacted for 'the protection of competition not competitors.'" (citation omitted)). Therefore, that KMB may have lost a potentially lucrative contract with Walker is not sufficient to state a cognizable antitrust claim.

HN5[] To prevail on a [§ 1](#) claim, a plaintiff must also show more than just an adverse effect on competition among different sellers of the same product [**8] ("intrabrand" competition), in this case Walker exhaust equipment. [See Borger v. Yamaha Int'l Corp., 625 F.2d 390, 397 \(2d Cir. 1980\)](#) (reversible error to instruct the jury to find defendant liable "solely on the basis of a purpose to restrict intrabrand competition, without any finding of either a purpose or effect related to interbrand competition"). Restrictions on intrabrand competition can actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality [*128] of a product. [See Continental T.V., 433 U.S. at 54-55](#) & n.23; [Eiberger v. Sony Corp. of Am., 622 F.2d 1068, 1075-76 \(2d Cir. 1980\)](#). Because the focus of our inquiry is the relevant market as a whole, restriction of intrabrand competition must be balanced against any increases in interbrand competition. [Eiberger, 622 F.2d at 1076; Copy-Data Sys., Inc. v. Toshiba Am., Inc., 663 F.2d 405, 411 \(2d Cir. 1981\)](#). The overarching standard is whether defendants' actions "diminish overall competition, and hence consumer welfare." [Graphic Prods. Distrib. v. Itek Corp., 717 F.2d 1560, 1571, 1573 \(11th Cir. 1983\)](#).

B. KMB's Evidence of Adverse Effect

We agree with [**9] the district court that KMB has failed to satisfy the adverse-effect requirement. As Judge Sand noted, KMB cannot show that "the impact on intrabrand competition was anything but de minimis." KMB's proof on this point consists almost entirely of affidavits from twelve of its current customers stating that they prefer both Walker products and KMB's superior service. Such [HN6](#)[] isolated statements of preference are not a sufficient "empirical demonstration concerning the [adverse] effect of the [defendants'] arrangement on price or quality," [Jefferson Parish Hosp. Dist. No. 2 v. Hyde](#), 466 U.S. 2, 30 n.49, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984), to state a § 1 claim. See [id. at 30](#) (finding inadequate evidence of an actual adverse effect on competition even though "the evidence indicates that some surgeons and patients preferred respondent's [anesthesiology] services").

In fact, an examination of the intrabrand market belies even KMB's assertion that intrabrand competition has been harmed. There are over twenty Walker distributors of various size in the Tri-state area. All the evidence suggests that there is a highly competitive intrabrand market in Walker products; in fact, during the pendency of this case, [**10] prices for Walker products have apparently fallen and distributors' discounts have increased. [HN7](#)[] The fact that KMB was not permitted to compete in this market does not alone prove an adverse effect on intrabrand competition. See [Capital Imaging](#), 996 F.2d at 546 (§ 1 claim fails where plaintiff conceded that price would stay the same were it allowed to enter the market); [Balaklaw v. Lovell](#), 14 F.3d 793, 798-99 (2d Cir. 1994) (finding plaintiff's claim insufficient because, "from the consumers' point of view, nothing about the market had changed" even though plaintiff was not permitted to compete).

Moreover, and critical to our decision, KMB has offered no evidence of an adverse effect on the whole Tri-state interbrand exhaust-product market. The only clear effect of defendants' alleged conspiracy was to prevent KMB from carrying Walker products. After it learned that it could not join the ranks of Walker distributors, KMB continued to compete with that group by offering AP exhaust products to jobbers. KMB was able to do so -- rather successfully, in fact -- by offering superior pricing and service to counteract what it considers the higher quality of Walker parts. In this very [**11] tangible sense, defendants' refusal to allow KMB to change over to Walker products tended to promote rather than curtail interbrand competition. KMB has thus failed to come forward with any evidence that defendants' actions adversely affected service, quality, or price market-wide.

C. Market Power as a Proxy for Adverse Effect

KMB argues that, even if it cannot show an actual adverse effect on competition, it can meet its initial burden under § 1 simply by showing that defendants possess sufficient market power to cause an adverse effect on competition. It then challenges the district court's conclusion that KMB's showing of Walker's market power was insufficient to survive summary judgment. We conclude that the showing of Walker's market power was insufficient in this case to satisfy KMB's burden of establishing an adverse effect on the market as a whole.

[HN8](#)[] The proper role of market power in the § 1 rule of reason analysis has been characterized differently by the various circuits. Some courts require that a plaintiff always show the defendant's market power in order [*129] to state a § 1 claim. See, e.g., [Rothery Storage & Van Co. v. Atlas Van Lines, Inc.](#), 792 F.2d 210, [\[*12\]](#) 221 (D.C. Cir. 1986) (suggesting that a showing of market power is a strict prerequisite to recovery in all § 1 cases), cert. denied, 479 U.S. 1033, 93 L. Ed. 2d 834, 107 S. Ct. 880 (1987); [General Leaseways, Inc. v. National Truck Leasing Ass'n](#), 744 F.2d 588, 596 (7th Cir. 1984) (making such a showing a prerequisite to recovery); [Graphic Products](#), 717 F.2d at 1568. The reasoning underlying this requirement is that unless a firm has "the ability to raise unilaterally prices and profitably maintain those prices above competitive levels and/or restrict output in the market," [State of New York by Abrams v. Anheuser-Busch, Inc.](#), 811 F. Supp. 848, 871 (E.D.N.Y. 1993), anticompetitive behavior will merely put the firm at a competitive disadvantage in the market as a whole and will not harm consumer welfare. [Capital Imaging](#), 996 F.2d at 546.

[HN9](#)[] This court has not made a showing of market power a prerequisite for recovery in all § 1 cases. If a plaintiff can show an actual adverse effect on competition, such as reduced output, [FTC v. Indiana Fed'n of Dentists](#), 476

U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986), we do not require a further showing of market power. Capital Imaging, 996 F.2d at 546. However, "where the [**13] plaintiff is unable to demonstrate such actual effects" -- as KMB is unable to do here -- "it must at least establish that defendants possess the requisite market power" and thus the capacity to inhibit competition market-wide. Capital Imaging, 996 F.2d at 546.

Market power has been defined as "the ability to raise price significantly above the competitive level without losing all of one's business." Graphic Prods., 717 F.2d at 1570; see also Broadway Delivery Corp. v. United Parcel Serv., 651 F.2d 122, 126-27 (2d Cir.) (defining the market power as "the power to control prices or exclude competition" in the context of a monopolization claim under § 2 of the Sherman Act), cert. denied, 454 U.S. 968, 70 L. Ed. 2d 384, 102 S. Ct. 512 (1981). Market power may be shown by evidence of "specific conduct indicating the defendant's power to control prices or exclude competition." Id. at 130. In addition, market share may be used as a proxy for market power. See id.; Graphic Prods., 717 F.2d at 1570.

The district court held that KMB failed to establish Walker's market power. KMB did not introduce any direct evidence of Walker's ability to affect prices in the aftermarket for automotive exhaust [**14] products. As to market share, KMB submitted evidence that Walker's national market share is approximately sixty percent. Its only evidence of area market share, however, consisted of answers from two deposed Walker employees agreeing that Walker's share of the area market is probably "in line" with its share of the national market.

We need not decide whether such assertions as to a defendant's share of the relevant market create a genuine issue of material fact sufficient to survive summary judgment. Even if market power were shown, it would not satisfy the adverse-effect requirement under these circumstances. When we said in Capital Imaging that HN10 [↑] a plaintiff wishing to show adverse effect through indirect means "must at least establish that defendants possess the requisite market power," Capital Imaging, 996 F.2d at 546 (emphasis added), we meant that a showing of market power, while necessary to show adverse effect indirectly, is not sufficient. There must be other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherent anticompetitive nature of defendant's behavior or the structure of the interbrand market. [**15] See Graphic Prods., 717 F.2d at 1573 (In order to show adverse impact indirectly, a plaintiff must show defendant's market power, that intrabrand competition was impeded, and that "the interbrand market structure was such that intrabrand competition was a critical source of competitive pressure on price, and hence of consumer welfare."); cf. 8 Philip Areeda, Antitrust Law P 1600d, at 10 (1986) ("The large market share of a dominant manufacturer does not itself make his restraint on intrabrand competition unreasonable."). This position is consistent with the approach of courts that require a showing of market power, but only as one of [*130] several steps necessary to establish adverse effect. See, e.g., Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1202 (6th Cir. 1982), cert. denied, 466 U.S. 931 (1984).

Here, KMB has not offered adequate reasons why we should infer an adverse effect on competition simply from Walker's alleged market power. KMB has not shown that defendants' actions have had a detrimental effect even on intrabrand competition. To the contrary, the evidence suggests that intrabrand competition is healthy and that interbrand competition is even healthier. [**16] We therefore conclude that, despite its efforts to prove Walker's market power, KMB has failed to show an adverse effect on competition as a whole.

D. Defendants' Anticompetitive Intent

KMB also contends that it has met the adverse-effect requirement by producing evidence of defendants' anticompetitive intent. HN11 [↑] Intent is relevant to the reasonableness inquiry, but only to "help courts interpret the effects" of defendants' actions. Anheuser-Busch, 811 F. Supp. at 874. Like market power, anticompetitive intent is not by itself sufficient to meet the adverse-effect requirement. See Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918) (noting that intent is relevant in the antitrust context, but "not because a good intention will save an otherwise objectionable regulation or the reverse" (emphasis added)); cf. Capital Imaging, 996 F.2d at 543 (citing id.). Without some evidence of an adverse impact on competition in either the interbrand or intrabrand market, the fact that customers induce a seller to refrain from dealing with another potential customer in order to limit competition does not satisfy a plaintiff's initial burden under § 1. See [**17]

Oreck, 579 F.2d at 133-34 (Plaintiff failed to show anticompetitive effect even though plaintiff's competitor convinced defendant to stop selling to plaintiff.). KMB's evidence of defendants' intent, even belief that what they were doing might be unlawful, is unavailing in the absence of evidence of anti-competitive effect.

II. Jurisdiction over KMB's State Law Claims

After granting summary judgment in defendants' favor, the district court found no basis for retaining jurisdiction over KMB's state law claims. Accordingly, the district court dismissed the remaining claims without prejudice. KMB notes that the second and third claims involved only KMB, a citizen of New York and Connecticut, and Walker, a citizen of Delaware and Wisconsin, and each involved more than \$ 50,000. Because diversity of citizenship provided an independent basis of jurisdiction over these claims (although not for the other state law claims), KMB contends, the district court erred in dismissing them.

KMB may be correct in claiming that, if jurisdiction over the second and third claims had been based upon diversity of citizenship, the district court would have erred in dismissing them. As a general [\[**18\]](#) rule, there must be complete diversity of citizenship between all plaintiffs and all defendants named in all claims in order for jurisdiction over any claim to be based upon diversity of citizenship. See Carden v. Arkoma Assocs., 494 U.S. 185, 187, 108 L. Ed. 2d 157, 110 S. Ct. 1015 (1990); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267, 2 L. Ed. 435 (1806). In this case complete diversity between all plaintiffs and all defendants was absent since defendants Prime and Woodbury Automotive Warehouse Enterprises, Inc. ("Woodbury") and plaintiff KMB are all citizens of New York. If, however, an independent basis for jurisdiction over non-diverse defendants exists, such as federal question jurisdiction under 28 U.S.C. § 1331, the district court should not dismiss the claims as to which diversity requirements have been met. Romero v. International Terminal Operating Co., 358 U.S. 354, 381, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959). The reasoning behind this exception is that plaintiffs should not be required to bring two suits in federal court solely in order to avoid destroying complete diversity. See Kauth v. Hartford Ins. Co., 852 F.2d 951, 959 (7th Cir. 1988).

This case presents a slightly different situation from that in Romero. The federal [\[**19\]](#) Sherman Act claim did originally provide an [\[*131\]](#) independent basis for jurisdiction over non-diverse defendants Prime and Woodbury. But here, unlike in Romero, the district court dismissed that claim when it granted defendants' motions for summary judgment. KMB argues, however, that the claim's initial presence in the complaint provided a basis of jurisdiction over the state law claims involving Prime and Woodbury sufficient to trigger the exception articulated in Romero, and that jurisdiction cannot be defeated by the subsequent dismissal of the only basis for federal question jurisdiction. This position has apparently been adopted in the Seventh Circuit. See Kauth, 852 F.2d at 958-59 (reversing the dismissal of a claim based upon diversity jurisdiction in similar circumstances even though it affirmed the dismissal of the only claims based upon federal question jurisdiction).

We need not decide this issue in this case since KMB's argument suffers from another flaw. KMB did not actually base jurisdiction over its state law claims against Walker on diversity of citizenship in either its complaint or its argument to the district court. Rather, it premised jurisdiction solely [\[**20\]](#) on supplemental jurisdiction under 28 U.S.C. § 1367. HN12 Section 1367 explicitly provides that a district court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The district court was thus well within its discretion when it dismissed KMB's state law claims.

HN13 Even though KMB did not raise diversity as a basis for jurisdiction until this appeal, we may consider its argument in order to avoid a miscarriage of justice. See C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co., 903 F.2d 114, 121 (2d Cir. 1990); Republic Nat'l Bank v. Eastern Airlines, Inc., 815 F.2d 232, 240 (2d Cir. 1987). The district court dismissed KMB's remaining claims without prejudice, and KMB has not advanced any reason why being compelled to refile its second and third claims would cause a miscarriage of justice. Accordingly, we affirm the district court's dismissal of these claims.

III. Sanctions under Rule 11

Defendants cross-appeal, arguing that the district court abused its discretion when it declined to impose sanctions against KMB under [Federal Rule of Civil Procedure 11](#). [HN14↑](#) A district court's decision [**21] whether to impose sanctions should only be reversed for abuse of discretion. [Rodick v. City of Schenectady, 1 F.3d 1341, 1350 \(2d Cir. 1993\)](#). Sanctions should only be imposed if "it is patently clear that a claim has absolutely no chance of success," and all doubts should be resolved in favor of the signing attorney. *Id.* (quotation omitted) (reversing a district court's imposition of sanctions). We are not persuaded that KMB's arguments were so completely lacking in merit as to warrant sanctions, and we therefore affirm the district court's decision not to impose sanctions.

CONCLUSION

For the reasons stated above and in the opinion of Judge Sand, we affirm the judgment of the district court.

End of Document

Four Way Plant Farm v. NCCI

United States District Court for the Middle District of Alabama, Northern Division

July 25, 1995, Decided ; July 25, 1995, FILED, ENTERED

CIVIL ACTION NO. 94-A-1324-N

Reporter

894 F. Supp. 1538 *; 1995 U.S. Dist. LEXIS 10988 **; 1995-2 Trade Cas. (CCH) P71,152

FOUR WAY PLANT FARM, INC., et al., Plaintiffs, vs. NCCI, et al., Defendants.

Core Terms

unincorporated association, Pool, diversity jurisdiction, federal claim, federal question, participating, anti trust law, state law, workers' compensation, plaintiffs', syndicates, removal, entity, state court, Associations, reinsuring, joined, federal jurisdiction, district court, federal law, antitrust, preempted, policies, federal court, fraudulently, enterprise, carriers, commerce, resident, cases

LexisNexis® Headnotes

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

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

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

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

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Removal > Elements for Removal > General Overview

Civil Procedure > ... > Removal > Elements for Removal > Federal Venue

[HN1](#)[] Real Party in Interest, Fictitious Names

Title [28 U.S.C.S. § 1441](#) states: (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded. (b) Any civil action of which the district courts have original

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jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

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

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

HN2 Removal, Specific Cases Removed

The plaintiff is the master of the complaint and at liberty to choose federal or state jurisdiction. A defendant seeking removal has the burden of demonstrating that the district court has jurisdiction. The removal statute, [28 U.S.C.S. § 1441](#), is interpreted strictly with remand being favored when removal jurisdiction is in doubt.

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

HN3 Subject Matter Jurisdiction, Federal Questions

The doctrine of artful pleading is a narrow exception to the rule that the plaintiff is the master of his or her complaint. Artful pleading occurs when a plaintiff, in an attempt to avoid federal jurisdiction, characterizes a claim as a state claim when the real nature of the claim is federal.

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

HN4 Subject Matter Jurisdiction, Federal Questions

A defendant's argument that plaintiffs engaged in interstate commerce is a defense and does not itself create federal jurisdiction.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5 Procedural Matters, Jurisdiction

Unlike other federal statutory schemes that preempt state regulation, the federal antitrust laws do not impinge on the jurisdiction of state courts to adjudicate claims asserted under state antitrust laws.

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

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

HN6 [down] **Subject Matter Jurisdiction, Federal Questions**

Federal question jurisdiction cannot exist when the basic issues require interpretations of state statutory and constitutional provisions.

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

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

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

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

HN7 [down] **Class Actions, Certification of Classes**

Whether plaintiffs, as representatives of a presently uncertified class, can waive any potential federal claims is an issue to consider when deciding whether the class should be certified or what class should be certified. As masters of their complaint, however, plaintiffs may choose to not avail themselves of any federal law. The question for the state court is whether, while waiving any potential federal claims, the plaintiffs will be satisfactory representatives of all the class members. Or, the matter may be considered in defining the class, so that the class would not include those wishing to assert a federal antitrust claim. The waiver of federal claims does not create a federal question.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > Business Entities

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN8 [down] **Citizenship, Business Entities**

In a suit based on diversity jurisdiction where an unincorporated association is sued as an entity, an unincorporated association has citizenship in any state in which one of its members has citizenship.

Business & Corporate Law > Unincorporated Associations

HN9 [down] **Business & Corporate Law, Unincorporated Associations**

An unincorporated association is defined as a group of persons acting together to prosecute a common purpose or enterprise.

Business & Corporate Law > Unincorporated Associations

HN10 [down] **Business & Corporate Law, Unincorporated Associations**

The actual function of a group, not its formal title, determines the legal status of the group, and the law of the state where the group was "created" determines whether the group is an unincorporated association.

Business & Corporate Law > Unincorporated Associations

HN11 [blue icon] **Business & Corporate Law, Unincorporated Associations**

The unincorporated association is not a legal entity separate from its members.

Counsel: **[**1]** FOR FOUR WAY PLANT FARM, INC., MCDONALD CONSTRUCTION COMPANY, INC., WALKER LOGGING COMPANY, INC., Individually and on behalf of all others similarly situated as more specifically alleged in the complaint, plaintiffs: Jere L. Beasley, Lowell Landis Sexton, Frank M. Wilson, P. Leigh O'Dell, Beasley, Wilson, Allen, Main & Crow, P.C., Montgomery, AL.

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Judges: W. HAROLD ALBRITTON, UNITED STATES DISTRICT JUDGE

Opinion by: W. HAROLD ALBRITTON

Opinion

[*1540] MEMORANDUM OPINION AND ORDER

INTRODUCTION

Plaintiffs Four Way Plant Farm, Inc., McDonald Construction Co., and Walker Logging Co., Inc., ("Plaintiffs") brought this action [*1541] in the Circuit Court for Bullock County, Alabama. They sued individually and also alleged a class action on behalf of other similarly situated Alabama employers who purchased workers' compensation insurance in Alabama since January 1, 1985.¹ [*4] In their complaint plaintiffs claimed under the **antitrust law** of Alabama, Ala. Code §§ 8-10-1 et. seq. and § 6-5-60, that defendants engaged in a price-fixing scheme in connection with assigned risk workers' compensation insurance. They specifically stated that they asserted no federal cause of action and that they alleged no violation of federal antitrust laws, and they explicitly waived any potential federal claims they might have.

Defendants are National Council on Compensation Insurance ("NCCI"), an insurance rating organization;² National Workers' Compensation Reinsurance Pool ("National Pool"), a name given to the group of insurance companies which have contracted together to provide insurance to the residual market and reduce the risks associated with these policies; Robert J. Maxwell, Jr., ("Maxwell") a salaried employee of NCCI, [*5] Director of Government, Consumer, and Industry Affairs for NCCI's Southern Region, and an Alabama resident; and numerous named and fictitious insurance companies doing business in Alabama.

Alabama employers employing more than three persons are required to obtain workers' compensation insurance. Three manners of obtaining such coverage exist: (1) purchase the insurance in the "voluntary" market from an insurer licensed to create such a policy, (2) purchase the [*6] insurance from the "assigned risk" or "residual" market from an insurance company which is one of the servicing carriers joined together as National Pool, or (3) self-insure if the employer meets certain prerequisites.

Plaintiffs assert that defendants have engaged in a conspiracy of price-fixing and other antitrust violations under Alabama law which artificially inflate the cost of premiums in the residual market.

Defendants removed the case to the federal district court alleging federal question jurisdiction and federal diversity jurisdiction.³ Plaintiffs filed a motion to remand the case to the state court.

[**7] Defendants allege two grounds for federal question jurisdiction: plaintiffs' claim is actually federal in nature and plaintiffs have engaged in artful pleading in an effort to evade federal jurisdiction, and plaintiffs cannot waive potential federal claims when they assert representation on the part of a class, albeit a class not yet certified.

¹ Excluded from the purported class are defendants and their subsidiaries and affiliates and self-insured employers for the time periods that they were self-insured.

² Maxwell Aff. at P3 describes NCCI as follows:

NCCI is a non-profit corporation and a licensed rating organization for workers' compensation insurance. NCCI engages in rate-making related activities which assist insurers writing workers' compensation business. In Alabama, NCCI also serves as the Administrator of the Workers' Compensation Insurance Plan, the state-approved and regulated structure by which Alabama employers unable to obtain workers' compensation insurance in the voluntary market can apply for and obtain such insurance.

³  [HN1](#) [28 U.S.C. § 1441 \(1994\)](#) states:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Defendants base diversity jurisdiction on two arguments: defendant Maxwell, an Alabama citizen, is fraudulently joined, and defendant National Pool, alleged by plaintiffs to be an unincorporated association with Alabama citizen members, [*1542] is not a suable entity but is merely a contractual reinsurance mechanism, thus diversity jurisdiction exists.

The court holds that there is neither federal question jurisdiction nor federal diversity jurisdiction, thus plaintiffs' motion to remand is due to be GRANTED.

MOTION TO REMAND STANDARD

HN2 [↑] The plaintiff is the master of the complaint and at liberty to choose federal or state jurisdiction. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). A defendant seeking removal has the burden of demonstrating that the district court has jurisdiction. *Cabalceta* [*8] *v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989). The removal statute is interpreted strictly with remand being favored when removal jurisdiction is in doubt. *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

FEDERAL QUESTION JURISDICTION

Defendants contend that federal question jurisdiction exists because plaintiffs' claims are federal in nature in spite of the fact that the complaint specifically disavows any federal claim and restricts the plaintiffs' claims to alleged violation of state statutes. Defendants argue that plaintiffs' efforts to deny them a federal forum for what are essentially federal claims cannot succeed for two reasons discussed hereafter.

Artful Pleading

HN3 [↑] The doctrine of artful pleading, recognized by the Supreme Court in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981), is a narrow exception to the rule that the plaintiff is the master of his or her complaint. Artful pleading occurs when a plaintiff, in an attempt to avoid federal jurisdiction, characterizes a claim as a state claim when the real nature of the claim is federal. The doctrine applies in two categories [*9] of cases.⁴

In the first category, plaintiff brings a cause of action in federal court and loses. The plaintiff then brings a similarly or identically worded complaint in state court. The defendant removes the case to federal court and moves for summary judgment or dismissal based on res judicata. The district court finds that removal jurisdiction exists because the "real nature" of the claim is federal. See, e.g., *Federated Dep't* [*10] *Stores*, 452 U.S. at 396-97 & n.2 (history of the case). The instant case clearly does not fall into this category since the plaintiffs have not brought their claims in federal court at any prior time.

In the second category of cases where artful pleading applies, the claim brought by plaintiff in state court is based on subject matter that is preempted by federal law. See *Caterpillar, Inc.*, 482 U.S. at 393; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987); *King Provision Corp. v. Burger King Corp.*, 750 F. Supp. 501, 504 (M.D. Fla. 1990). See also *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993) (held that federal law preempted state law, thus removal was proper); *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.) (citing preemption cases as the paradigm of artful pleading), cert. denied, 479 U.S. 885, 93 L. Ed. 2d 253, 107

⁴ It has been argued that artful pleading applies whenever the plaintiff is deliberately trying to deny the defendant federal court jurisdiction. This overly broad interpretation of the exception of artful pleading directly contradicts the doctrine that the plaintiff is the master of his or her complaint and may deliberately choose to base the claims on state law. See *King Provision Corp. v. Burger King Corp.*, 750 F. Supp. 501, 505-06 & nn.3-5 (M.D. Fla. 1990). See generally 14A Charles A. Wright et al., *Federal Practice and Procedure* § 3722, pp. 266-76 (2d ed. 1985).

S. Ct. 277 (1986); *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980) ("The accepted rule in this circuit is that upon removal the removal court should inspect the complaint carefully to determine whether a federal claim is necessarily presented, even if the plaintiff has [**11] couched his [*1543] pleading exclusively in terms of state law."), cert. denied, 450 U.S. 949, 67 L. Ed. 2d 378, 101 S. Ct. 1410 (1981); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 572-73 (N.D. Cal. 1981) ("If the subject matter of the claim has been preempted, there is no room for the assertion of a claim under state law."), aff'd in part, rev'd in part, 731 F.2d 1423 (9th Cir. 1984). Compare *Cheshire v. Coca-Cola Bottling Affiliated, Inc.*, 758 F. Supp. 1098, 1100 (D.S.C. 1990) ("Federal question [jurisdiction] does not exist simply because the subject matter of the action could give rise to a federal law claims [sic] as well as a state law claim."). Defendants here in effect argue that this case falls into this second category because, they assert, the commerce engaged in was interstate commerce, not intrastate commerce, and Alabama antitrust laws do not apply to insurance.

HN4 [↑] Defendants' argument that plaintiffs engaged in interstate commerce is a defense and does not itself create federal jurisdiction. *Caterpillar, Inc.*, 482 U.S. at 392-93; *Metropolitan Life Ins. Co.*, 481 U.S. at 63; *Gully v. First Nat'l Bank*, 299 U.S. 109, 113, 81 L. Ed. [**12] 70, 57 S. Ct. 96 (1936) ("The controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."). See also *Anzulewicz v. Bluefield Community Hosp., Inc.*, 531 F. Supp. 49 (S.D. W.Va. 1981) (action brought under state antitrust laws in which the court held that the issue regarding whether requested relief was available under state law was an issue the state court could decide and no artful pleading occurred). Federal antitrust laws are not intended to preempt state antitrust laws. **HN5** [↑] "Unlike other federal statutory schemes that preempt state regulation, the federal antitrust laws do not impinge on the jurisdiction of state courts to adjudicate claims asserted under state antitrust laws." *Salveson*, 525 F. Supp. at 574. See also *California v. ARC America Corp.*, 490 U.S. 93, 103-06, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989) (antitrust regulation is not exclusively within the federal domain); *Cheshire*, 758 F. Supp. at 1100 (Congress does not intend to occupy the area of antitrust exclusively); *King Provision Corp.*, 750 F. Supp. at 504 (the area of antitrust is not preempted by federal law). Compare *Caterpillar, Inc.*, [**13] 482 U.S. at 393-94 (citing ERISA and LMRA as examples of federal preemption).

Whether the Alabama antitrust statutes do not include insurance within the definition of "commerce," as is alleged by the defendants, is an issue the Alabama court can decide. "Plaintiff has deliberately chosen to rely upon state law and remedies provided [by state law]; if by doing so plaintiff cannot avail himself of a remedy arguably available under federal law, then so be it." *Anzulewicz*, 531 F. Supp. at 51. This question alone does not create federal jurisdiction. See *id. at 53* (**HN6** [↑]) "Federal question jurisdiction cannot exist when the basic issues require interpretations of state statutory and constitutional provisions."). See also *Caterpillar, Inc.*, 482 U.S. at 392-93; *Metropolitan Life Ins. Co.*, 481 U.S. at 63; *Gully*, 299 U.S. at 113.

Contrary to defendants' contentions, the doctrine of artful pleading is not broader than the two exceptions listed above. Defendants rely heavily upon *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (E.D.N.Y. 1980), declaring it to be directly on point. However, the case is distinguishable. First, the district court held that federal [**14] diversity jurisdiction existed, therefore its discussion of whether federal question jurisdiction existed is arguably mere dicta. Second, more than thirty other cases alleging the same price-fixing scheme were brought in federal court pursuant to the federal antitrust laws. In the instant case, there have been no prior claims brought in federal court. See also *King Provision*, 750 F. Supp. at 506 n.5. Likewise, the other cases relied upon by defendants either fall into one of the two [*1544] exceptions⁵ [**15] or are distinguishable.⁶

⁵ *Federated Dep't Stores*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (brought state claims following the dismissal of federal claims); *Burda v. M. Ecker Co.*, 954 F.2d 434, 438 (7th Cir. 1992) (district court relied on federal preemption; court of appeals relied on failure of plaintiff to state facts indicating federal jurisdiction); *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976) (plaintiff brought state claims based on allegedly converted evidence arising from the same nucleus of facts following the settlement of the federal claims; "the proper avenue of redress for a party seeking relief from a [federal] judgment claiming fraud as grounds for relief is under Fed.R.Civ.P. 60(b)(3)."); *Kahn v. Salomon Bros. Inc.*, 813 F. Supp. 191 (E.D.N.Y. 1993) (federal law was a necessary element in deciding the claim, and another suit based on federal law had been brought by another plaintiff in federal court on the same nucleus of facts).

[**16] This is simply a case of plaintiffs choosing to limit their theory of recovery to a claim under state law. They have a right to do so. If their only possible claim is actually federal, that does not mean that they will recover in state court on a federal claim; it means that they will lose their lawsuit. The court finds that federal question jurisdiction is not established under the theory of artful pleading.

Waiver of Federal Claims by Purported Class Representatives

Defendants' contention that federal jurisdiction can be grounded on plaintiffs' waiver of any federal claims is without merit. [HNT](#) [↑] Whether plaintiffs, as representatives of a presently uncertified class, can waive any potential federal claims is an issue to consider when deciding whether the class should be certified or what class should be certified. As masters of their complaint, however, plaintiffs may choose to not avail themselves of any federal law. The question for the state court is whether, while waiving any potential federal claims, the plaintiffs will be satisfactory representatives of all the class members. Or, the matter may be considered in defining the class, so that the class would not include those [**17] wishing to assert a federal antitrust claim. The waiver of federal claims does not create a federal question. Cf. [*In re Romulus Community Schs.*, 729 F.2d 431 \(6th Cir. 1984\)](#) (in a class action lawsuit, following the removal of the case by defendants and a motion by plaintiffs to strike the federal claim from the complaint and remand the case, the district court granted plaintiffs' motion without prejudice; writ of mandamus denied and appeal of withdrawal of federal claim dismissed).⁷

[**18] FEDERAL DIVERSITY JURISDICTION

Plaintiffs, who are citizens of Alabama, contend that diversity does not exist because defendant Maxwell is also an Alabama citizen and because some companies which are members of National Pool are citizens of Alabama.

[*1545] Defendants allege that the non-diverse defendants do not defeat federal jurisdiction. First, they contend that Maxwell, the Director of Government, Consumer, and Industry Affairs for NCCI's Southern Region, is a nominal party who is fraudulently joined. Second, they contend that National Pool is a contractual reimbursement mechanism, not an unincorporated association as plaintiffs allege. In order to establish federal diversity jurisdiction, defendants must show both that Maxwell is fraudulently joined and that National Pool is incorrectly deemed an unincorporated association.

The court finds that National Pool is an unincorporated association under Florida law and can be sued in its name under Alabama law. Thus pursuant to federal law, in which diversity jurisdiction involving an unincorporated

⁶ [*Buchanan v. Delaware Valley News*, 571 F. Supp. 868 \(E.D. Pa. 1983\)](#) (court held that claims arose under federal antitrust law because Pennsylvania has no state antitrust statute); [*Three J Farms, Inc. v. Alton Box Bd. Co.*, 1979-1 Trade Cas. \(CCH\) P62,423 \(D.S.C. 1978\)](#) (facts alleged by the plaintiffs were almost identical to the facts in the consolidated complaint filed in federal court in accordance with multidistrict litigation, and the complaint alleged interstate commerce), *rev'd on other grds.*, [*609 F.2d 112 \(4th Cir. 1979\)*](#), *cert. denied*, [*445 U.S. 911 \(1980\)*](#). In [*Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co.*, 747 F. Supp. 1292](#), *modified on other grds.*, [*810 F. Supp. 986 \(C.D. Ill. 1990\)*](#), after noting that federal antitrust laws do not preempt Illinois antitrust laws, the court looked at the merits of the case, decided that the commerce activity alleged in the complaint was interstate, and ruled that Illinois law was inapplicable "although neither of the parties have cited any law on this point and the Court has found no law on this point" [*Mechanical Rubber*, 747 F. Supp. at 1295-96](#). The case has been criticized with its own circuit. See [*Corporate Travel Consultants, Inc. v. United Airlines, Inc.*, 799 F. Supp. 58, 60 n.1 \(N.D. Ill. 1992\)](#) ("This court does not believe that it would be wise to adopt the broad rule stated by the district court in *Mechanical Rubber*."). The court finds *Mechanical Rubber* to be unpersuasive.

⁷ The remand in *In re Romulus* was not based on § 1441 or § 1447, but rather the district court followed [*United Mine Workers v. Gibbs*, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\)](#), and held that in accordance with its discretion the court would remand the state claims to the state court following the dismissal of the sole federal claim. Additionally, the district court allowed the withdrawal of the federal claim without notice to the class members because the class was not yet certified "and may never be . . ." [*In re Romulus*, 729 F.2d at 440](#) (quoting the district court).

association is based on the residency of the members, and because National Pool has member corporations incorporated and with their [**19] principal places of business in Alabama,⁸ federal diversity jurisdiction is defeated. Therefore, the court will not examine the fraudulent joinder contention made by defendants regarding defendant Maxwell.

National Pool

Plaintiffs assert that National Pool is an unincorporated association. [HN8](#)[[↑]] In a suit based on diversity jurisdiction where the unincorporated association is sued as an entity, an unincorporated association has citizenship in any state in which one of its members has citizenship. See 7C Charles A. Wright et al., *Federal Practice and Procedure* § 1861, p. 217 (1986). Defendants argue that National Pool is a contractual reinsurance mechanism and not any type of legal entity, essentially averring that the members of National Pool have entered into a contract for their own benefits which they refer to as the National Workers' Compensation Reinsurance Pool.

[HN9](#)[[↑]] An unincorporated association has been defined as a group of persons acting together to prosecute [**20] a common purpose or enterprise. *Black's Law Dictionary* 121 (6th ed. 1990) (one of several definitions of "association"; citing [Penrod Drilling Co. v. Johnson](#), 414 F.2d 1217, 1222 (5th Cir. 1969)[], cert. denied, 396 U.S. 1003, 24 L. Ed. 2d 495, 90 S. Ct. 552(1970)]).⁹ See also [Motta v. Samuel Weiser, Inc.](#), 768 F.2d 481, 485 (1st Cir.) (defining "unincorporated association"), cert. denied, 474 U.S. 1033, 88 L. Ed. 2d 575, 106 S. Ct. 596 (1985); [Project Basic Tenants Union v. Rhode Island Housing & Mortgage Finance Corp.](#), 636 F. Supp. 1453, 1458 (D.R.I. 1986) (same); *Black's Law Dictionary* at 1531-32 (defining unincorporated association as, "Voluntary group of persons, without a charter, formed by mutual consent for purpose of promoting common enterprise or prosecuting common objective.") (citing [Local 4076, United Steelworkers of Am. v. United Steelworkers of Am., AFL-CIO](#), 327 F. Supp. 1400, 1402 (W.D. Pa. 1971)). [HN10](#)[[↑]] The actual function of the group, not its formal title, determines the legal status of the group, [California Clippers, Inc. v. United States Soccer Football Ass'n](#), 314 F. Supp. 1057, 1068 (N.D. Cal. 1970); [Rosen v. Alleghany Corp.](#), [**21] 133 F. Supp. 858, 867 (S.D.N.Y. 1955), and the law of the state where the group was "created" determines whether the group is an unincorporated association. [Sanchez v. Bowers](#), 70 F.2d 715, 717 (2d Cir. 1934); [California Clippers](#), 314 F. Supp. at 1068. To determine whether National Pool is an unincorporated association, we examine Florida law.¹⁰

[**22] Florida statutes do not define an unincorporated association and the court has [*1546] found no case law defining the term. Florida Jurisprudence defines an association as "a collection of persons who have joined together for a common objective or purpose" and states, "An unincorporated association is generally created and formed by the voluntary action of a number of individuals in associating themselves together under a common name for the accomplishment of some lawful purpose." 4 Fla. Jur. 2d Associations & Clubs §§ 1 & 2 (1994). The former Fifth Circuit defined association as "a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise." [Penrod Drilling Co.](#), 414 F.2d at 1222 (quoting 7 C.J.S. Associations § 1, at p. 19). The definition of association in *Penrod Drilling* has been accepted by other courts as a definition of unincorporated association. [Committee for Idaho's High Desert v. Yost](#), 881 F. Supp. 1457, 1469 n.1 (D. Idaho 1995); [Motta v. Samuel Weiser, Inc.](#), 598 F. Supp. 941, 949-50 (D. Me. 1984), aff'd, [768](#)

⁸ See [28 U.S.C. § 1332\(c\)\(1\)](#).

⁹ In [Bonner v. City of Prichard](#), 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit held as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

¹⁰ NCCI is based in Florida with its main offices in Boca Raton, Florida. Vieweg Aff. at P3. NCCI is the administrator of the state-approved workers' compensation residual market plan. *Id.* at P4. In certain cases, NCCI assigns employers who are unable to obtain their own workers' compensation insurance in a direct manner to a servicing carrier who issues a policy for the employer and acts like a direct carrier. However, the servicing carriers have contracted and formed National Pool which reinsures the risks, thus sharing in the risks of the insurance. *Id.* at P6. NCCI's employee, William Vieweg, is the Administrator for National Pool.

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F.2d 481 (1st Cir.), cert. denied, 474 U.S. 1033, [**23] 88 L. Ed. 2d 575, 106 S. Ct. 596 (1985); Delta Coal Program v. Libman, 554 F. Supp. 684, 686 n.1 (N.D. Ga. 1982), aff'd, 743 F.2d 852 (11th Cir. 1984); California Clippers, 314 F. Supp. at 1068; see also *Black's Law Dictionary* at 121 (one of several definitions of association which "An unincorporated society;" and cites *Penrod Drilling*). The court therefore will apply the common law definition of unincorporated association.

Under this definition, the court finds that National Pool is an unincorporated association.

The insurance companies participating in National Pool execute a document, Articles of Agreement, which states:

Whereas, the undersigned parties hereto . . . are engaged in the business of insuring liability under workers compensation acts . . . ; and

Whereas, in addition to being participating companies they are also members of Workers Compensation Insurance Plans . . . that are in effect in various states . . . ; and

* * * *

Whereas, it is desired that the premiums, losses, costs and expenses arising under certain policies issued pursuant to the Insurance Plans are covered by these Articles of Agreement be equitably distributed [**24] by means of reinsuring the policies among the participating companies so as to avoid undue loss to any one of the participating companies . . . ;

We therefore, for the purpose of reinsuring such policies with such participating companies, and for the protection of each such participating company from extraordinary hazards incident to the issuance of such policies, the undersigned participating companies hereby subscribe to, become parties to, and adopt these Articles of Agreement.

Vieweg Aff., exh. A (Articles of Agreement, as amended effective January 1, 1993). In addition to the purpose described in the above quoted preamble, the Articles have a separate section titled "Purpose and Limitations" which also describes the purpose of the organization. Art. II. The Articles of Agreement delineate the procedure for electing a Board of Governors which manages and controls the operations and business of the National Pool except for those powers reserved for the Administrator. *Id.* at Art. V. In turn, the Board of Governors elects a Chair and Executive Vice-Chair. *Id.* The participating companies hold annual meetings, and the Chair of the Board of Governors has the power [**25] to call additional meetings. *Id.* at Art. IV. The National Pool is not an informal, transitory group, but rather an organized, structured group existing for the purpose of reinsuring its members against excessive losses from workers' compensation insurance policies.

National Pool, through its Articles of Agreement, has been in existence at least since 1970. Vieweg Dep. at 24. It collects the premiums due to the participating carriers and distributes the monies quarterly. Although it uses a bank account established through NCCI and the monies collected from the Alabama carriers are mingled with the monies collected from other pools, National Pool maintains an accounting system whereby it accounts for its balance. Vieweg Dep. [*1547] at 33-36, 66. The participating carriers of National Pool reimburse NCCI for expenses it incurs during the administration of National Pool. Vieweg Dep. at 30. National Pool does not have its own mailing address, but can be reached by writing to National Pool in care of NCCI. Vieweg Dep. at 54.

In *California Clippers*, the district court determined that the group at issue was not an unincorporated association, noting that the group had no charter, no bylaws, [**26] no articles, no office, no place of business, no mailing address, no bank account, no assets, and no obligations. 314 F. Supp. at 1068. The court stated, "We have only the most informal and transitory of organizations. . . . In fact, it appears that this committee has never even met." *Id.*

In *Project Basic Tenants Union*, the court found that the union, which lacked structure and had no elected officers, no bylaws, no budget, and no set membership, was an unincorporated association because the union had a distinct purpose and acted towards meeting that purpose. 636 F. Supp. at 1458. The court stated, "Associations that are not actual assemblages of people, but rather are amorphous and attenuated groups or the most informal or transitory of organizations, have been held not to constitute unincorporated associations." *Id.* (quotation marks and citation omitted). See also *Committee for Idaho's High Desert*, 881 F. Supp. at 1463, 1469 (holding the Committee

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was an unincorporated association "comprised of a voluntary group of individuals who have formed and joined together over the years for the purpose of prosecuting [an environmental] common interest enterprise.").

Defendants [**27] rely on the intention of the participating carriers of National Pool and *Roby v. Corporation of Lloyd's, 796 F. Supp. 103 (S.D.N.Y. 1992)*, aff'd, *996 F.2d 1353* (2d Cir.), cert. denied, U.S. , 114 S. Ct. 385 (1993), to support their contention that National Pool is not an unincorporated association. They point out that there was a change in the Articles of Agreement in 1991 to delete the designation of National Pool as an unincorporated association. The court notes, however, that no basic change was made in the organization or operation of National Pool which, until then, had been referred to by its members as an unincorporated association. The intention of National Pool, however, is irrelevant. If the group fits the definition of an unincorporated association, then it is an unincorporated association. *California Clippers, 314 F. Supp. at 1068* (the title the group gives itself is not determinative of whether the group is an unincorporated association); *Rosen, 133 F. Supp. at 867* (same). *Roby* is distinguishable.

In *Roby* investors in Lloyd's of London brought an action against Lloyd's syndicates, "groups of insurers-investors which are [**28] organized for the purpose of assuming insurance risks[,]" alleging violations of federal securities laws and the Racketeer Influenced and Corrupt Organizations Act. *Id. at 103-04*. The court examined the law of England where the syndicates were "created" and held that the syndicates were not legal entities and could only be sued by proceeding against all the members or against a representative member or members. *Id. at 105-06*.

Alternatively, applying New York law, the court concluded the same outcome would be reached based on legal precedent for that court and the New York statutory definition of unincorporated associations. *Id. at 107*. New York case law defines an unincorporated association as "an organization composed of a body of persons united without a charter for the prosecution of some common enterprise." *Meinhart v. Contresta, 194 N.Y.S. 593, 594 (N.Y. Sup. Ct. 1922)*; see also *Heifetz v. Rockaway Point Volunteer Fire Dep't, 124 N.Y.S.2d 257, 260* (N.Y. Sup. Ct.), aff'd, *282 A.D. 1062, 126 N.Y.S.2d 604* (N.Y. App. Div. 1953). **HN11**¹¹ The unincorporated association is not a legal entity separate from its members. *Heifetz, 124 N.Y.S.2d at 260*. However, § 13 [**29] of the New York statutes, which mandates the proper procedure for maintaining an action against an unincorporated association, states in part:

An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, [*1548] against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

N.Y. Gen'l Ass'n Law § 13 (McKinney 1995) (emphasis added); see also *Bobe v. Lloyd's, 27 F.2d 340, 341 (S.D.N.Y. 1927)*, aff'd per curiam, *27 F.2d 347* (2d Cir. 1928) (quoted language of § 13 the same). Section 13 relaxed the common law rule which required service of process on all of the members of the association. *Crystal v. Board of Educ. of the City Sch. Dist. of the City of Long Beach, 87 Misc. 2d 632, 385 N.Y.S.2d 701, 703 (N.Y. Sup. Ct. 1976)*. [**30]

The court in *Roby* relied on the prior decision concerning Lloyd's syndicates which held that the syndicates were not unincorporated associations pursuant to § 13 of the General Associations Law. *Roby, 796 F. Supp. at 107* (citing *Bobe, 27 F.2d at 345*). The issue in *Bobe* was whether service of process had been obtained by serving the Lloyd's corporation as the alleged treasurer of the two syndicates, both alleged to be unincorporated associations. *27 F.2d at 341*. The court held that the syndicates were not unincorporated associations "within the meaning of section 13 of the General Associations Law of the state of New York[.]" *id. at 345*, and that Lloyd's was not the treasurer for the two syndicates, *id. at 346*.

Florida law has not liberalized the common law rules of service on an unincorporated association, see *Florio v. State, 119 So. 2d 305, 309 (Fla. Dist. Ct. App. 1960)*, thus there is no Florida equivalent to New York's § 13.

Pursuant to the only definition of unincorporated association in use in Florida, i.e., the broad, common law definition used in this circuit, National Pool is an unincorporated association.¹¹

[**31] Although the court decides that National Pool is an unincorporated association, the issue remains whether it is subject to suit in its name. To determine whether an unincorporated association is subject to suit, the court examines the law of the forum state.

At common law, unincorporated associations were not legal entities subject to suit. Actions against an unincorporated association had to name the individual members as defendants and serve process upon each member. This common law rule is not in effect in Alabama. Alabama Rules of Civil Procedure provide for service of an unincorporated association "by serving it in its entity name by certified mail at any of its usual places of business or by serving an officer or agent of any such organization or association or an officer or agent of any branch or local of such organization or association" Rule 4(c)(8) (Supp. 1993). See also [Ala. Code §§ 6-7-80](#) to -81 (1993) (actions may be commenced by or against any unincorporated association or organization in its name). Cf. *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, Purchase Directorate*, 360 F.2d 103, 108 n.1 (2d Cir.) (in New York, an association [**32] may not be sued in the association's name, but may be sued in the name of the president or treasurer), cert. denied, 385 U.S. 931, 17 L. Ed. 2d 213, 87 S. Ct. 291 (1966). Therefore, defendant National Pool, an unincorporated association, can be sued and served with process in the name of the association.

"For purposes of diversity jurisdiction, an unincorporated association is said to have no citizenship of its own. Thus, if suit is brought by or against an association as an entity or by or against its individual members, [*1549] the organization's citizenship is deemed to be the same as that of its members." 7C Wright et al., § 1861 at 217; see also [28 U.S.C. § 1332](#). Among the members of National Pool are corporations incorporated in Alabama and with their principal places of business in Alabama. Plaintiffs also are residents of Alabama. Therefore, diversity jurisdiction is destroyed.

CONCLUSION

There is no federal question jurisdiction on the face of the complaint. While defendants raise questions regarding whether plaintiffs have a valid state claim, they do not meet their burden of proving that plaintiffs engaged in artful pleading.

Defendant National Pool is an unincorporated [**33] association and accordingly is a resident of every state where its members are residents. Because National Pool has members which are incorporated in Alabama and have their principal places of business in Alabama, defendant National Pool defeats federal diversity jurisdiction.

It is unnecessary to reach the contention that Maxwell was fraudulently joined, since there would be no diversity jurisdiction even if the court agreed.

Plaintiffs' motion to remand is GRANTED, and it is hereby ORDERED that this case is remanded to the Circuit Court for Bullock County, Alabama. The clerk is DIRECTED to take appropriate action to effect the remand.

DONE this 25th day of July, 1995.

W. HAROLD ALBRITTON

¹¹ If Alabama law is considered controlling, the outcome would be the same. The court has found neither a statutory definition nor a case law definition of unincorporated association in Alabama. From this, the court infers that the common law definition remains in effect. See, e.g., *Gulf South Conference v. Boyd*, 369 So. 2d 553, 555 (Ala. 1979) (the Gulf South Conference is an unincorporated association composed of nine colleges and universities with a stated purpose and a self-imposed government of rules, bylaws, and a constitution); [League of Women Voters v. Renfro](#), 292 Ala. 128, 290 So. 2d 167, 168 (Ala. 1974) ("[The League of Women Voters] is a non-profit, unincorporated association, the general purpose of which is to promote political responsibility."). National Pool is an unincorporated association under the common law definition.

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UNITED STATES DISTRICT JUSTICE

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Vinci v. Waste Management, Inc.

Court of Appeal of California, First Appellate District, Division One

July 25, 1995, Decided

No. A066486.

Reporter

36 Cal. App. 4th 1811 *; 43 Cal. Rptr. 2d 337 **; 1995 Cal. App. LEXIS 697 ***; 95 Cal. Daily Op. Service 5847; 1995-2 Trade Cas. (CCH) P71,069

LEONARD G. VINCI, Plaintiff and Appellant, v. WASTE MANAGEMENT, INC., et al., Defendants and Respondents.

Prior History: [***1] Superior Court of City and County of San Francisco, No. 957805, William J. Cahill, Judge.

Disposition: The judgment of dismissal is affirmed.

Core Terms

antitrust, recycling, antitrust violation, anticompetitive, alleges, shareholder, proper party, settlement, practices

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN1](#) [] **Public Enforcement, State Civil Actions**

The Cartwright Act, [Cal. Bus. & Prof. Code § 16700 et seq.](#), prohibits combinations in restraint of trade. [Cal. Bus. & Prof. Code § 16720.](#)

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN2](#) [] **Public Enforcement, State Civil Actions**

See [Cal. Bus. & Prof. Code § 16750\(a\).](#)

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

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

HN3 [down] **Private Actions, Standing**

The doctrine of antitrust standing is somewhat different from standing as a constitutional doctrine. Harm to an antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether a plaintiff is a proper party to bring a private antitrust action.

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

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN4 [down] **Private Actions, Standing**

A court evaluates a number of factors on a case-by-case basis to determine whether a particular plaintiff is a proper party to bring an antitrust action. The factors which favor a finding that a plaintiff is a proper party include the following: (1) the existence of an antitrust violation with resulting harm to a plaintiff; (2) an injury of a type which the antitrust laws were designed to redress; (3) a direct causal connection between the asserted injury and the alleged restraint of trade; (4) the absence of more direct victims so that the denial of standing would leave a significant antitrust violation unremedied; and (5) the lack of a potential for double recovery.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

After sustaining defendant's demurrer, the trial court entered a judgment dismissing a former employee's suit against his former employer for alleged monopolistic practices. Plaintiff had owned and operated a recycling business. Defendant acquired the business, plaintiff became an employee, and defendant later fired him. Plaintiff sued defendant on the basis that its acquisitions and predatory price competition with competing businesses created a monopoly in violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)). (Superior Court of City and County of San Francisco, No. 957805, William J. Cahill, Judge.).

The Court of Appeal affirmed. The court held that plaintiff had no standing to sue defendant under the Cartwright Act. The employee could not sue for his loss of a recycling corporation that the employer acquired from him. Even if the employee were the sole shareholder of the corporation, the remedy for the injury rested with the corporation instead of the shareholder to avoid a double recovery by each of them. Also, the employee could not sue for his lost job because the loss of a job was not the type of loss the **antitrust law** was intended to forestall. He did not allege employment boycott or that he was so essential to the monopolistic scheme that his firing was itself an anticompetitive act. There were competitors and consumers allegedly injured by the employer's predatory price competition and acquisition of market power who could remedy any antitrust violations. The employee's only remedy was a wrongful termination action. (Opinion by Dossee, J., with Strankman, P. J., and Newsom, J., concurring.)

Headnotes

CA(1) [down] (1)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Standing to File Antitrust Actions.

--Under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), which prohibits combinations in restraint in trade, whether a particular plaintiff has standing as a proper party to bring an antitrust action depends on the following: (1) the existence of an antitrust violation with resulting harm to the plaintiff, (2) an injury of a type which the antitrust laws were designed to redress, (3) a direct causal connection between the asserted injury and the alleged restraint of trade, (4) the absence of more direct victims so that the denial of standing would leave a significant antitrust violation unremedied, and (5) the lack of a potential for double recovery.

[CA\(2\)](#) [] (2)

Monopolies and Restraints of Trade § 10—Remedies of Individuals—Standing to Bring Private Antitrust Action—Right of Employee to Sue Employer for Antitrust Violations: Employer and Employee § 5—Mutual Rights and Duties.

--A former employee had no standing to sue his former employer for creation of a monopoly in violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) by acquiring competitors and predatory price competition. Thus, the trial court properly sustained the employer's demurrer to the employee's complaint. The employee could not sue for his loss of a recycling corporation that the employer acquired from him. Even if the employee were the sole shareholder of the corporation, the remedy for the injury rested with the corporation instead of the shareholder to avoid a double recovery by each of them. Also, the employee could not sue for his lost job because the loss of a job was not the type of loss the antitrust law was intended to forestall. He did not allege employment boycott or that he was so essential to the monopolistic scheme that his firing was itself an anticompetitive act. There were competitors and consumers allegedly injured by the employer's predatory price competition and acquisition of market power who could remedy any antitrust violations. The employee's only remedy was a wrongful termination action.

[See 1 **Witkin**, Summary of California Law (9th ed. 1987) Contracts, § 575 et seq.]

Counsel: Joseph L. Alioto for Plaintiff and Appellant.

McCutchen, Doyle, Brown & Enersen, Alfred C. Pfeiffer, Jr., James L. Hunt, Frank M. Hinman and Amy J. Metzler for Defendants and Respondents.

Judges: Opinion by Dossee, J., with Strankman, P. J., and Newsom, J., concurring.

Opinion by: DOSSEE, J.

Opinion

[*1813] [338] DOSSEE, J.**

In this antitrust action the sole question presented for our review is whether plaintiff has standing to sue his employer for alleged monopolistic practices. We conclude he does not, and we affirm the judgment of dismissal.

PROCEDURAL HISTORY

Plaintiff Leonard G. Vinci owned and operated a recycling business, Vinci Enterprises, Inc., which was in competition with Oakland Scavenger Company. In 1986 Vinci Enterprises sued Oakland Scavenger for alleged anticompetitive practices. Oakland Scavenger was eventually acquired by defendant Waste Management, Inc. The lawsuit between Vinci Enterprises and Oakland Scavenger was settled in 1989, and under the terms of the settlement agreement, Oakland [***2] Scavenger's successor, Waste Management, agreed to provide Vinci Enterprises with quality materials for its recycling operation.

At some unspecified time thereafter, Waste Management took over the operation of the 77th Avenue facility which had been operated by Vinci Enterprises. As part of that acquisition, plaintiff was employed by Waste Management, but on December 2, 1992, he was fired.

More than a year later, on January 12, 1994, plaintiff filed the present lawsuit against Waste Management alleging, among other things, wrongful termination, breach of the settlement agreement, and anticompetitive practices in violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)).

Waste Management demurred to the complaint. Waste Management argued that plaintiff's claim for wrongful termination was barred by the one-year statute of limitations and that plaintiff was not a proper party to sue either for breach of the settlement agreement or for antitrust violations. The trial court agreed with Waste Management and sustained the demurrer. Plaintiff appeals from the judgment of dismissal.

On appeal plaintiff does not dispute that the statute of limitations had expired on his [***3] claim for wrongful termination. Nor does he challenge the trial court's conclusion that plaintiff, as an individual, has no standing to sue for breach of the settlement agreement entered into between Waste Management and Vinci Enterprises, Inc. Plaintiff's argument on appeal is confined to the question whether plaintiff has standing to sue under the Cartwright Act.

[*1814] DISCUSSION

HN1 [↑] The Cartwright Act prohibits combinations in restraint of trade. ([Bus. & Prof. Code, § 16720](#).) Under the act, **HN2** [↑] "[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor . . ." ([Bus. & Prof. Code, § 16750, subd. \(a\)](#).)

HN3 [↑] In interpreting similar language in the federal **antitrust law**, the United States Supreme Court observed that the doctrine of antitrust standing is somewhat different from standing as a constitutional doctrine. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." ([Associated General Contractors \[***4\] v. Carpenters \(1983\) 459 U.S. 519, 535, fn. 31 \[74 L. Ed. 2d 723, 736-737, 103 S. Ct. 897\]](#).) The court recognized that "contradictory and inconsistent results" had been reached in prior cases due to the absence of a precise test to determine antitrust standing. ([Id. at p. 536, fn. 33 \[74 L. Ed. 2d at p. 737\]](#).) However, the court declared that the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that would dictate the result in every case. ([Id. at p. 536 \[74 L. Ed. 2d at p. 737\]](#).) Instead, **HN4** [↑] the court set out a number of factors to be evaluated on a case-by-case basis to determine whether a particular plaintiff is a proper party to bring an antitrust action. ([Id. at pp. 537-544 \[74 L. Ed. 2d at pp. 737-742\]](#)).¹

[***5] [**339] **CA(1)** [↑] (1) The factors identified by the court which favor a finding that the plaintiff is a proper party include the following: (1) the existence of an antitrust violation with resulting harm to the plaintiff; (2) an injury of a type which the antitrust laws were designed to redress;² (3) a direct causal connection between the asserted injury and the alleged restraint of trade; (4) the absence of more direct victims so that the denial of standing would leave a significant antitrust violation unremedied; and (5) the lack of a potential for double recovery. ([459 U.S. at pp. 537-544 \[74 L. Ed. 2d at pp. 737-744\]](#).)

¹ Because the Cartwright Act has objectives identical to the federal antitrust acts, the California courts look to cases construing the federal antitrust laws for guidance in interpreting the Cartwright Act. ([Blank v. Kirwan \(1985\) 39 Cal. 3d 311, 320 \[216 Cal.Rptr. 718, 703 P.2d 58\]](#); [Partee v. San Diego Chargers Football Co. \(1983\) 34 Cal. 3d 378, 382 \[194 Cal.Rptr. 367, 668 P.2d 674\]](#), cert. den. [466 U.S. 904 \[80 L. Ed. 2d 153, 104 S. Ct. 1678\]](#); [Mailand v. Burckle \(1978\) 20 Cal. 3d 367, 376 \[143 Cal.Rptr. 1, 572 P.2d 1142\]](#).)

² Waste Management relies almost exclusively upon this factor, articulated by the Supreme Court in [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. \(1977\) 429 U.S. 477, 489 \[50 L. Ed. 2d 701, 712-713, 97 S. Ct. 690\]](#). Yet, in [Associated General Contractors](#) the Supreme Court clarified that the nature of the plaintiff's alleged injury is but one of several factors to be considered.

[*1815] [***6] **CA(2)[↑]** (2) In the present case, plaintiff alleges that Waste Management has been attempting to monopolize the business of garbage collection and recycling in the San Francisco Bay Area by acquiring its competitors and by engaging in predatory practices designed to injure or destroy its competitors. Plaintiff alleges two distinct forms of injury: (1) the loss of his recycling business and (2) the loss of his job with Waste Management. We analyze them separately.

(1) Loss of Recycling Business

The complaint alleges that in 1989 and 1990, after the previous lawsuit was settled, Waste Management breached the settlement agreement by depriving Vinci Enterprises, Inc., of the quality material needed to operate its recycling business. It did so by enlisting other recycling haulers to take accounts from Waste Management (presumably accounts that Vinci Enterprises wanted for itself), by refusing to deliver certain accounts to Vinci Enterprises, by intercepting and diverting materials destined for Vinci's recycling facility, and by procrastinating in procuring a lucrative account promised to Vinci Enterprises.

The complaint does not reveal the exact relationship between plaintiff and Vinci Enterprises, [***7] Inc., but even if we read into the complaint an allegation that plaintiff was sole shareholder of the corporation, we conclude that plaintiff lacks standing to sue. The party directly injured by Waste Management's conduct was not plaintiff, an individual, but Vinci Enterprises, Inc., a corporation. The remedy lies with the corporation, not the shareholder, even if the injured shareholder is the sole shareholder. ([Solinger v. A & M Records, Inc. \(9th Cir. 1983\) 718 F.2d 298, 299](#); [Stein v. United Artists Corp. \(9th Cir. 1982\) 691 F.2d 885, 896](#); [Sherman v. British Leyland Motors, Ltd. \(9th Cir. 1979\) 601 F.2d 429, 439](#).) In fact, to allow a shareholder to sue on his own behalf would run the risk of double recovery--once to the shareholder and once to the corporation. (See [Stein, supra, 691 F.2d at p. 897](#).)

(2) Loss of Job

The complaint alleges that Waste Management tried to put out of business one Richard Valle, who was engaged in a joint venture with Waste Management. Further, the complaint alleges that in September 1992 Waste Management sought to engage in predatory price competition with Norcal, Inc., which held the garbage contract for San Francisco, in order [***8] to damage Norcal so that Waste Management could acquire the company at a distress price. Finally, the complaint alleges that as an employee of Waste Management, plaintiff refused to participate in these anticompetitive practices, [*1816] although ordered to do so by his superiors at Waste Management, and he was fired as a result.

It is clear from the complaint that at the time plaintiff lost his job plaintiff was neither a consumer nor a competitor in the market in which trade was restrained. Plaintiff was an employee. The injury he suffered, the loss of his job, was not the type of loss the antitrust statute was intended to forestall. ([Fallis v. Pendleton Woolen Mills, ***3401 Inc. \(6th Cir. 1989\) 866 F.2d 209, 211](#); [Feeney v. Chamberlain Mfg. Corp. \(5th Cir. 1987\) 831 F.2d 93, 96](#); [Program Engineering v. Triangle Publications \(9th Cir. 1980\) 634 F.2d 1188, 1191](#); [Solinger v. A & M Records, Inc. \(9th Cir. 1978\) 586 F.2d 1304, 1311](#), cert. den. 441 U.S. 908 [60 L. Ed. 2d 377, 99 S. Ct. 1999].) It did not result from Waste Management's acquisition of market power. ([In re Industrial Gas Antitrust Litigation \(7th Cir. 1982\) 681 F.2d 514, 519](#), cert. den. [***9] 460 U.S. 1016 [75 L. Ed. 2d 487, 103 S. Ct. 1261].)

Moreover, the alleged targets of Waste Management's anticompetitive scheme, Richard Valle and Norcal, are the normal parties to remedy any antitrust violations. Plaintiff's remedy for his own injury is a wrongful termination action. Plaintiff cannot resurrect that time-barred cause of action by framing his lawsuit as an antitrust claim. We hold that plaintiff is not a proper party to bring an action for antitrust violations by his employer.³

³ In light of our decision we find it unnecessary to reach the argument raised in Waste Management's supplemental brief that plaintiff is collaterally estopped from proceeding with his state court action because his lawsuit filed in federal court was dismissed. The requests for judicial notice of the federal court proceedings are denied.

We are not persuaded otherwise by [*Ostrofe v. H.S. Crocker Co., Inc. \(9th Cir. 1984\) 740 F.2d 739*](#). In that case the court held that an employee could sue his employer and [***10] other conspirators after he was fired for refusing to participate in a price-fixing conspiracy and was boycotted from employment by all the conspirators.

Ostrofe is distinguishable, as the trial court here correctly found. First, the plaintiff in *Ostrofe* suffered direct injury as the victim of a horizontal boycott. ([*740 F.2d at p. 742*](#); see [*Bhan v. NME Hospitals, Inc. \(9th Cir. 1985\) 772 F.2d 1467, 1470, fn. 4*](#).) Further, he was an essential participant in the price-fixing scheme, which could not have succeeded without his active participation. Thus, his discharge was an integral part of the anticompetitive conduct. ([*Ostrofe v. H.S. Crocker Co., Inc., supra, 740 F.2d at pp. 745-746*](#).) And, finally, because *Ostrofe* was a necessary part of the conspiracy, there was no one else with as strong an incentive to vindicate the public interest in antitrust enforcement. ([*Id. at p. 746*](#).) The antitrust violation would have gone unremedied if the plaintiff had been denied standing. ([*Id. at p. 747*](#).)

[*1817] In the present case, in contrast, plaintiff has made no allegations to bring him within the *Ostrofe* case. He has not alleged any employment boycott. [***11] Nor has he alleged that he was so essential to the anticompetitive scheme that his discharge was itself an anticompetitive act. And, as we have discussed, direct victims do exist who could remedy the antitrust violations. In subsequent cases, even from the Ninth Circuit, *Ostrofe* has been limited to its unique facts. (See [*Lucas v. Bechtel Corp. \(9th Cir. 1986\) 800 F.2d 839, 846*](#); [*Exhibitors' Service, Inc. v. American Multi-Cinema \(9th Cir. 1986\) 788 F.2d 574, 580*](#).) We decline to extend it further.

The judgment of dismissal is affirmed.

Strankman, P. J., and Newsom, J., concurred.

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Jala v. Western Auto Supply Co.

United States District Court for the District of Maine

July 26, 1995, Decided ; July 26, 1995, RECEIVED AND FILED

Civil No. 95-100-P-H

Reporter

1995 U.S. Dist. LEXIS 11028 *; 1995-2 Trade Cas. (CCH) P71,173

JOSEPH M. JALA d/b/a WESTERN AUTO ASSOCIATE STORE, PLAINTIFF v. WESTERN AUTO SUPPLY COMPANY, DEFENDANT

Core Terms

manufacturer, conspiracy, Counts, termination, Sherman Act, acquiescence, Anti-Trust, acceding, prices, antitrust statute, motion to dismiss, anti trust law, defense motion, distributor, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN1[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Anti-Trust Act, 15 U.S.C.S. § 1, prohibits any contract, combination or conspiracy in restraint of trade.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

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

HN2[] Sherman Act, Claims

Section 1 of the Sherman Act requires that there be a contract, combination or conspiracy between the manufacturer and other distributors in order to establish a violation. [15 U.S.C. § 1](#). Independent action is not proscribed. A manufacturer generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. The manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. A distributor is free to acquiesce in the manufacturer's demand in order to avoid termination. Acquiescence because of fear of termination does not create an agreement.

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For Defendant: Andrew M. Horton, Esq., Verrill & Dana, Portland, ME. Seth W. Brewster, Esq., Ropes & Gray, Boston, MA.

Judges: D. Brock Hornby, United States District Judge

Opinion by: D. Brock Hornby

Opinion

ORDER ON DEFENDANT'S MOTION TO DISMISS

This is a lawsuit against Western Auto Supply by a terminated dealer. Count IV invokes section 1 of the federal Sherman Anti-Trust Act, [15 U.S.C. § 1](#). Counts V and VI are state law claims under, respectively, the Missouri antitrust statute, V.A.M.S. [§ 416.031](#), and the Maine antitrust statute, [10 M.R.S.A. § 1101](#). Western Auto Supply has moved to dismiss the antitrust counts. The parties agree that the disposition of Counts V and VI is controlled by the disposition of Count IV. For the reasons that follow, I GRANT the defendant's motion and dismiss Counts IV, V and VI.

HN1[] Section 1 of the Sherman Anti-Trust Act prohibits any "contract, combination . . . or conspiracy" in restraint of trade. The plaintiff's complaint alleges no such contract, combination or conspiracy. Instead, it asserts unilateral [*2] action by the defendant Western Auto Supply in setting prices and terminating the plaintiff's dealership. That omission is the essential basis of Western Auto Supply's motion to dismiss. The plaintiff responds by pointing to P 23 of his complaint where he states that he "acceded to Western Auto's demands that he set retail prices at their specified levels." In other words, the plaintiff does not dispute that an agreement is necessary, but maintains that his acceding is enough.

As support for his contention that his acceding to Western Auto's demand is a sufficient contract, combination or conspiracy upon which to sue, the plaintiff cites footnote 6 of [Albrecht v. Herald Co., 390 U.S. 145, 150 n.6, 19 L. Ed. 2d 998, 88 S. Ct. 869 \(1968\)](#); [Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1266 \(9th Cir.\), cert. denied, 464 U.S. 956, 78 L. Ed. 2d 331, 104 S. Ct. 385 \(1983\)](#); and [Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 752 \(1st Cir. 1994\)](#).

To the extent that footnote 6 of *Albrecht* might once have furnished any support for the plaintiff, that support was destroyed by [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#). There the Court stated:

HN2[] Section 1 of the Sherman Act requires that there be a 'contract, combination . . . or conspiracy' between the manufacturer *and other distributors* in order to establish a violation. [15 U.S.C. § 1](#). Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. [United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#); cf. [United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 \(1960\)](#). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal

with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

465 U.S. at 760 (emphasis supplied). See also 7 Phillip E. Areeda, Antitrust Law P 1451d,e at 127, 128 (1986) ("acquiescence because of fear of termination does not create an agreement"). The *Filco* case, 709 F.2d 1257 (9th Cir. 1983), preceded Monsanto, 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984), and therefore [*4] is no longer persuasive authority. Caribe BMW, 19 F.3d 745 (1st Cir. 1994), assumes that acquiescence by the plaintiff to a manufacturer's price setting is enough, but that was not the issue confronting the court. There is no indication in *Caribe BMW* that the First Circuit had *Monsanto* brought to its attention.

I conclude, therefore, that as a result of the Supreme Court's decision in *Monsanto* the complaint is deficient in failing to allege a contract, combination or conspiracy as required by section 1 of the Sherman Act. Since the parties agree that Maine and Missouri antitrust law follow the Sherman Act, it is hereby **ORDERED** that Counts IV, V and VI are **DISMISSED**.

SO ORDERED.

Dated at Portland, Maine this 26th day of July, 1995.

D. Brock Hornby

United States District Judge

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Datagate, Inc. v. Hewlett-Packard Co.

United States Court of Appeals for the Ninth Circuit

June 14, 1995, Argued and Submitted, San Francisco, California ; July 27, 1995, Filed

No. 93-17276

Reporter

60 F.3d 1421 *; 1995 U.S. App. LEXIS 19924 **; 1995-2 Trade Cas. (CCH) P71,070; 95 Cal. Daily Op. Service 5863; 95 Daily Journal DAR 10037

DATAGATE, INC., Plaintiff-Appellant, v. HEWLETT-PACKARD CO., Defendant-Appellee.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. CV-86-20018-RPA. Robert P. Aguilar, District Judge, Presiding.

Core Terms

tying arrangement, purchaser, hardware, software, tie-in, insubstantial, district court, tied product, summary judgment, commerce, customer, tying product, market power, coerced, parties, antitrust, cases, dollar-volume, foreclosed, substantial volume, de minimis, competitor, argues, volume, sales

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 [down arrow] Standards of Review, De Novo Review

The court of appeals reviews de novo the district court's order granting summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2 [down arrow] Antitrust & Trade Law, Sherman Act

A tying arrangement is a device used by a competitor with market power in one market for the "tying" product to extend its market power into an entirely distinct market for the "tied" product. To accomplish this, the competitor

agrees to sell the tying product only on the condition that its customers also purchase the tied product. The competitor thus uses its market power in the tying product to coerce the customer into purchasing the tied product. This is one of the few practices determined to be illegal per se under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

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

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

Three elements must be satisfied to establish that a tying arrangement is illegal per se: (1) a tie-in between two products or services sold in different markets, (2) market power in the tying product, and (3) the tying arrangement affects a not insubstantial volume of commerce.

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

[**HN4**](#) Price Fixing & Restraints of Trade, Tying Arrangements

The requirement that a "not insubstantial" amount of commerce be involved in a tying arrangement makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie. An analysis of market shares might become relevant if it were alleged that an apparently small dollar-volume of business actually represented a substantial part of the sales for which competitors were bidding. But normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.

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

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

The requirement that a tie-in must be more than de minimis should be rigorously distinguished from any supposed requirement that an otherwise per se illegal tying arrangement must have a substantial impact on any given market in order to be actionable.

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

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

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

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

[**HN6**](#) Justiciability, Standing

Unlike standing under U.S. Const. art. III, the question of standing to sue under the antitrust laws does not go to subject matter jurisdiction, and thus need not be considered *sua sponte*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN7 **Summary Judgment, Evidentiary Considerations**

On summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party.

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

HN8 **Price Fixing & Restraints of Trade, Tying Arrangements**

The "essential characteristic" of a *per se* illegal tying arrangement is that the seller makes use of its market power in the tying product to coerce the buyer to purchase the tied product.

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

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 > 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 > Claims

HN9 **Tying Arrangements, Clayton Act**

Under the plain language of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a contract, combination, or conspiracy in restraint of trade is required to establish a violation of [§ 1](#). The "contract" requirement is satisfied in tie-in cases by the coerced sales contract for the tied item. A showing that the buyer of the tied product was coerced by the tying arrangement into making the purchase is sufficient to show that the buyer was not merely "acting independently."

Counsel: W. Ruel Walker, San Francisco, California, and Francis O. Scarpulla, San Francisco, California, for the plaintiff-appellant.

Kurt. W. Melchior, Alison S. Hightower, Nossaman, Guthner, Knox & Elliot, San Francisco, California, and Robert A. Skitol, James A. Myers, Penelope M. Lister Farano, Drinker Biddle & Reath, Washington D.C., for the defendant-appellee.

Judges: Before: Alfred T. Goodwin, Mary M. Schroeder and Robert R. Beezer, Circuit Judges. Opinion by Judge Beezer.

Opinion by: ROBERT R. BEEZER

Opinion

[*1422] OPINION

BEEZER, Circuit Judge:

We consider whether a tying arrangement foreclosing a single customer can ever affect a "not insubstantial" volume of commerce and so be illegal *per se* under the Sherman Act, [§ 1 \(15 U.S.C. § 1\)](#). Datagate, Inc. appeals the district court's order granting summary judgment in favor of Hewlett-Packard Company. ("HP") on Datagate's claim that HP imposed illegal tying arrangements on its customers. The district court held that Datagate had presented evidence sufficient to establish a material issue [**2] of fact as to only a single tying arrangement, affecting one customer, and that this was insufficient as a matter of law to affect a "not insubstantial" amount of commerce under [Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). We have jurisdiction over Datagate's timely appeal, [28 U.S.C. § 1291](#), and we reverse.

/

Datagate is an independent service organization ("ISO") which engages in the maintenance [*1423] and repair of HP computer equipment ("hardware service"). HP competes with Datagate and other ISOs in the market for the provision of hardware service. HP also provides support services for the proprietary operating systems and applications software which are necessary to operate its computer equipment ("software service"). The provision of software service requires the use of HP's proprietary materials.

Datagate sued HP alleging numerous violations of the antitrust laws arising from HP's conduct in the hardware service market. The district court granted summary judgment for HP on all Datagate's claims. We affirmed in part, reversed in part and remanded. [Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864 \(9th Cir. 1991\)](#) ("Datagate I"), cert. [**3] denied, 503 U.S. 984 (1992). We remanded two of Datagate's claims to the district court: One alleging that HP had illegally imposed tying arrangements on its customers, in violation of the Sherman Act, [§ 1](#), by refusing to provide software service unless the customers also purchased hardware service from HP, and a second claim for injunctive relief under the Clayton Act, § 16 ([15 U.S.C. § 26](#)).

On remand, Datagate abandoned the claim for injunctive relief. HP again moved for summary judgment on the tie-in claim, and Datagate requested and received two continuances for further discovery on that claim. For the purposes of the summary judgment motion, the parties entered into the following stipulation: "assuming arguendo the existence of separate markets for software service and hardware service for HP minicomputers, defendant [HP] had market power in the tying product (software service) and there was a substantial volume of commerce in the tied product (hardware service)." The district court then granted summary judgment for HP.

The district court determined that the uncontested evidence in the record was sufficient to create a triable issue of fact as to whether HP had imposed [**4] a tying arrangement on Rockwell International ("Rockwell"), one of its customers. The court further determined that Datagate's evidence failed to establish a triable issue of fact as to the existence of any additional tying arrangements allegedly imposed by HP. Quoting from *Jefferson Parish*, the district court held that a tying arrangement imposed on only a single customer was insufficient as a matter of law to support Datagate's tie-in claim: "If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." [Jefferson Parish, 466 U.S. at 16](#).

Datagate appeals.

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HN1[] We review de novo the district court's order granting summary judgment. [Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1432 \(9th Cir. 1995\)](#).

///

The district court interpreted Jefferson Parish to mean that, as a matter of law, a tying arrangement imposed on a single customer is always *de minimis*, and not of concern to the antitrust laws. The district court read *Jefferson Parish* too broadly.

A

HN2[] A tying arrangement is a device used by a competitor with market [**5] power in one market (for the "tying" product) to extend its market power into an entirely distinct market (for the "tied" product). To accomplish this, the competitor agrees to sell the tying product (here software service) only on the condition that its customers also purchase the tied product (in this case hardware service). The competitor thus uses its market power in the tying product to coerce the customer into purchasing the tied product. This is one of the few practices that the Supreme Court has determined to be illegal *per se* under the Sherman Act, [§ 1](#). See [Jefferson Parish, 466 U.S. at 9-10](#).

HN3[] Three elements must be satisfied to establish that a tying arrangement is illegal *per se*: (1) a tie-in between two products or services sold in different markets, (2) market power in the tying product, and (3) the tying [***1424**] arrangement affects a not insubstantial volume of commerce. [Bhan v. NME Hosps. Inc., 929 F.2d 1404, 1411](#) (9th Cir.), cert. denied, 502 U.S. 994, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991). For the purposes of the summary judgment motion, the parties unquestionably stipulated to the second element: HP's market power in the tying product.

The parties dispute exactly which of the other [**6] elements is at issue in this appeal. Datagate argues that the third element is at issue: whether a "not insubstantial" volume of commerce was affected by HP's single alleged tying arrangement. While continuing to press its argument under *Jefferson Parish*, HP contends that the parties stipulated to the third element, and that the *Jefferson Parish* analysis either goes to the first element of whether HP imposed a tie-in at all, or creates a fourth requirement of multiple tying arrangements.

First, the parties did not stipulate to the third element. Although the district court stated that the parties stipulated that "a tying arrangement imposed by HP would affect a substantial volume of commerce in the tied market," that is not what the parties' stipulation says. The parties simply stipulated that there was a substantial volume of commerce in the tied market, not that any tie-in by HP would affect a substantial volume. At oral argument, HP declined to concede that any tying arrangement it might have imposed would have affected a not insubstantial amount of commerce. Thus, the parties' stipulation establishes only the second element.

Second, the crucial language from *Jefferson* [**7] *Parish* goes to the "not insubstantial" requirement, rather than bearing in some way on the first element, or creating an entirely new element, as HP urges. The dispositive issue in *Jefferson Parish* was whether the defendant had market power, and thus whether it could effectively impose a tying arrangement. See [466 U.S. at 26](#). The "single purchaser" language relied upon by the district court and HP appeared in a section of the opinion discussing the background of *per se* liability for tie-ins:

Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of **antitrust law**. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. (citing cases)

Jefferson Parish, 466 U.S. at 16. One of the cases the Court cited in the above passage was Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501-02, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969) ("*Fortner I*"^{**8}). The cited pages from *Fortner I* concern *only* the meaning of the "not insubstantial" requirement. *Id.* In context, it cannot seriously be questioned that the *Jefferson Parish* Court was discussing the same requirement.

We must determine whether Datagate brought forth enough evidence to create a disputed issue of material fact regarding the first and third elements.

B

Whichever element is involved, HP argues that a tying arrangement foreclosing only one purchaser can never be *per se* illegal. Construing HP's argument to be that a tying arrangement affecting only a single purchaser is insubstantial as a matter of law, we disagree.

We agree with Datagate that the Supreme Court did not intend the above-quoted language from *Jefferson Parish* to create a "single purchaser" rule of general applicability. The Court's statement must be read in conjunction with the facts of the case, which involved the market for anesthesiology services. See Jefferson Parish, 466 U.S. at 22. The foreclosure of a single purchaser in that market (*i.e.* one patient in a single surgical procedure) would involve only several hundred dollars. Again, the Court's citation to *Fortner* ^{**9} *I* is helpful. In that case, the Court explained at some length ^{**10} [*1425] the meaning of the "not insubstantial" requirement:

HN4[↑] The requirement that a "not insubstantial" amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie An analysis of market shares might become relevant if it were alleged that an apparently small dollar-volume of business actually represented a substantial part of the sales for which competitors were bidding. But normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie

Fortner I, 394 U.S. at 501. Read with reference to *Fortner I*, the Court's statement in *Jefferson Parish* means simply that, on the facts of that case, where a single purchaser represented neither a substantial dollar-volume nor a substantial portion of the relevant market, the foreclosure of a single sale would be *de minimis*.

A broader reading of the Court's statement would be unwarranted, and would lead to aberrant results. Under ^{**10} HP's interpretation, a tying arrangement forcing a single sale worth millions of dollars would be perfectly legal, while an identical arrangement forcing multiple sales worth many times less would be subject to *per se* condemnation. We do not believe this is the rule that the Court intended.

HP's reliance on Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), cert. denied, 473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534 (1985) is misplaced. That case did not hold, as HP states, that *Jefferson Parish* imposed a threshold "single purchaser" rule. The issue decided by *Digidyne* was whether the "not insubstantial" element included a requirement that a substantial portion of the market in the tied product be affected. See id. at 1341. Relying on the above-quoted passage from *Fortner I*, we concluded that such a showing was not required. *Id.* It was undisputed in *Digidyne* that multiple purchasers were involved; that case is not controlling here.

The remainder of HP's argument on this issue, analogizing to cases involving antitrust standing, misses the point.¹ HP contends that the "single purchaser" rule is required in order to ensure that only tie-ins with substantial anticompetitive ^{**11} effects in the relevant market are proscribed. Such is not the law. The foundational principle of *per se* antitrust liability is that some acts are considered so inherently anticompetitive that no examination of their

¹ Datagate's standing to sue under the antitrust laws is not at issue in this appeal. HP did not contend before the district court that Datagate had not suffered causal antitrust injury. HN6[↑] Unlike Article III standing, the question of standing to sue under the antitrust laws does not go to subject matter jurisdiction, and thus need not be considered *sua sponte*. See Rebel Oil, 51 F.3d at 1433 (question of causal antitrust injury goes to scope of protection afforded by antitrust laws).

impact on the market as a whole is required. See [Fortner I, 394 U.S. at 501](#). [HN5](#)[↑] The requirement in the cases that a tie-in must be more than *de minimis* should be rigorously distinguished from any supposed requirement that an otherwise *per se* illegal tying arrangement must have a substantial impact on any given market in order to be actionable. See [Digidyne, 734 F.2d at 1341](#).

[**12] We hold that *Jefferson Parish* does not impose a "multiple purchaser" requirement of general applicability. The "not insubstantial" requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a "not insubstantial" dollar-volume of sales.

IV

Applying this rule to the evidence in the record, we conclude Datagate has brought forth enough evidence that Rockwell represented a "not insubstantial" dollar-volume of hardware service sales to survive summary judgment.

In opposition to summary judgment, Datagate submitted the declaration of its president that the Rockwell hardware service contract at issue was worth approximately \$ 100,000 per year. HP does not argue that this dollar-volume is insubstantial, concentrating instead on its single purchaser theory.

[*1426] This amount is sufficient. See [Moore v. James H. Matthews & Co., 550 F.2d 1207, 1216 \(9th Cir. 1977\)](#) ("The 'not insubstantial' test has been met by showing dollar volumes which total \$ 60,800, and estimated sales of \$ 86,376." (citations omitted)). Even adjusting these holdings for inflation, a dollar volume of \$ 100,000 per year for an unspecified number of years would [**13] hardly be *de minimis*.

V

HP argues that the evidence in the record is insufficient to establish even the single Rockwell tying arrangement. We disagree. It is common ground that, [HN7](#)[↑] on summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. [Rebel Oil, 51 F.3d at 1432](#).

[HN8](#)[↑] The "essential characteristic" of a *per se* illegal tying arrangement is that the seller makes use of its market power in the tying product to coerce the buyer to purchase the tied product. [Jefferson Parish, 466 U.S. at 12-13](#); see also [Datagate I, 941 F.2d at 870](#) (seller must have "coerced to some extent the purchaser into buying the tied product." (citation omitted)).

Datagate submitted to the district court the deposition testimony of Robert Buckner, a Rockwell employee responsible for the procurement of hardware services on HP equipment owned by Rockwell. Buckner testified that, in late 1985 or early 1986, he spoke to two HP employees who told him that HP would not provide software service if Rockwell purchased hardware service from a third party. Buckner also testified, when asked what "impact" HP's refusal to provide software service would have on Datagate's [**14] ability to win Rockwell's hardware service contract, that "[Rockwell] could not afford to do without our software maintenance." Finally, Datagate's president declared that Datagate's prices for hardware maintenance were significantly below HP's.

Read in the light most favorable to Datagate, this uncontested evidence is sufficient to establish a disputed issue of material fact as to whether HP imposed a coercive tying arrangement on Rockwell. It can readily be inferred from Buckner's testimony that HP's threat to withhold software service precluded Rockwell from considering other providers of hardware service. Buckner's testimony also indicates that, although he had reservations, he was interested in purchasing hardware service from a provider other than HP until he learned that HP would refuse to provide software service. Finally, the fact that Datagate's prices for hardware service were lower than HP's supports the inference that HP's threats to some extent coerced Rockwell into making a purchase from HP it would not have made on the open market. See [Jefferson Parish, 466 U.S. at 14-15](#) (explaining that the primary harm from tying arrangements is the impairment of competition [**15] on the merits in the market for the tied product).

HP argues that the allegation in Datagate's complaint that HP "retreated" from its tie-in position constitutes an admission which undermines Datagate's claim. HP is incorrect. That HP eventually stopped tying software services

to the purchase of hardware services does not defeat any claim Datagate may have against HP based on purchases foreclosed during the period HP allegedly did have a tie-in policy. For the same reason, HP is not helped by Buckner's deposition testimony that, several months after two HP employees told him of the tie-in policy and Rockwell entered a hardware service contract with HP, a different HP employee told him that there was no such policy. That testimony is consistent with a change in HP policy, after the tying arrangement had already coerced Rockwell into purchasing hardware services from HP.

HP argues that Datagate failed to present sufficient evidence of a "contract, combination . . . or conspiracy" to survive summary judgment under [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#). HP misconstrues the application of *Monsanto* to tie-in cases. HP is correct that, [HN9](#) under *Monsanto* [**16] and the plain language of the Sherman Act, a "contract, combination . . . or conspiracy" in restraint of trade is required to establish a violation of [§ 1, 15 U.S.C. § 1; Monsanto, I*1427 465 U.S. at 761](#). What HP fails to recognize is that the "contract" requirement is satisfied in tie-in cases by the coerced *sales contract* for the tied item. See [Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 191-92 \(2d Cir. 1992\)](#) ("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.'") (citations omitted, emphasis added). A showing that the buyer of the tied product was coerced by the tying arrangement into making the purchase is sufficient to show that the buyer was not merely "acting independently." See [Monsanto, 465 U.S. at 764](#).

This is illustrated by the Fourth Circuit's decision in [Service & Training, Inc. v. Data General Corp., 963 F.2d 680 \(4th Cir. 1992\)](#), upon which HP relies. In that case, the plaintiff alleged that the defendant computer manufacturer's policy of licensing diagnostic software only to users that serviced their own equipment was an illegal [**17] tie-in between the software and repair services. [Id. at 682-83](#). The court cited extensively to *Monsanto* in holding that the plaintiff had not made out a tie-in claim. [Id. at 685-86](#). However, the court's holding was founded on its determination that there was no evidence that the defendant had ever conditioned the sale of the software upon the purchase of its repair services. [Id. at 686](#). In other words, the defendant had never forced anyone to buy the tied product. What *Monsanto* requires is evidence of a coerced agreement to purchase the tied product. See [id. at 685](#) & n.11. Datagate has brought forth sufficient evidence of such a tie-in to survive summary judgment.

HP's reference to unilateral refusal to deal cases similarly misses the point. HP relies heavily on a footnote in [Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 \(1992\)](#). There, the Supreme Court stated: "Assuming, *arguendo*, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not." [112 S. Ct. at 2080 n.8](#). This simply [**18] means that, for the purposes of tie-in analysis, the defendant may sell the tying product to anybody or nobody at all. What it may not do is *condition* the sale of the tying product upon the purchase of the tied product, thereby expanding its market power into the market for the tied product. The harm from tying arrangements is the forced sale of the *tied* product, not the withholding of the tying product. HP does not argue that it had some legitimate policy of unilaterally refusing to sell software services to certain parties. *Kodak* does not help HP.

Finally, HP's "law of the case" argument is meritless. In refusing to reconsider its original pre-remand summary judgment order, the district court commented that Buckner's testimony was "insignificant" and "not enough to show coercion in this context." These comments went to the determination of whether HP's conduct had a large enough impact on the hardware service market to be anticompetitive under a rule of reason analysis. See [Datagate I, 941 F.2d at 868-69](#) (discussing antitrust standing). As discussed above, if HP's conduct was *per se* illegal, it was also *per se* anticompetitive. At the time the district court [**19] made the observations quoted by HP, it had already dismissed Datagate's tie-in cause of action for failure to state a claim. The court's comments, made on summary judgment, could not be a dispositive ruling on a legal issue not before it.

Despite HP's persistent attempts to obfuscate the applicable legal standards, we hold that Datagate presented evidence sufficient to create a factual dispute as to whether HP coerced Rockwell into purchasing its hardware services by threatening to withhold software services.²

[*1428] VI

We conclude that Jefferson Parish does not create a "single ****20** purchaser" rule of general applicability. There are disputed issues of material fact that preclude summary judgment for HP. The judgment of the district court is REVERSED and the case is REMANDED to that court for further proceedings consistent with this opinion.

End of Document

² Datagate argues that, even if there is a "multiple purchaser" requirement, it presented evidence sufficient to create a disputed issue of material fact regarding more than a single tying arrangement. As we have concluded that Datagate's tie-in claim survives summary judgment on the basis of the disputed issues of material fact concerning the alleged Rockwell tying arrangement, we need not address Datagate's alternative argument.

Newman v. Associated Press

United States District Court for the Southern District of New York

July 28, 1995, Dated ; July 31, 1995, FILED

94 Civ. 3474 (PKL) (THK)

Reporter

1995 U.S. Dist. LEXIS 19588 *

FRANCINE NEWMAN, Plaintiff, - against - THE ASSOCIATED PRESS, Defendant.

Subsequent History: [*1] Adopting Order of January 2, 1996, Reported at: [1996 U.S. Dist. LEXIS 5](#).

Core Terms

racketeering activity, pro se, racketeering, anti trust law, enterprise, dismissal with prejudice, plaintiff's claim, conspiracy, recommend, publish, listen, antitrust claim, Teachers, conclusory allegation, economic injury, anticompetitive, Affirmation, allegations, disseminate, antitrust, newspaper, asserts, damages, deprive, rights, press, views

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[Complaints, Requirements for Complaint

[Fed. R. Civ. P. 8\(a\)](#) sets forth a minimum standard for the sufficiency of complaints, requiring that a complaint shall contain a short and plain statement of the claim showing that the pleader is entitled to relief.

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

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

HN2[Motions to Dismiss, Failure to State Claim

[Fed. R. Civ. P. 12\(b\)\(6\)](#) addresses the substantive, rather than technical, elements of the complaint, providing that a party may move to dismiss a complaint on the ground that it fails to state a claim upon which relief may be granted. In deciding a motion to dismiss under [Rule 12\(b\)\(6\)](#), the court must construe the allegations of the complaint in the plaintiff's favor. 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 is dismissal warranted.

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

Civil Procedure > Parties > Pro Se Litigants > General Overview

HN3 **Pro Se Litigants, Pleading Standards**

Courts must construe pro se complaints liberally, applying less stringent standards than when a plaintiff is represented by counsel. Where a plaintiff acts pro se, a court must read his supporting papers liberally, and interpret them to raise the strongest arguments that they suggest.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN4 **Protection of Rights, Section 1983 Actions**

A plaintiff proceeding under [42 U.S.C.S. § 1983](#) must specifically identify the federal right she claims has been violated and must demonstrate that the defendant acted under color of state law when depriving the plaintiff of that right.

Business & Corporate Law > Foreign Corporations > General Overview

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

International Trade Law > General Overview

HN5 **Business & Corporate Law, Foreign Corporations**

To state a claim for damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1961 et seq.](#), a plaintiff must satisfy two distinct pleading burdens. First, she must allege that the defendant has violated the RICO statute. To do so, she must allege that the following seven RICO elements exist: (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. Second, a plaintiff must allege that she was injured in her business or property by reason of a violation of [§ 1962](#).

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

Securities Law > ... > Elements of Proof > Pattern > General Overview

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

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

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

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

Securities Law > RICO Actions > Elements of Proof > Definition of Racketeering Activity

Securities Law > RICO Actions > Elements of Proof > Enterprise

HN6 [down] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Under the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1961 et seq.](#), "racketeering activity" is any act chargeable under several generically described state criminal laws, any act indictable under numerous specific federal criminal provisions, including mail and wire fraud, and any offense involving bankruptcy or securities fraud or drug-related activities that is punishable under federal law. The specific acts which qualify as racketeering activity are set forth in [18 U.S.C.S. § 1961\(1\)](#). The statute defines a "pattern" of racketeering activity as at least two acts of racketeering activity occurring within a ten-year period. [18 U.S.C.S. § 1961\(5\)](#). The two or more acts of racketeering activities must be criminal acts, and only certain criminal acts fall within the statute. An "enterprise" is defined as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. [18 U.S.C.S. § 1961\(4\)](#). The existence of an enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. Further, the enterprise must be connected to the pattern of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

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

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

HN7 [down] **Costs & Attorney Fees, Clayton Act**

[15 U.S.C.S. § 15](#) provides in part: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States and shall recover threefold the damages by him sustained and the cost of suit, including reasonable attorney's fees.

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

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

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

HN8 [down] **Standing, Requirements**

In order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an economic injury. The economic injury must be 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. Those suffering derivative injuries, not within the sector of the economy directly affected by a defendant's anticompetitive practices, lack antitrust standing.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN9 [down] **Dismissal, Involuntary Dismissals**

Where a plaintiff is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with prejudice.

Counsel: FRANCINE NEWMAN, plaintiff, [PRO SE], Forest Hills, NY.

For ASSOCIATED PRESS, INC., defendant: Carolyn Killeen Foley, Rogers & Wells, New York, NY.

Judges: Theodore H. Katz, United States Magistrate Judge. Judge Peter K. Leisure

Opinion by: Theodore H. Katz

Opinion

REPORT AND RECOMMENDATION

THEODORE H. KATZ, United States Magistrate Judge.

TO THE HON. PETER K. LEISURE, United States District Judge:

This *pro se* action was referred to me for general pretrial supervision and reports and recommendations on dispositive motions, pursuant to your Order Of Reference dated May 12, 1994. Defendant has moved to dismiss the Complaint for failure to state a claim, pursuant to [Rule 12\(b\)\(6\), Fed. R. Civ. P.](#), and for failure to plead with adequate specificity, pursuant to [Rule 8\(a\)\(2\)](#). For the following reasons, I recommend that Defendant's motion be granted and that the Complaint be dismissed with prejudice.

BACKGROUND

Pro se plaintiff, Francine Newman, brought this [Section 1983](#) action to recover monetary damages from Defendant, The Associated Press ["the AP"]. Plaintiff's claims arise [*2] out of a single incident which she describes as follows. On or about July 10, 1992, she went to a reception area at one of Defendant's offices, located at 30 Rockefeller Plaza, in order to deliver information about alleged racketeering on the part of the New York City Board of Education, the United Federation of Teachers, and the New York City Corporation Counsel, to compel "whistleblower" teachers to submit to forced psychiatric evaluations. (Complaint PP 1-3.) After identifying herself as a New York City high school teacher and successful litigant in a lawsuit concerning this alleged wrongdoing, two receptionists, a male employee, and a security officer threatened to oust Plaintiff with police assistance and forced her to leave the building. (Complaint PP 5, 6.) The information Plaintiff wished the AP to disseminate was not published, in Plaintiff's view "consistent with the racketeering conspiracy of 'mental health' practitioners such as psychiatrists and their collaborators in and out of the public sector . . ." (Complaint P 6.)

Based on this single encounter with Defendant, Plaintiff claims that the AP has: (1) violated and conspired to violate her [First Amendment](#) rights; (2) [*3] violated federal RICO laws; (3) violated federal antitrust laws; and, (4) violated certain provisions of the United Nations Charter. (Complaint P 1.) She asserts that there has been underreporting of the procedures applied to New York City teachers and Defendant is under a duty not to deprive her of her freedom of speech. (Complaint P 5.) She further asserts that Defendant "has a vested interest in this form of racketeering enslavement of the human condition" and seeks \$ 10 million in damages. (Complaint PP 7, 8.)

DISCUSSION

Defendant has moved to dismiss the Complaint based on two grounds: (1) [Rule 8, Fed. R. Civ. P.](#), for failure to plead with adequate specificity; and, (2) [Rule 12\(b\)\(6\), Fed. R. Civ. P.](#), for failure to state a claim upon which relief may be granted.

HN1 [↑] [Rule 8\(a\)](#) sets forth a minimum standard for the sufficiency of complaints, requiring that a complaint "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ." [Fed. R. Civ. P. 8\(a\)](#). The rule ensures that a defendant has notice of the charges against it and can file a responsive pleading and prepare a defense. [Simmons v. Abruzzo, 49 F.3d 83, 86 \(2d Cir. 1995\)](#); [Salahuddin v. Cuomo, 861 F.2d 40, 42 \(2d Cir. 1988\)](#); [Chodos v. F.B.I., 559 F. Supp. 69, 71 \(S.D.N.Y.\), aff'd without op., 697 F.2d 289 \(2d Cir. 1982\), cert. denied, 459 U.S. 1111, 103 S. Ct. 741, reh'g denied, 460 U.S. 1048, 103 S. Ct. 1451 \(1983\)](#). It "also serves to sharpen the issues to be litigated and to confine discovery and the presentation of evidence within reasonable bounds." [Chodos, 559 F. Supp. at 71](#).

HN2 [↑] [Rule 12\(b\)\(6\)](#) addresses the substantive, rather than technical, elements of the complaint, providing that a party may move to dismiss a complaint on the ground that it fails to state a claim upon which relief may be granted. In deciding a motion to dismiss under [Rule 12\(b\)\(6\)](#), the Court must construe the allegations of the complaint in the plaintiff's favor. [Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 \(1974\)](#). See also [Hernandez v. Coughlin, 18 F.3d 133, 136 \(2d Cir.\), cert. denied, U.S. , 130 L. Ed. 2d 63, 115 S. Ct. 117 \(1994\)](#); [Dahlberg v. Becker, 748 F.2d 85, 88 \(2d Cir. 1984\)](#), cert. denied, 470 U.S. 1084, 105 S. Ct. 1845, 85 L. Ed. 2d 144 (1985); [Ruderman v. Police Dept. of the City of New York, 857 F. Supp. 326, 328 \(S.D.N.Y. 1994\)](#). 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 . . ." is dismissal warranted. [Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 \(1957\)](#). See also [Hernandez, 18 F.3d at 136](#); [Dahlberg, 748 F.2d at 88](#); [Ruderman, 857 F. Supp. at 328](#).

"The Supreme Court has long held that **HN3** [↑] courts must construe *pro se* complaints liberally, applying less stringent standards than when a plaintiff is represented by counsel." [Elliott v. Bronson, 872 F.2d 20, 21 \(2d Cir. 1989\)](#) (per curiam). See also [Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 \(per curiam\), reh'g denied, 405 U.S. 948, 92 S. Ct. 963, 30 L. Ed. 2d 819 \(1972\)](#); [Sadler v. Brown, 793 F. Supp. 87, 90 \(S.D.N.Y. 1992\)](#); [Barsella v. United States, 135 F.R.D. 64, 66 \(S.D.N.Y. 1991\)](#). "Where a plaintiff acts *pro se*, a court must 'read his supporting papers liberally, and . . . interpret them to raise the strongest arguments that they suggest.'" [Burrus v. Keane, 93 Civ. 3945 \(LAP\), 1995 U.S. Dist. LEXIS 3988, *4 \(S.D.N.Y. \[*6\] March 30, 1995\)](#) (citing [Soto v. Walker, 44 F.3d 169, 173 \(2d Cir. 1995\)](#)). See also [Hernandez, 18 F.3d at 136](#) ("In reviewing a complaint for dismissal under [Rule 12\(b\)\(6\)](#), the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. . . . This standard is applied with even greater force where the . . . complaint is submitted *pro se*.").

This policy, however, does not require courts to sustain every *pro se* complaint. See, e.g., [Barsella, 135 F.R.D. at 66](#) (dismissing a *pro se* complaint where, even viewed in its most favorable light, it "contained little more than a prolix collection of demands for relief"); [Chodos, 559 F. Supp. at 71-72](#) (dismissing *pro se* complaint on grounds that it consisted of "rambling, confused documents from which it is impossible to adequately discern the basis for plaintiff's claim or the facts upon which the alleged claim exists."). Factual allegations must support the legal basis upon which the plaintiff asserts that she is entitled to relief. See [Ruderman, 857 F. Supp. at 330](#) ("mere conclusory allegations . . . 'are meaningless as a practical [*7] matter and, as a matter of law, insufficient to state a claim.'") (quoting [Duncan v. AT & T Communications, Inc., 668 F. Supp. 232, 234 \(S.D.N.Y. 1987\)](#)).

I. [First Amendment Claim](#)

Although Plaintiff asserts a variety of grounds for her claims against Defendant, the core of this action arises out of the AP's alleged violation of Plaintiff's First Amendment rights, by its failure to listen to and publish her story. All of Plaintiff's other allegations concern purported reasons why Defendant refused to do so.¹

[*8] This Court is satisfied that Plaintiff has pleaded her First Amendment claim with sufficient specificity to comply with the requirements set forth in Rule 8, Fed. R. Civ. P. The predicate factual allegation for her First Amendment claim -- that Defendant failed to listen to and publish her story when she was on its premises on July 10, 1992 -- is clear. Nevertheless, it is my conclusion that Plaintiff's First Amendment claim fails, under Rule 12(b)(6), to state a claim upon which relief may be granted.

HN4 A plaintiff proceeding under 42 U.S.C. § 1983 must specifically identify the federal right she claims has been violated and must demonstrate that the defendant acted under color of state law when depriving the plaintiff of that right. See Monroe v. Pape, 365 U.S. 167, 171-72, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492 (1961); Rodriguez v. Hynes, No. 94 Civ. 4578 (JBW), 1995 U.S. Dist. LEXIS 7951, *12 (E.D.N.Y. June 8, 1995); City of Oklahoma City v. Tuttle, 471 U.S. 808, 816, 105 S. Ct. 2427, 2432-33, 85 L. Ed. 2d 791, reh'g denied, 473 U.S. 925, 106 S. Ct. 16, 87 L. Ed. 2d 695 (1985).

The Court need not reach the issue of whether the AP acts under color of state law, since [*9] Plaintiff simply does not have a First Amendment right to require the AP to listen to or disseminate her views.

"The First Amendment has long been recognized as promoting diversity of expression of differing views by allowing numerous means of expression to flourish, not by allowing suits because a given publication or even chain declines to broadcast or publish any particular view." Glendora v. Gannett Company, 858 F. Supp. 369, 371 (S.D.N.Y.), aff'd without op., 40 F.3d 1238 (2d Cir. 1994), cert. denied, U.S. , 115 S. Ct. 1435 (1995). See also Miami Herald Publishing Company v. Tornillo, 418 U.S. 241, 258, 94 S. Ct. 2831, 2839, 41 L. Ed. 2d 730 (1974) (holding that a state "right of reply" statute, which granted a political candidate whose record or personal character had been assailed in a newspaper the right to demand that the newspaper print any reply to the charges, violated the newspaper's First Amendment right to a free press); Cyntje v. Daily News Publishing Company, 551 F. Supp. 403, 405-06 (D.V.I. 1982) ("plaintiff may deem his press releases and his other messages to be of transcendent national importance . . . that still does [*10] not give him an enforceable right to see such information printed in the pages of someone else's publication."); Ahmad v. Levi, 414 F. Supp. 597, 602 (E.D. Pa. 1976) (a court "cannot, consistent with the constitutional guarantee of a free press, order . . . defendants to publish certain information or assess damages against them for past failures to publish certain information."). As the Supreme Court stated in *Tornillo*:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258, 94 S. Ct. at 2840 (footnote omitted).

In short, Plaintiff has no constitutional right to force the AP to publish her story, or to listen to her speech. See AMSAT Cable Ltd. v. Cablevision [*11] of Connecticut L.P., 6 F.3d 867, 871 (2d Cir. 1993) (First Amendment does not guarantee the right to have someone listen to speech); Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990), cert. denied, 501 U.S. 1222, 111 S. Ct. 2839, 115 L. Ed. 2d 1007

¹ The following excerpts from Plaintiff's Complaint illustrate this point. Plaintiff asserts that "defendant in its capacity as a commercial disseminator of information is under a duty as a licensee of public utilizes [sic] in the nature of a monopoly for that purpose not to deprive plaintiff of her right to freedom of speech." (Complaint P 5.) Plaintiff believes that she has a First Amendment right to "deliver[] information" to the defendant. (Complaint P 3.) She claims that when she "protested the denial of her constitutional right to publicize the protected racketeering practiced by the defendant," she was "required to leave the building and the information was withheld from dissemination." (Complaint P 6.)

(1991) ("the *first amendment* does not guarantee that someone will listen to Warner's speech") (quoting district court opinion). Thus, Plaintiff's *Section 1983* claim that her *First Amendment* rights have been violated should be dismissed for failure to state a claim upon which relief may be granted.

II. RICO Claim

Plaintiff seeks treble damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. § 1961 et seq.](#), claiming that the AP withheld her story from publication "consistent with the racketeering conspiracy of 'mental health' practitioners such as psychiatrists and their collaborators in and out of the public sector for the racketeering agenda of said defendant as an illegal substitution for the application of the rule of law without any judicial process or due process of law." (Complaint P 6.) She further claims that "defendant Associated [*12] Press has a vested interest in this form of racketeering enslavement of the human condition [operated by the New York City Board of Education and the United Federation of Teachers in collusion with the New York City Corporation Counsel] under color of law and interfered with plaintiff's constitutional rights to plaintiff's damage solely in consequence of its racketeering efforts." (Complaint PP 4, 7.) These are the sum and substance of Plaintiff's RICO allegations.

HN5 To state a claim for damages under RICO, a plaintiff must satisfy two distinct pleading burdens. [Moss v. Morgan Stanley, 719 F.2d 5, 17 \(2d Cir. 1983\)](#), cert. denied, 465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984). First, she must allege that the defendant has violated the RICO statute, [18 U.S.C. § 1962](#). [Moss, 719 F.2d at 17](#). To do so, she must allege that the following seven RICO elements exist: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." [*13] [Moss, 719 F.2d at 17](#). See also [18 U.S.C. § 1962\(a\)-\(c\)](#). Second, a plaintiff must allege that she was "'injured in her business or property by reason of a violation of section 1962.'" [Moss, 719 F.2d at 17](#) (quoting [18 U.S.C. § 1964\(c\)](#)). See also [Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1344 \(2d Cir. 1994\)](#); [First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 767 \(2d Cir. 1994\)](#), cert. denied, U.S. , 130 L. Ed. 2d 632, 115 S. Ct. 728 (1995).

HN6 Under RICO, "racketeering activity" is "any act 'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law." [Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 481-82, 105 S. Ct. 3275, 3277, 87 L. Ed. 2d 346 \(1985\)](#). The specific acts which qualify as racketeering activity are set forth in [18 U.S.C. § 1961\(1\)](#). The statute defines a "pattern" of racketeering activity as at least two acts of racketeering activity occurring within a ten-year period. [18 U.S.C. § 1961\(5\)](#). [*14] See also [Sedima, 473 U.S. at 496 n.14, 105 S. Ct. at 3285 n.14](#); [Moss, 719 F.2d at 17](#). Significantly, "the two or more acts of racketeering activities must be criminal acts, and only certain criminal acts fall within the statute." [Carlino v. Hammer, 91 Civ. 0466 \(KMW\), 1992 U.S. Dist. LEXIS 4927, *7](#) (S.D.N.Y. April 15, 1992). See also [18 U.S.C. §§ 1961 \(1\) and \(5\)](#).

An "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." [18 U.S.C. § 1961\(4\)](#). See also [United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528, 69 L. Ed. 2d 246 \(1981\)](#) ("The enterprise is an entity . . . a group of persons associated together for a common purpose of engaging in a course of conduct."); [Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 \(2d Cir. 1994\)](#); [Moss, 719 F.2d at 21-22](#). The existence of an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." [Turkette, 452 U.S. at 583, 101 S. Ct. at 2528](#). Further, [*15] the enterprise must be connected to the pattern of racketeering activity. [Id. at 583, 101 S. Ct. at 2528](#); [Moss, 719 F.2d at 21](#). See also [18 U.S.C. § 1962\(c\)](#).

In the instant case, it is readily apparent that Plaintiff's RICO claim fails under the standards of both [Rules 8](#) and [12\(b\)\(6\), Fed. R. Civ. P.](#), and should be dismissed with prejudice. First, Plaintiff has failed to allege that the AP has engaged in a "pattern" of "racketeering activity" as contemplated by the RICO statute. The only act Defendant is

alleged to have committed consists of refusing to disseminate Plaintiff's views. This act, however, is legal and does not qualify as "racketeering activity." Cf. [Carlino, 1992 U.S. Dist. LEXIS 4927](#) (complaint dismissed where plaintiffs alleged that defendants filed baseless charges of unfair labor practices, since those acts were neither criminal nor sufficient to qualify as "racketeering activity").² Moreover, Plaintiff alleges only a *single* act, rather than the minimum of two, as required by the statute. See [McLaughlin v. Anderson, 962 F.2d 187, 194 \(2d Cir. 1992\)](#).

[*16] Further, other than through vague and conclusory allegations of conspiracy,³ Plaintiff has failed to plead any facts which infer that Defendant is engaged in an "enterprise" as defined by the statute, i.e., an ongoing organization which is engaged in a pattern of racketeering activity. Cf. [Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 25-26 n.4 \(2d Cir. 1990\)](#) (court affirms dismissal of RICO conspiracy claim under [Rule 8](#), where alleged facts do not imply any agreement involving each of the defendants to commit at least two predicate acts, or knowledge that those acts were part of a pattern of racketeering).

[*17] Finally, Plaintiff has neither alleged, nor can she plausibly assert, as is required under [18 U.S.C. § 1964\(c\)](#), that she has suffered an injury to her property or business as a result of Defendant's racketeering activity. See [Town of West Hartford v. Operation Rescue, 915 F.2d 92, 103-04 \(2d Cir. 1990\)](#) (rejecting plaintiff town's argument that injuries to its "ability to carry out its functions" falls within the ambit of [section 1964\(c\)](#)); [Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150, 107 S. Ct. 2759, 2764, 97 L. Ed. 2d 121 \(1987\)](#). "Business or property" within the meaning of the statute refers to "commercial interests or enterprises." [Town of West Hartford, 915 F.2d at 103](#). Since Plaintiff's only injury consists of being denied access to the AP to disseminate her personal views, it is clear that the harm she has suffered does not qualify as economic injury within the meaning of the statute.

In sum, Plaintiff has asserted only the most conclusory allegations about Defendant's "vested interest" in racketeering activities. She has failed to plead the existence of the essential elements of a RICO claim, nor could she. Plaintiff had only a single [*18] encounter with Defendant and that incident in no way reflects or suggests either a single act or a pattern of racketeering activity, or the existence of a RICO "enterprise". Moreover, Plaintiff has not suffered any economic harm as a result of Defendant's conduct.⁴ I therefore recommend that Plaintiff's RICO claim be dismissed. Cf. [Moss, 719 F.2d at 23](#) (affirming trial court's [Rule 12\(b\)\(6\)](#) dismissal of RICO claim, since defendant did not commit a predicate act under the RICO statute and plaintiff failed to allege a causal connection between his injury and defendant's allegedly unlawful conduct); [Carlino, 1992 U.S. Dist. LEXIS 4927](#), ** 6-7 (dismissal under [Rule 12\(b\)\(6\)](#) is warranted when complaint fails to allege racketeering activity); [Behette v.](#)

² Because Plaintiff did not suffer any injury as a result of a predicate racketeering act by Defendant, she also lacks standing under RICO. See [Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 25 \(2d Cir. 1990\)](#) (plaintiff found to lack standing because act of discharging an employee was not predicate racketeering act; "standing may be founded only upon injury from overt acts that are also [section 1961](#) predicate acts, and not upon any and all overt acts furthering a RICO conspiracy.").

³ Plaintiff apparently believes that a conspiracy against "whistleblower" teachers exists between the New York City Board of Education, the United Federation of Teachers and the New York City Corporation Counsel's Office. See Complaint PP 4, 7. Conclusory allegations of conspiracy are insufficient to survive a [Rule 12\(b\)\(6\)](#) motion to dismiss. See [San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246, 256 \(2d Cir. 1984\)](#), cert. denied, [470 U.S. 1035, 105 S. Ct. 1408, 84 L. Ed. 2d 797 \(1985\)](#); [Ostrer v. Aronwald, 567 F.2d 551 \(2d Cir. 1977\)](#) (per curiam); [Srubar v. Rudd, Rosenberg, Mitofsky & Hollender, 875 F. Supp. 155, 159 \(S.D.N.Y. 1994\)](#).

⁴ I note that Plaintiff was suspended from her job as a teacher many years before the incident with Defendant which is described in the Complaint. Any economic harm Plaintiff suffered as a result of losing her employment is unconnected to the harm she is alleged to have suffered as a result of Defendant's failure to listen to or print her story, and was the subject of separate litigation, initiated almost twenty years ago, against the New York City Board of Education and various psychiatrists. See, e.g., [Newman v. Board of Education of City School Dist. of New York, 594 F.2d 299 \(2d Cir. 1979\)](#); [Newman v. Board of Education of City School Dist. of New York, 508 F.2d 277 \(2d Cir. 1974\)](#); [Newman v. deSola Pool, No. 78 Civ. 1088, LEXIS GENFED Library, DIST File \(S.D.N.Y. June 1, 1979\)](#).

[Saleeby, 842 F. Supp. 657, 661 \(E.D.N.Y. 1994\)](#) (dismissing plaintiff's RICO claim under [Rule 8](#) on the ground that the complaint did not allege specific facts showing the elements of a RICO claim).

[*19] III. Antitrust Claim

Plaintiff's Complaint alludes to [antitrust law](#) in two passing references. It suggests a basis for federal jurisdiction arising out of a "violation of Title [15 U.S.C. § 4](#) for illegal restraint of trade." (Complaint P 1.) Since *pro se* complaints are to be read liberally, this Court assumes that Plaintiff intended to invoke [15 U.S.C. § 15, section 4](#) of the Clayton Act. That statute provides a remedy to any person who has been injured in her business or property as a result of an antitrust violation.⁵ [*20] The Complaint further asserts that "defendant in its capacity as a commercial disseminator of information is under a duty as a licensee of utilizes⁶ [sic] in the nature of a monopoly for that purpose not to deprive plaintiff of her right to freedom of speech." (Complaint P 5.) These are the Complaint's total allegations making reference to [antitrust law](#) or terminology.

Viewed liberally and in the only way that makes sense, the Complaint merely characterizes the AP as a monopoly, and accuses it of depriving Plaintiff of her freedom of speech. This is simply a variation of Plaintiff's [First Amendment](#) claim, which has already been addressed, *supra*, pages 5-8. There can be little question that the Complaint fails to state a claim under the antitrust laws and that any such claim would be frivolous.

As a threshold matter, based upon the facts alleged and any reasonable inferences that can be drawn from them, Plaintiff lacks standing to assert any antitrust claims. Like the RICO statute, the Clayton Act, which permits private suits based on antitrust violations, is meant to remedy economic injury. See [Agency Holding Corp., 483 U.S. at 150, 107 S. Ct. at 2764; Reiter v. Sonotone Corp., 442 U.S. 330, 338-343, 99 S. Ct. 2326, 2330-2333, 60 L. Ed. 2d 931 \(1979\)](#) (discussing injury to business and property as requiring some pecuniary, rather than personal, injury). Further, "it is now [*21] well settled that [HN8](#)[[↑]] in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an [economic] injury." [Balaklaw v. Lovell, 14 F.3d 793, 797 \(2d Cir. 1994\)](#). The economic injury must be "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, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 \(1977\)](#). Those suffering derivative injuries, not within the sector of the economy directly affected by a defendant's anticompetitive practices, lack antitrust standing. See [G.K.A. Beverage Corp. v. Honickman, No. 94-7200, 55 F.3d 762, 1995 U.S. App. LEXIS 13556, * 10 \(2d Cir. June 1, 1995\)](#).

In this action, Plaintiff has not alleged, nor can she, that she sustained any economic injury flowing from Defendant's conduct (not to mention conduct that is proscribed by the antitrust laws). She claims only a deprivation of her constitutional rights resulting from the AP's [*22] refusal to publish her personal views. As noted above, any economic harm that Plaintiff may have suffered would have been as a result of having been terminated as a teacher many years before the incident in issue occurred. The AP is not even alleged to have played any role in those events.

Any antitrust claim must fail for other obvious reasons as well. Plaintiff has failed to identify any anticompetitive activity by Defendant, either in the form of a *per se* violation of the Sherman Act (through such activity as price-fixing, tying arrangements or group boycotts), see, e.g., [15 U.S.C. § 1; Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 542-43](#) (2d Cir.), cert. denied, [U.S. , 126 L. Ed. 2d 337, 114 S. Ct. 388 \(1993\)](#), or under the rule of reason, which at a minimum, requires the identification of a relevant market and an adverse effect on competition in that market. *Id.*; see also [North Jersey Secretarial School v. McKiernan, 713 F.](#)

⁵ [HN7](#)[[↑]] [15 U.S.C. § 15](#) provides in relevant part: "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 . . . and shall recover threefold the damages by him sustained and the cost of suit, including reasonable attorney's fees."

⁶ The Court assumes that Plaintiff intends this word to be "utilities."

Supp. 577, 583 (S.D.N.Y. 1989) (dismissing plaintiff's complaint where it did not sufficiently define the relevant product market or the effect of the allegedly unlawful agreement on the market). She has [*23] also failed to identify any agreement or concerted action in restraint of trade between the AP and another distinct economic entity in restraint of trade. See, e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984); Capital Imaging, 996 F.2d at 542; Heart Disease Research Found. v. GMC, 463 F.2d 98, 100 (2d Cir. 1972) (a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal). In addition, she has failed to identify any anticompetitive conduct by the AP which threatens monopolization. See 15 U.S.C. § 2; Copperweld, 467 U.S. at 767-68, 104 S. Ct. at 2739-40; Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 246 (2d Cir. 1985). In short, other than alluding to the antitrust laws as one of many bases for her claims against the AP, Plaintiff has failed to plead any of the basic elements of an antitrust claim and, based upon the facts alleged, any such claim would be frivolous.

In conclusion, I recommend that Plaintiff's antitrust claim be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which [*24] relief may be granted. Not only does Plaintiff's Complaint fail to conform with the pleading requirements of Rule 8, Fed. R. Civ. P., but the facts upon which the Complaint is predicated cannot possibly sustain a claim for antitrust violations.

IV. Dismissal with Prejudice

Although it is apparent that Plaintiff's claims against Defendant should be dismissed, the question remains whether dismissal should be with or without prejudice. In general, plaintiffs whose pleadings are dismissed for legal insufficiency should be offered at least one opportunity to replead. See, e.g., Ronzani v. Sanofi S.A., 899 F.2d 195, 198 (2d Cir. 1990); Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991), cert. denied, U.S. , 118 L. Ed. 2d 208, 112 S. Ct. 1561 (1992); Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962). However, the court has discretion to dismiss a complaint without granting leave to amend. See Hernandez, 18 F.3d at 138; McLaughlin, 962 F.2d at 195; Ronzani, 899 F.2d at 198; Kaster v. Modification Systems, Inc., 731 F.2d 1014, 1018 (2d Cir. 1984).

HN9 "Where a plaintiff is unable to allege any fact [*25] sufficient to support its claim, a complaint should be dismissed with prejudice." Cortec, 949 F.2d at 48-49 (affirming district court's dismissal with prejudice of one of plaintiff's 1933 Securities Act claims against defendant Westinghouse, on the ground that the undisputed facts revealed that Westinghouse could not possibly be liable to plaintiff for § 12(2) liability). See also Spain v. Ball, 928 F.2d 61, 62-63 (2d Cir. 1991) (Title VII and ADEA claims should have been dismissed with prejudice, since the plaintiff could not possibly allege facts sufficient to support either claim; those statutes do not apply to uniformed members of the armed services, and the plaintiff was applying for a uniformed position in the Navy); Greenwaldt v. Coughlin, 93 Civ. 6551 (LAP), 1995 U.S. Dist. LEXIS 5144, *16 (S.D.N.Y. April 16, 1995) (*pro se* prisoner whose conspiracy claim was dismissed not granted leave to replead, since the prisoner had no protected interest at stake and thus could not possibly cure his pleading defect).

As discussed in detail above, Plaintiff has made only disjointed, rambling and conclusory allegations concerning the legal effect of a single event in which [*26] Defendant, the AP, expelled her from its reception area without listening to or printing her story. Her Complaint fails to state a claim under the First Amendment, or the RICO or antitrust statutes. Indeed, the facts pled by Plaintiff make it apparent that she lacks standing under RICO and the antitrust laws. Furthermore, in response to Defendant's motion to dismiss, Plaintiff submitted an Affirmation, dated June 13, 1994 and a Reply Affirmation, dated July 5, 1994. Although Plaintiff asserted that the facts on which she based her claims were clear, and she restated them, they remained essentially unchanged from those set forth in the Complaint and were accompanied by even more disjointed and conclusory allegations of fraud, prior restraint, and psychiatric racketeering. Since the underlying events in issue could not plausibly give rise to a federal cause of action, any amendment of the Complaint would be futile.⁷ I therefore recommend that the Complaint be dismissed with prejudice. Cf. In re American Express Co. Shareholder Litig., 39 F.3d 395, 402 (2d Cir. 1994) (dismissal

⁷ In addition, Plaintiff has failed to plead any facts which could even suggest the existence of any federally cognizable claim under the United Nations Charter.

without leave to replead RICO claim not erroneous where amendment would be futile because of inability [*27] to satisfy RICO's proximate cause requirement); [Town of West Hartford, 915 F.2d at 100-04](#) (plaintiff's RICO claims viewed as so insubstantial and implausible as to merit dismissal for want of jurisdiction); [Hecht, 897 F.2d at 26](#) (because it would have made no difference in outcome if Plaintiff pleaded RICO conspiracy properly, Second Circuit declined to remand to give opportunity to move to amend complaint).

CONCLUSION

For the above reasons, I respectfully recommend Defendant's motion to dismiss the action pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) be granted with prejudice. Pursuant to [28 U.S.C. § 636\(b\)\(1\)\(C\)](#) and [Rule 72\(b\) of the Federal Rules of Civil Procedure](#), the parties shall have ten days from service of this Report to file written objections. See also [Fed. R. Civ. P. 6\(a\)](#) and [\(e\)](#). Such objections shall be filed with the Clerk [*28] of the Court, with extra copies delivered to the chambers of the Honorable Peter K. Leisure, U.S.D.J., and to the chambers of the undersigned, Room 1660. Any requests for an extension of time for filing objections must be directed to Judge Leisure. Objections that are not filed on time will be waived for purposes of appeal. [Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 \(1985\), reh'g denied, 474 U.S. 1111, 106 S. Ct. 899, 88 L. Ed. 2d 933 \(1986\); Frank v. Johnson, 968 F.2d 298, 300 \(2d Cir.\), cert. denied, 506 U.S. 1038, 121 L. Ed. 2d 696, 113 S. Ct. 825 \(1992\); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 \(2d Cir. 1989\).](#)

Dated: July 28, 1995

New York, New York

Respectfully submitted,

Theodore H. Katz

United States Magistrate Judge

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CENTURY SHOPPING CTR. FUND I v. MALONE & HYDE, INC.

Court of Appeals of Wisconsin, District One

August 1, 1995, Released

No. 94-2922

Reporter

1995 Wisc. App. LEXIS 943 *; 197 Wis. 2d 117; 541 N.W.2d 838; 1995-2 Trade Cas. (CCH) P71,149

T.C. #88-CV-018071 CENTURY SHOPPING CENTER FUND I, a Wisconsin Limited Partnership, by its general partner, Century Capital Group, and CENTURY MANAGEMENT GROUP, LTD., a Wisconsin corporation, Plaintiffs-Joint-Appellants, v. MALONE & HYDE, INC., a Delaware Corporation, as successor in interest to Godfrey Company, Inc., JOSEPH A. CRIVELLO and CRIVELLO PROPERTIES, a General Partnership, Defendants-Respondents. MARQUETTE PHARMACY, INC., a Wisconsin Corporation, SUSAN L. KULINSKI, d/b/a Oak Creek Book Exchange, a Sole Proprietorship, RONALD J. and MARGARET S. ENTRINGER, d/b/a Oak Creek Homestyle Laundry and Cleaners, a Wisconsin General Partnership, Plaintiffs-Joint-Appellants, v. MALONE & HYDE, INC., a Delaware Corporation, JOSEPH A. CRIVELLO and CRIVELLO PROPERTIES, a General Partnership, Defendants-Respondents. RONALD P. HUNTLEY, as and only as Trustee in Bankruptcy of HOWELL PLAZA, INC., Plaintiff-Joint-Appellant, v. MALONE & HYDE, INC., a Delaware Corporation, Defendant-Respondent.

Notice: [*1] UNPUBLISHED LIMITED PRECEDENT OPINION - REFER TO LOCAL RULE 809.23(1)(B)5, STATS.

Prior History: APPEAL from orders of the circuit court for Milwaukee County: JOHN E. MCCORMICK, Judge.

Disposition: Reversed.

Core Terms

alleges, lease, discovery, shopping center, monopolize, conspiracy, trial court, trial court's dismissal, conspired, space, relevant market, predecessors, tenant, unfair competition, supermarket, indirectly, damages, destroy, amicus, pattern of racketeering activity, trade association, food store, Wisconsin Organized Crime Control Act, privileges, Antitrust, documents, predicate, retail

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

Facts alleged in a complaint must be taken as true, and a claim should be dismissed as legally insufficient only if it is quite clear that under no conditions can the plaintiff recover. Whether a complaint states a claim is a question of law that the appellate court decides independently of the trial court's determination.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN2 [down] **Preclusion of Judgments, Law of the Case**

Absent extraordinary circumstances, a final appellate decision in a lawsuit is the law of the case for all subsequent proceedings in that action.

Torts > Vicarious Liability > Partners > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN3 [down] **Vicarious Liability, Partners**

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 failure of the third person to perform the contract.

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Torts > Vicarious Liability > Partners > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

HN4 [down] **Management Duties & Liabilities, Causes of Action**

A partner is liable for the wrongful acts of his or her partners.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN5 [down] **Concerted Action, Civil Conspiracy**

See [Wis. Stat. § 134.01](#).

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN6 [down] **Concerted Action, Civil Conspiracy**

[Wis. Stat. § 134.01](#) gives rise to a civil claim for damages by those injured by a conspiracy.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

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

HN7 [down] **Amendment of Pleadings, Relation Back**

See Wis. R. Civ. P. 802.09(3), [Wis. Stat. § 802.09\(3\)](#).

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

[HN8](#) [down] **Regulated Practices, Trade Practices & Unfair Competition**

An instance where the result of **antitrust law** and unfair competition law enforcement may not conflict is when a firm with substantial market power, perhaps approaching that of a monopoly, uses unfair competition to augment its position by eliminating a rival concern from the market. But it is the elimination of the competition, by fair means or foul, that is the concern of the **antitrust law**, and it is only the unfair method on which the law of unfair competition focuses.

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

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

[HN9](#) [down] **Conspiracy, Elements**

A plaintiff who suffers damages as the result of a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful has a claim sounding in conspiracy.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[HN10](#) [down] **Regulated Practices, Price Fixing & Restraints of Trade**

See [Wis. Stat. § 133.03](#).

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

[HN11](#) [down] **Private Actions, Remedies**

See [Wis. Stat. § 133.18\(1\)\(a\)](#).

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

Governments > Legislation > Interpretation

[HN12](#) [down] **Regulated Practices, Price Fixing & Restraints of Trade**

The court interprets [Wis. Stat. § 133.03\(1\)](#) in accordance with the federal courts' interpretation of [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#).

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

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

HN13 [blue arrow] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Allegations that defendants conspired or combined to engage in acts of unfair competition with intent to injure or to destroy the plaintiff as a competitor constitute allegations of an antitrust violation under [Wis. Stat. § 133.03\(1\)](#).

Antitrust & Trade Law > Clayton Act > Penalties

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

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

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

HN14 [blue arrow] **Clayton Act, Penalties**

See [Wis. Stat. § 133.03\(2\)](#).

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

HN15 [blue arrow] **Regulated Practices, Monopolies & Monopolization**

The court interprets [Wis. Stat. § 133.03\(2\)](#) in accordance with the federal court's interpretation of its Sherman Antitrust Act counterpart, [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN16 [blue arrow] **Actual Monopolization, Monopoly Power**

The focus of [Wis. Stat. § 133.03\(2\)](#) ([§ 133.03\(2\)](#)) is monopolization by predatory or anticompetitive conduct combined with specific intent to achieve monopoly power. Attempted monopolization in violation of [§ 133.03\(2\)](#) requires, in addition, that there be a dangerous probability of achieving monopoly power.

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

Governments > Legislation > Interpretation

HN17 [blue download icon] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The Wisconsin Organized Crime Control Act (Act), Wis. Stat. §§ 946..80 to 946.88, is patterned after the federal Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-1968](#), and the court is guided by pertinent federal authority interpreting that statute. For the purposes of a private plaintiff seeking damages resulting from the violation of the Act, the Act has three main components: the section describing the activities prohibited by the Act, [Wis. Stat. § 946.83](#); the section defining the terms of art used in the Act, [Wis. Stat. § 946.82](#); and the provision permitting recovery of damages, [Wis. Stat. § 946.87\(4\)](#).

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

HN18 [blue download icon] **Criminal Offenses, Racketeering**

See [Wis. Stat. § 946.83](#).

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

HN19 [blue download icon] **Criminal Offenses, Racketeering**

See [Wis. Stat. § 946.82](#).

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

HN20 [blue download icon] **Private Actions, Racketeer Influenced & Corrupt Organizations**

See [Wis. Stat. § 946.87\(4\)](#).

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

HN21 [blue download icon] **Criminal Offenses, Racketeering**

Defendants violate the Wisconsin Organized Crime Control Act, [Wis. Stat. §§ 946.80 to 946.88](#), if they knowingly use, directly or indirectly, proceeds derived directly or indirectly from a pattern of racketeering activity to acquire any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise, [Wis. Stat. § 946.83\(1\)](#); acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property through a pattern of racketeering activity, [Wis. Stat. § 946.83\(2\)](#); or as employees or associates of any enterprise conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity, [Wis. Stat. § 946.83\(3\)](#).

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

HN22 [L] **Criminal Offenses, Racketeering**

The crimes that constitute racketeering activity are listed in [Wis. Stat. § 946.82\(4\)](#).

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

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

HN23 [L] **Defenses, Demurrs & Objections, Motions to Dismiss**

As long as the Wisconsin Organized Crime Control Act, [Wis. Stat. §§ 946.80 to 946.88](#), is been violated it is sufficient for a plaintiff to allege injury flowing from the predicate offenses rather than a racketeering injury. Further, general factual allegations of injury suffice at the preliminary stage because on a motion to dismiss the court presumes that general allegations embrace those specific facts that are necessary to support the claim.

Business & Corporate Law > ... > Corporate Governance > Record Inspection & Maintenance > General Overview

HN24 [L] **Corporate Governance, Record Inspection & Maintenance**

See [Wis. Stat. § 133.12](#).

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

HN25 [L] **Criminal Offenses, Miscellaneous Offenses**

See [Wis. Stat. § 180.0129](#).

Criminal Law & Procedure > ... > Fraud > False Pretenses > General Overview

HN26 [L] **Fraud, False Pretenses**

See [Wis. Stat. § 943.39\(1\)](#).

Criminal Law & Procedure > ... > Miscellaneous Offenses > Destruction of Property > General Overview

HN27 [L] **Miscellaneous Offenses, Destruction of Property**

See [Wis. Stat. § 943.01](#).

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN28 [L] **Discovery, Relevance of Discoverable Information**

As with its federal counterpart, *Fed. R. Civ. P. 26(b)*, Wis. R. Civ. P. 804.01(2)(a), [Wis. Stat. § 804.01\(2\)\(a\)](#) (Rule 804.01(2)(a)), is an expansive grant of pre-trial discovery. Anything that is relevant to the subject matter involved in the pending action is fair game even though what is sought to be discovered would not itself be admissible at trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence. Rule 804.01(2)(a). As long as these requisites are met, the hoary cry of fishing expedition is not a valid objection.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN29 [+] **Noerr-Pennington Doctrine, Sham Exception**

Although there is, of course, a broad right under the First Amendment and its Wisconsin equivalent to petition government and participate in judicial proceedings, that right does not immunize illegal activity when the petitioning of government or the participation in judicial proceedings is a mere sham designed to cloak and advance illegal activity.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

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

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

HN30 [+] **Discovery, Privileged Communications**

Wis. R. Civ. P. 804.01(2)(a), [Wis. Stat. § 804.01\(2\)\(a\)](#), permits discovery of any matter, not privileged. Statutory privileges are to be strictly and narrowly construed.

Judges: Before Wedemeyer, P.J., Sullivan and Fine, JJ.

Opinion by: FINE

Opinion

FINE, J. This is an appeal from the trial court's dismissal of consolidated actions brought against what this opinion refers to as the Sentry defendant--the successor to the entities that owned the anchor tenant in the Howell Plaza Shopping Center in Oak Creek, Wisconsin, a Sentry food store. One action was brought by the former owner and manager of Howell Plaza and by former tenants in the Howell Plaza shopping center. We refer to these parties as the "Century plaintiffs," and to their complaint as the "Century complaint." The Century plaintiffs also sued the

Crivello defendants, developers of Oak Creek Centre, a shopping center across the street from Howell Plaza.¹ The other action, against the Sentry defendant only, was brought by the trustee-in-bankruptcy of Howell Plaza's developer and current owner. The trial court dismissed the complaints and precluded Century from pursuing [*2] certain discovery. We reverse.

I. The complaints.

A. Standard of review.

HN1[] Facts alleged in a complaint must be taken as true, and "a claim should be dismissed as legally insufficient only if 'it is quite clear that under no conditions can the plaintiff recover.'" *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979) (citation omitted). Unfortunately, the trial court ignored this paradigm. In any event, whether a complaint states a claim is a question of law that we decide independently of the trial court's determination. See *Williams v. Security Sav. & Loan Ass'n*, 120 Wis.2d 480, 482, 355 N.W.2d 370, 372 (Ct. App. 1984).

B. The claims.

The complaints filed by the various plaintiffs allege claims that are either identical or similar to each other, [*3] or are overlapping. For simplicity of discussion, we analyze the separate claims *seriatim*.

1. The Century plaintiffs allege that the Sentry food store owner breached its anchor-tenant lease. This claim had been dismissed previously, but the dismissal was reversed by this court in *Century Shopping Center Fund I v. Crivello*, 156 Wis.2d 227, 233-237, 456 N.W.2d 858, 861-863 (Ct. App. 1990). The supreme court denied review. 461 N.W.2d 444 (1990) (Table). The Sentry defendant argues, and the trial court agreed, that the breach-of-lease issue could be revisited because the supreme court partially overruled *Century Shopping Center Fund* in *Sampson Investments v. Jondex Corp.*, 176 Wis.2d 55, 69-70, 499 N.W.2d 177, 183 (1993). We disagree.

Sampson Investments explained that the lease clause in *Century Shopping Center Fund* was different than the lease clause in **Sampson Investments**:

Although the court of appeals, in *Century*, required a commercial lessee to continuously operate a retail food market, the lease at issue in *Century* is distinguishable from the lease at issue in the present case. The lease in *Century*[*4] provided that the premises "shall be used as a retail food market and allied operation." The provision at issue in *Century*, however, differs from the provision at issue in the present case which contains the word "only." Furthermore, while the commercial lessee in *Century* was not permitted to sublet the premises without the lessor's written consent, Jondex possesses an unfettered right to sublet[,] which is inconsistent with a continuous operation clause. Additionally, the lease in *Century* contained a percentage-of-gross-receipts as part of the rent component while the lease at issue in the present case provided for a flat-rate monthly rent. These distinctions render the *Century* case inapposite to the present case.

Sampson Investments, 176 Wis.2d at 69-70, 499 N.W.2d at 183 (footnote omitted). Nevertheless, **Sampson Investments** opined that the legal analysis in *Century Shopping Center Fund* was flawed, and overruled the decision "to the extent it contradicts the law as expressed herein." *Id.*, 176 Wis.2d at 70, 499 N.W.2d at 183.

HN2[] Absent extraordinary circumstances, a final appellate decision in a lawsuit is the law of [*5] the case for all subsequent proceedings in that action. *Univest Corp. v. General Split Corp.*, 148 Wis.2d 29, 38-39, 435 N.W.2d 234, 237-238 (1989) (doctrine may be disregarded "when 'cogent, substantial, and proper reasons exist'") (citation omitted); cf. *Schauer v. DeNeveu Homeowners Assoc.*, No. 93-2459, slip op. at 11-14 (Wis. June 20, 1995) (RULE 806.07(1)(f), STATS., does not permit trial court to reopen judgment because caselaw relied upon in rendering judgment has been overruled in an unrelated proceeding). Although **Sampson Investments** criticized the

¹ The action against Frank P. Crivello and Crivello Investments has been stayed pursuant to *§ 362 of the United States Bankruptcy Code*, as the result of their filing under Chapter 11 of the Code.

analysis in ***Century Shopping Center Fund*** in connection with whether a lease clause requires a tenant to continually operate its business, it did not opine that the *result* in ***Century Shopping Center Fund*** was wrong. Accordingly, we see no reason to depart from the general rule--***Century Shopping Center Fund's*** decision on the breach-of-lease issue is the law of the case here.

The breach-of-contract count also asserts claims other than the clause required Sentry to continuously operate a food store at Howell Plaza. The trial court's written decision did not address these [*6] claims. We do. First, the count alleges that the Sentry defendant intentionally destroyed property in its Howell Plaza space, thereby violating the lease provision that required Sentry to surrender the premises at the end of the lease term "in the same condition in which they were at the commencement of said term, reasonable use and wear thereof, and damage by accidental fire or the elements excepted." Second, the count asserts that Sentry secretly assigned to the Crivello defendants effective control to whom Sentry could sublease its space, in violation of a clause in the lease that provided that the lease "shall not be assigned in any way" by Sentry "nor shall the leased premises be subleased in whole or in part without the written consent" of Howell Plaza. These averments state claims. The trial court's dismissal of the breach-of-lease count is reversed.

2. The Century plaintiffs allege that Joseph A. Crivello, a partner in Crivello Properties, tortiously interfered with Century's contract rights in connection with Howell Plaza's lease with Sentry. The classic summary of what constitutes tortious interference with contract rights is in [RESTATEMENT \(SECOND\) OF TORTS § 766](#) (1979):

[HN3](#) [*7]

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 failure of the third person to perform the contract.

This formulation is the law in this state. [Charolais Breeding Ranches, Ltd. v. FPC Securities Corp., 90 Wis.2d 97, 105-106, 279 N.W.2d 493, 497 \(Ct. App. 1979\)](#). [HN4](#) A partner is liable for the wrongful acts of his or her partners. Sections 178.10 and 178.12, STATS. The Century complaint alleges sufficiently that the Crivello partnership acting through partner Frank P. Crivello induced Sentry to violate its contract with Howell Plaza. The trial court's dismissal of the tortious-interference-with-contract claim against Joseph A. Crivello is reversed.

3. The Century plaintiffs allege that the Sentry defendant conspired to injure Century's "reputation, trade and business," and the Howell Plaza trustee alleges that Frank P. Crivello and the Sentry defendant entered into a similar conspiracy to injure [*8] Howell Plaza, Inc., in its business, all in violation of [§ 134.01](#), STATS. [HN5](#) [Section 134.01](#) provides that: "Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever ... shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding \$ 500." [HN6](#) This statute gives rise to a civil claim for damages by those injured by the conspiracy. [Radue v. Dill, 74 Wis.2d 239, 244-245, 246 N.W.2d 507, 510-511 \(1976\)](#).

The complaints allege that the Sentry defendant agreed with Crivello to cripple Howell Plaza and destroy Howell Plaza's business, and that, pursuant to that agreement, the Sentry defendant, among other things, destroyed Howell Plaza property, violated its lease agreement to operate a food store in Howell Plaza, gave Crivello effective control over to whom the Sentry defendant could sublet its Howell Plaza space, and that the Sentry defendant refused to relinquish its space at Howell Plaza once it moved to the Oak Creek Centre, thereby preventing Howell Plaza from getting [*9] another anchor tenant. These allegations sufficiently assert that the conspiracy was to harm Howell Plaza; they thus state a claim under [§ 134.01](#), STATS. See [Maleki v. Fine-Lando Clinic Chartered, S.C., 162 Wis.2d 73, 86-88, 469 N.W.2d 629, 634-635 \(1991\)](#) ("malice" requirement in [§ 134.01](#) means that all parties to conspiracy intended to do harm). The trial court's dismissal of the claims predicated on [§ 134.01](#) is reversed.²

² The trial court dismissed the claim under [§ 134.01](#), STATS., because it believed that the violation of an underlying legal right was required (relying on our statement in [Century Shopping Center Fund I v. Crivello, 156 Wis.2d 227, 239, 456 N.W.2d 858, 864 \(Ct. App. 1990\)](#), that there is no violation of [§ 134.01](#) "unless a legal right has been invaded") and that Howell Plaza had no

[*10] 4. The Century plaintiffs allege that Crivello defamed them by telling a Howell Plaza tenant that "Century is a real estate group and is a risky venture," that the "Century management group is bankrupt," and that the tenant "should really go with someone more stable" as a shopping center landlord. These statements are capable of a defamatory meaning and are actionable *per se*. See [*Ridgeway State Bank v. Bird*, 185 Wis. 418, 426, 202 N.W. 170, 173 \(1925\)](#). Further, the complaint sufficiently avers that the statements were part of the alleged conspiracy between Crivello and the Sentry defendant to destroy Howell Plaza so as to make the Sentry defendant liable for the defamation even though it did commit the tort directly. See [*Segall v. Hurwitz*, 114 Wis.2d 471, 481, 339 N.W.2d 333, 338 \(Ct. App. 1983\)](#). Moreover, although the defamation claim was asserted in an amended Century pleading beyond the applicable two-year statute of limitations, § 893.57, STATS., Century's original complaint was filed within the two-year period, and the defendants have not explained why the relation-back provisions of [§ 802.09\(3\)](#), STATS., do not apply.³ The trial court's dismissal of [*11] the defamation claim is reversed.

5. The Century plaintiffs allege that the Sentry defendant and Crivello engaged in "unfair competition." We are puzzled by this stand-alone [*12] count because we are unaware of any Wisconsin authority, and the parties have cited none, sanctioning in this context a legally cognizable claim for "unfair competition" as such, absent an impairment on some other right or interest. Indeed, "unfair competition is still competition," and restraints on competition, fair or unfair, may run counter to the core free-market-place rationale underlying the anti-trust laws. See [*Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 88-90 \(5th Cir. 1978\)](#) (absent anti-competitive effect, allegations that "unfair" methods were used to eliminate a competitor does not state a cognizable claim under the Sherman Antitrust Act), cert. denied, 439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1021. Giving Century's complaint the benefit of every reasonable inference, as we must, we read the "unfair competition" count to refer to the other, more specific allegations of injury that have been well-pleaded. See *id.*, [576 F.2d at 89](#).⁴ Accordingly, we reverse the trial court's dismissal of the "unfair competition" count.

legal right to compel the Sentry defendant to operate a food store at the shopping center. Our statement in [*Century Shopping Center Fund*](#), however, was predicated on our holding to that effect in [*Maleki v. Fine-Lando Clinic Chartered, S.C.*, 154 Wis.2d 471, 481-486, 453 N.W.2d 208, 212-214 \(Ct. App. 1990\)](#). The supreme court overruled our decision in *Maleki* on this point. [*Maleki v. Fine-Lando Clinic Chartered, S.C.*, 162 Wis.2d 73, 91-95, 469 N.W.2d 629, 636-638 \(1991\)](#). The supreme court's decision in *Maleki* thus also overruled, *sub silentio*, its own decision on this point in [*Cranston v. Bluhm*, 33 Wis.2d 192, 198-200, 147 N.W.2d 337, 340-341 \(1967\)](#), which it did not cite and which held that a conspiracy claim based on the closing of a theater for six months was properly dismissed when there was "no affirmative requirement in the lease that the theatre [sic] be operated at least six months in any lease year."

³ [HNT](#) RULE 802.09(3), STATS., provides:

RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

⁴ As *Northwest Power Products* explains:

[HN8](#) "An instance where the result of *antitrust law* and unfair competition law enforcement may not conflict is when a firm with substantial market power, perhaps approaching that of a monopoly, uses unfair competition to augment its position by eliminating a rival concern from the market. *But it is the elimination of the competition, by fair means or foul, that is the concern of the antitrust law, and it is only the unfair method on which the law of unfair competition focuses.*"

Id., [576 F.2d at 89](#) (emphasis added). See also [*Grams v. Boss*, 97 Wis.2d 332, 347, 294 N.W.2d 473, 481 \(1980\)](#) ("Allegations that the defendants conspired or combined to engage in acts of unfair competition with intent to injure or destroy the plaintiff as a competitor" state an antitrust-violation claim under [§ 133.03\(1\)](#), STATS.).

[*13] 6. The Century plaintiffs allege that the Sentry defendant and Crivello, together with "the other co-conspirators" engaged in a common-law conspiracy. [HN9](#) A plaintiff who suffers damages as the result of a "combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful" has a claim sounding in conspiracy. [Radue v. Dill](#), 74 Wis.2d at 241, 246 N.W.2d at 509; see also [Cranston v. Bluhm](#), 33 Wis.2d 192, 198, 147 N.W.2d 337, 340 (1967). Century's complaint alleges that among the methods Crivello and the Sentry defendant used to harm Howell Plaza was the unlawful destruction of Howell Plaza's property. This is sufficient to state a claim for conspiracy under the ***Radue*** formulation, and the trial court's dismissal of the conspiracy claim is reversed.

7. The Century plaintiffs and the Howell Plaza trustee allege that the Sentry defendant and Crivello conspired to restrain trade and commerce in violation of [§ 133.03\(1\)](#), STATS. This provision, which tracks [section 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1](#), declares: [HN10](#) "Every contract, combination in the form of [*14] trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal." [HN11](#) "Any person injured, directly or indirectly," by a violation of [§ 133.03\(1\)](#) "shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees." [Section 133.18\(1\)\(a\)](#), STATS. [HN12](#) We interpret [§ 133.03\(1\)](#) in accordance with the federal courts' interpretation of [section 1](#) of the Sherman Act. [Independent Milk Producers Co-op v. Stoffel](#), 102 Wis.2d 1, 6, 298 N.W.2d 102, 104 (Ct. App. 1980).

[HN13](#) "Allegations that the defendants conspired or combined to engage in acts of unfair competition with intent to injure or to destroy the plaintiff as a competitor" "constitute [allegations of] an antitrust violation" under [§ 133.03\(1\)](#), STATS. [Grams v. Boss](#), 97 Wis.2d 332, 347, 294 N.W.2d 473, 481 (1980). The Century complaint's allegations in support of this claim are abundant. The only question is whether there must be an allegation of an anti-competitive effect, or whether a *per se* rule applies. See *id.*, 97 Wis.2d at 348, 294 N.W.2d at 481.⁵ As with the situation in [Grams](#), 97 Wis.2d at 351, 294 N.W.2d at 483, we need [*15] not decide whether application of the *per se* rule here is appropriate because the Century complaint amply alleges the anti-competitive effects of the alleged conspiracy.

[*16] The Century complaint identifies a relevant market for grocery and related products, which, for the purposes of the appeal, the Sentry defendant does not challenge, and alleges that the Sentry defendant, as the anchor tenant in Howell Plaza was serving that market. The complaint also alleges that Crivello's Oak Creek Centre was seeking a supermarket similar to Sentry but decided that it would be in its interest if there were only one, rather than two, supermarkets serving that market, and that Crivello conspired with the Sentry defendant to have Sentry move to Oak Creek Centre and, significantly, to prevent Howell Plaza from replacing Sentry. Thus, according to the facts alleged in the complaint, the defendants saw to it that a second supermarket could not operate in what is alleged to be the relevant market. Whether or not these allegations can be proved at a trial, or whether or not they can survive

⁵ The *per se* doctrine is a broad-bladed sword, unable to make distinctions with any precision. It is pressed into service by the dual engine of instinct and necessity. It spares victims of presumed inherently pernicious practices the burden of demonstrating the market impact of those practices, which would be required under the so-called "rule of reason," because adverse market impact is assumed. See [Broadcast Music, Inc. v. CBS, Inc.](#), 441 U.S. 1, 7-8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979); [Northern Pac. Ry. Co. v. United States](#), 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). Membership criteria for this club of convenience, however, is strict: the practice must threaten the "central nervous system of the economy." [United States v. Socony-Vacuum Oil Co.](#), 310 U.S. 150, 224 n.59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940). As we have already noted, the antitrust laws protect competition not competitors. See [Northwest Power Products, Inc. v. Omak Industries, Inc.](#), 576 F.2d 83, 88-90 (5th Cir. 1978), cert. denied, 439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1021; [Mid-West Underground Storage, Inc. v. Porter](#), 717 F.2d 493, 497 (10th Cir. 1983). The *per se* rule's rationale has weakened as markets have expanded and the tools with which to compete in those market have become more efficient. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 19 (1984). Accordingly, there has been a retrenchment from the rigidity of the *per se* rule, see, e.g., [National Collegiate Athletic Ass'n v. Board of Regents](#), 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984); [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984); [Independent Milk Producers Co-op v. Stoffel](#), 102 Wis.2d 1, 10-11, 298 N.W.2d 102, 106 (Ct. App. 1980), and calls for permitting the forces of free-market dynamics to assume the greater regulatory burden, Easterbrook, 63 Tex. L. Rev. at 29.

a motion for summary judgment, they certainly state a claim under [§ 133.03\(1\)](#), STATS. See [Grams, 97 Wis.2d at 352-353, 294 N.W.2d at 483-484](#). The trial court's dismissal of the [§ 133.03\(1\)](#) claims is reversed.⁶

[*17] 8. The Century plaintiffs allege that Frank P. Crivello monopolized and attempted to monopolize the relevant market for "retail strip mall supermarket space," that Frank P. Crivello and the Sentry defendant monopolized and attempted to monopolize the relevant market for groceries and related products, and that Frank P. Crivello and the Sentry defendant conspired to monopolize the relevant market for "retail strip mall supermarket space" and the relevant market for groceries and related products, all in violation of [§ 133.03\(2\)](#), STATS. The Howell Plaza trustee alleges that the Sentry defendant attempted to monopolize the relevant market, and that Frank P. Crivello and the Sentry defendant conspired to monopolize that market, also all in violation of [§ 133.03\(2\)](#). This provision, which tracks [section 2](#) of the Sherman Antitrust Act, [15 U.S.C. § 2](#), declares: [HN14](#)[[↑]] "Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce may be fined not more than \$ 100,000 if a corporation, or, if any other person, \$ 50,000, or be imprisoned for not more than 5 years, or both." "Any person injured, directly [*18] or indirectly," by a violation of [§ 133.03\(2\)](#) "shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees." [Section 133.18\(1\)\(a\)](#), STATS. As with [§ 133.03\(1\)](#), STATS., [HN15](#)[[↑]] we interpret [§ 133.03\(2\)](#) in accordance with the federal court's interpretation of its Sherman Act counterpart. See [Grams, 97 Wis.2d at 346, 294 N.W.2d at 480](#).

[HN16](#)[[↑]] The focus of [§ 133.03\(2\)](#), STATS., is monopolization by "predatory or anticompetitive conduct" combined with specific intent to achieve monopoly power. See [Spectrum Sports, Inc. v. McQuillan](#), 506 U.S. ___, [113 S. Ct. 884, 890, 122 L. Ed. 2d 247, 257 \(1993\)](#) (interpreting [§ 2](#) of the Sherman Act). Attempted monopolization in violation of [§ 133.03\(2\)](#) requires, in addition, that there be a "dangerous probability of achieving monopoly power." *Ibid.*

Century's allegations are sufficient to state a claim under [§ 133.03\(2\)](#), STATS. Century asserts that Frank P. Crivello and the Sentry defendant conspired to and did acts that would cripple Howell Plaza as a competing shopping center and that would prevent the location in Howell Plaza of a competing supermarket. Indeed, incorporated [*19] into the complaint is a letter by Frank P. Crivello to a potential source of financing for Oak Creek Centre. In that letter, Frank P. Crivello boasts of his pursuit of monopoly power as assisted by the Sentry defendant. He tells the financing source that the Sentry defendant has agreed to close its store in Howell Plaza, and "keep it dark." This, he predicts, "will cripple [Howell Plaza] and make it difficult for them to compete with me in the future." Further, he notes that the Sentry defendant can tie up its space ("keep it dark") in Howell Plaza for six years, and that this "will make the lease of our [non anchor-tenant] space extremely easy because we will be the dominant center without question." Additionally, Frank P. Crivello describes the result of his deal with the Sentry defendant as a "very neat play for us" because "we are not going to see competition pop up down the road in the way of another food store" inasmuch as "the other corners are already developed." Century alleges that Howell Plaza was forced into bankruptcy as a result of the defendants' predatory practices. This is a sufficient allegation of injury to pass muster under [§ 133.18\(1\)\(a\)](#), STATS. The trial [*20] court's dismissal of the monopolization and attempted monopolization claims is reversed.

9. The Century plaintiffs allege that the Sentry defendant's predecessors and the Crivello defendants violated the Wisconsin Organized Crime Control Act, [§§ 946.80 to 946.88](#), STATS. [HN17](#)[[↑]] The Act was patterned after the federal Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. §§ 1961-1968](#), and we are guided by pertinent federal authority interpreting that statute. [State v. Evers, 163 Wis.2d 725, 732, 472 N.W.2d 828, 831 \(Ct.](#)

⁶ In its brief and on oral argument, the Sentry defendant focussed on [Juster Associates v. City of Rutland](#), 901 F.2d 266 (2nd Cir. 1990), as, in the Sentry defendant's view, requiring affirmance of the trial court's dismissal of the antitrust claims. In *Juster*, a shopping center owner complained because the City of Rutland "subsidized or otherwise aided" the developers of a competing shopping center--thus *increasing* competition in the relevant market, *id.*, [901 F.2d at 269](#); here, on the other hand, Century complains that the defendants have conspired to destroy, not help, a competitor--thus *decreasing* competition. *Juster* recognized that "increased competition and reduced profits resulting from an agreement between other parties does not constitute an antitrust injury." *Ibid.* *Juster* is wholly inapplicable.

App. 1991). For the purposes of a private plaintiff seeking damages resulting from the violation of the Wisconsin Organized Crime Control Act, the Act has three main components: the section describing the activities prohibited by the Act, § 946.83, STATS.;⁷ [*21] the section defining the terms of art used in the Act, § 946.82, STATS.;⁸ [*22] and the provision permitting recovery of damages, § 946.87(4), STATS.⁹

⁷ HN18 [↑] Section 946.83, STATS., provides:

Prohibited activities. (1) No person who has received any proceeds with knowledge that they were derived, directly or indirectly, from a pattern of racketeering activity may use or invest, whether directly or indirectly, any part of the 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) No person, through a pattern of racketeering activity, may acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) No person employed by, or associated with, any enterprise may conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity.

⁸ HN19 [↑] Section 946.82, STATS., provides:

Definitions. In ss. 946.80 to 946.88:

(1) "Commission of a crime" means being concerned in the commission of a crime under s. 939.05.

(2) "Enterprise" means any sole proprietorship, partnership, limited liability company, corporation, business trust, union organized under the laws of this state or other legal entity or any union not organized under the laws of this state, association or group of individuals associated in fact although not a legal entity. "Enterprise" includes illicit and licit enterprises and governmental and other entities.

(3) "Pattern of racketeering activity" means engaging in at least 3 incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity.

(4) "Racketeering activity" means any activity specified in 18 USC 1961 (1) in effect as of April 27, 1982 or the attempt, conspiracy to commit, or commission of any of the felonies specified in: chs. 161 and 945 and ss. 49.49, 134.05, 139.44 (1), 180.0129, 181.69, 184.09 (2), 185.825, 215.12, 221.17, 221.31, 221.39, 221.40, 551.41, 551.42, 551.43, 551.44, 553.41 (3) and (4), 553.52 (2), 940.01, 940.19 (3) to (6), 940.20, 940.203, 940.21, 940.30, 940.305, 940.31, 941.20 (2) and (3), 941.26, 941.28, 941.298, 941.31, 941.32, 943.01 (2), 943.012, 943.013, 943.02, 943.03, 943.04, 943.05, 943.06, 943.10, 943.20 (3) (b) to (d), 943.23 (1g), (1m), (1r), (2) and (3), 943.24 (2), 943.25, 943.27, 943.28, 943.30, 943.32, 943.34 (1) (b) and (c), 943.38, 943.39, 943.40, 943.41 (8) (b) and (c), 943.50 (4) (b) and (c), 943.60, 943.70, 944.21 (5) (c) and (e), 944.32, 944.33 (2), 944.34, 945.03, 945.04, 945.05, 945.08, 946.10, 946.11, 946.12, 946.13, 946.31, 946.32 (1), 946.48, 946.49, 946.61, 946.64, 946.65, 946.72, 946.76, 947.015, 948.05, 948.08, 948.12 and 948.30.

⁹ HN20 [↑] Section 946.87(4), STATS., provides, as material here:

Civil Remedies.

....

(4) Any person who is injured by reason of any violation of s. 946.83 or 946.85 has a cause of action for 2 times the actual damages sustained and, when appropriate, punitive damages. The person shall also recover attorney fees and costs of the investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought under this section.

HN21[] Defendants violate the Wisconsin Organized Crime Control Act if they knowingly use, directly or indirectly, proceeds derived directly or indirectly "from a pattern of racketeering activity" to acquire "any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise," [§ 946.83\(1\)](#), STATS.; "acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property" "through a pattern of racketeering activity," [§ 946.83\(2\)](#), STATS.; or as employees or associates of "any enterprise" "conduct or participate, [*23] directly or indirectly, in the enterprise through a pattern of racketeering activity," [§ 946.83\(3\)](#), STATS. "Pattern of racketeering activity" means engaging in at least 3 incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity." [Section 946.82\(3\)](#), STATS.

HN22[] The crimes that constitute "racketeering activity" are listed in [§ 946.82\(4\)](#), STATS.

The Century plaintiffs sufficiently allege all the necessary elements to support its claim under the Wisconsin Organized Crime Control Act. First, as predicate crimes under [§ 946.82\(4\)](#), STATS., the complaint alleges that the Sentry defendant's predecessors falsely reported to the Wisconsin Secretary of State that they did not conspire to restrain trade and monopolize the relevant market. Such false reports, if made, violate [§ 180.0129](#), STATS., and [§ 943.39\(1\)](#), STATS., which are predicate offenses under the Act.¹⁰ [*26] See [§ 946.82\(4\)](#), [*24] STATS. The complaint also alleges that the Sentry defendant's predecessors illegally destroyed Howell Plaza property, in violation of [§ 943.01](#), STATS., which is also a predicate offense under the Act. See [§ 946.82\(4\)](#).¹¹ [*27] Second,

¹⁰ [Section 133.12](#), STATS., requires every Wisconsin corporation, **HN24**[] "in its annual report filed with the secretary of state, [to] show whether it has entered into any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce." **HN25**[] [Section 180.0129](#), STATS., provides:

Penalty for false document. (1) A person may not sign a document with intent that it be delivered to the secretary of state for filing or deliver, or cause to be delivered, a document to the secretary of state for filing, if the person knows that the document is false in any material respect at the time of its delivery.

(2) Whoever violates this section may be fined not more than \$ 10,000 or imprisoned for not more than 2 years or both.

HN26[] [Section 943.39\(1\)](#), STATS., provides:

Fraudulent writings. Whoever, with intent to injure or defraud, does any of the following is guilty of a Class D felony:

(1) Being a director, officer, manager, agent or employee of any corporation or limited liability company falsifies any record, account or other document belonging to that corporation or limited liability company by alteration, false entry or omission, or makes, circulates or publishes any written statement regarding the corporation or limited liability company which he or she knows is false[.]

¹¹ **HN27**[] [Section 943.01](#), STATS., provides:

Damage to property. (1) Whoever intentionally causes damage to any physical property of another without the person's consent is guilty of a Class A misdemeanor.

(2) Any person violating sub. (1) under the following circumstances is guilty of a Class D felony:

(a) 1. In this paragraph, "highway" means any public way or thoroughfare, including bridges thereon, any roadways commonly used for vehicular traffic, whether public or private, any railroad, including street and interurban railways, and any navigable waterway or airport.

2. The property damaged is a vehicle or highway and the damage is of a kind which is likely to cause injury to a person or further property damage; or

(b) The property damaged belongs to a public utility or common carrier and the damage is of a kind which is likely to impair the services of the public utility or common carrier; or

the Century plaintiffs have sufficiently alleged that the Sentry defendant's predecessors, Crivello Properties, Joseph A. Crivello, and Frank P. Crivello violated [§ 946.83](#) in connection with their interest in Oak Creek Centre and the anchor-tenant space, see [§§ 946.83\(1\) & \(2\)](#), and that they participated in each other's affairs "through a pattern of racketeering activity," see [§ 946.83\(3\)](#). The Century plaintiffs also sufficiently allege damage under the Wisconsin Organized Crime Control [HN23](#)¹² Act--as long as the Act has been violated it is sufficient for a plaintiff to allege injury flowing from the predicate offenses (here, alleged violations of [§§ 180.0129, 943.01](#), and [943.39\(1\)](#)) rather than a "racketeering injury." See [Sedima, S.P.R.L. v. Imrex Co., Inc.](#), 473 U.S. 479, 497, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985) (interpreting the Racketeer Influenced and Corrupt Organizations Act). Further, "general factual allegations of injury" suffice at this stage because "on [*25] a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." [NOW, Inc. v. Scheidler](#), 510 U.S. ___, 114 S. Ct. 798, 803, 127 L. Ed. 2d 99, 107 (1994) (interpreting the Racketeer Influenced and Corrupt Organizations Act) (citation omitted). The trial court's dismissal of the Wisconsin Organized Crime Control Act claim is reversed.¹²

II. Discovery.

On July 2, 1992, the Milwaukee law firm of O'Neil, Cannon & Hollman, S.C., attorneys for the Sentry defendant in this case, and the firm that represented one of the Sentry defendant's predecessors in [Century Shopping Center Fund I v. Crivello](#), 156 Wis.2d 227, 456 N.W.2d 858 (Ct. App. 1990), filed motions with the supreme court for permission to submit *amicus* briefs in the then pending **Sampson Investments** case on behalf of the Wisconsin Merchants Federation and the Wisconsin Grocers Association, trade associations representing retailers in this state. The supreme court granted the motions on July 16, 1992, and a consolidated brief on behalf of the Federation and the Association was filed on August 4, 1992. The motions and the consolidated *amicus* brief filed with the [*28] supreme court argued that the court of appeals decision in **Sampson Investments**, which relied on **Century Shopping Center Fund**, see **Sampson Investments v. Jondex**, Nos. 91-0297, 91-0957, slip op. at 5 (Wis. Ct. App. Jan. 10, 1992) (unpublished), would "have calamitous results" for the members of the Federation and the Association. In their consolidated brief, the trade associations asked, *inter alia*, that the supreme court overturn this court's holding in **Century Shopping Center Fund**.

(c) The property damaged belongs to a person who is or was a witness as defined in s. 940.41 (3) or a grand or petit juror and the damage was caused by reason of the owner's having attended or testified as a witness or by reason of any verdict or indictment assented to by the owner.

(d) If the total property damaged in violation of sub. (1) is reduced in value by more than \$ 1,000. For the purposes of this paragraph, property is reduced in value by the amount which it would cost either to repair or replace it, whichever is less.

(e) The property damaged is on state-owned land and is listed on the registry under sub. (5).

(2m) Whoever causes damage to any physical property of another under all of the following circumstances is subject to a Class B forfeiture:

(a) The person does not consent to the damage of his or her property.

(b) The property damaged is on state-owned land and is listed on the registry under sub. (5).

....

(3) If more than one item of property is damaged under a single intent and design, the damage to all the property may be prosecuted as a single forfeiture offense or crime.

(4) In any case of unlawful damage involving more than one act of unlawful damage but prosecuted as a single forfeiture offense or crime, it is sufficient to allege generally that unlawful damage to property was committed between certain dates. At the trial, evidence may be given of any such unlawful damage that was committed on or between the dates alleged.

(5) The department of natural resources shall maintain a registry of prominent features in the landscape of state-owned land. To be included on the registry, a feature must have significant value to the people of this state.

¹² Inasmuch as we have reversed the trial court's dismissal of the complaints, we do not reach the issue of whether the trial court erred in denying leave to the plaintiffs to replead. See [Gross v. Hoffman](#), 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

As part of their discovery in this action, Century sought to depose two attorneys from O'Neil, Cannon & Hollman, S.C., and officers and employees of the Wisconsin Merchants Federation and the Wisconsin Grocers Association, all in connection with the filing of the *amicus* brief in **Sampson Investments**. The notices of deposition also sought documents described as pertinent to that inquiry. The trade associations, again represented by O'Neil, Cannon & Hollman, S.C., moved to quash, and asserted three grounds in support of the motion. First, they alleged that the information sought was "not reasonably calculated to lead to the discovery of admissible evidence," [*29] a prerequisite to discovery under RULE 804.01(2), STATS. Second, they argued that discovery would "chill the constitutional rights of non-parties to petition the government for redress of grievances contrary to the [First Amendment to the Constitution of the United States](#) and [Article I, sec. 4 of the Wisconsin Constitution](#)." Third, they asserted that the discovery "seeks information protected by the attorney-client privilege." In support of the motion, the trade associations submitted a conclusory affidavit by a lawyer from O'Neil, Cannon & Hollman, S.C., that essentially reiterated these arguments.

In opposition to the motion to quash, and in support of its own motion to compel discovery, Century argued that the *amicus* filing in **Sampson Investments** was part of the scheme by one of the predecessors of the Sentry defendant to affect the merits of this action in the guise of the *amicus* submission in another case: "The Plaintiffs seek the discovery at issue in order to determine whether and the extent to which [a predecessor of the Sentry defendant] subverted the integrity of the judicial process by effectively appearing before the Wisconsin Supreme Court *ex parte* [*30], and without the full disclosure required by the applicable ethical rules." (Footnote omitted.) The trial court granted the motion to quash and denied Century's motion to compel discovery, holding that the information sought was not relevant to the issues in this case, would subject those named in the notices of deposition to "an unwarranted fishing expedition" and would invade the attorney client privilege. The trial court neither held an evidentiary hearing on the motions nor examined *in camera* any of the requested documents. We reverse.

[HN28](#)[] As with its federal counterpart, *Rule 26(b) of the Federal Rules of Civil Procedure*, RULE 804.01(2)(a), STATS., is an expansive grant of pre-trial discovery. Anything that is "relevant to the subject matter involved in the pending action" is fair game even though what is sought to be discovered would not itself be admissible at trial if discovery "appears reasonably calculated to lead to the discovery of admissible evidence." RULE 804.01(2)(a). As long as these requisites are met, the hoary cry of "fishing expedition" is not a valid objection. See [Hickman v. Taylor, 329 U.S. 495, 507, 91 L. Ed. 451, 67 S. Ct. 385 \(1947\)](#); [State ex rel. Dudek v. Circuit Court](#) [*31], 34 Wis.2d 559, 585, 150 N.W.2d 387, 402 (1967); see also [State ex rel. Amek bin Rilla v. Circuit Court](#), 76 Wis.2d 429, 435, 251 N.W.2d 476, 480 (1977) (requirement that material sought be relevant).

On this record, sparse and untested by examination and cross-examination as it is, Century has made a threshold showing that the material it seeks is within the scope of permissible discovery. First, the spine of this case is the alleged conspiracies by the defendants in connection with termination of Sentry's anchor-tenant status in the Howell Plaza shopping center. An important vertebra in that spine is Sentry's Howell Plaza lease. Our decision in **Century Shopping Center Fund** interpreted that lease, and, as noted, the supreme court denied review. The *amicus* submission to the supreme court in **Sampson Investments** by the law firm that represents the Sentry defendant in this case sought to have **Century Shopping Center Fund** overruled. Century claims that the law firm did not adequately disclose to the supreme court that, as alleged by Century, the law firm's interest in seeking to have **Century Shopping Center Fund** overruled extended [*32] beyond the face of its submissions and that those submissions were attempts by the firm on behalf of the Sentry defendant here to influence the outcome of this case in a proceeding at which the plaintiffs in this case would not be represented. [HN29](#)[] Although there is, of course, a broad right under the First Amendment and its Wisconsin equivalent to petition government and participate in judicial proceedings, that right does not immunize illegal activity when the petitioning of government or the participation in judicial proceedings is a mere "sham" designed to cloak and advance illegal activity. [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511-516, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#) (applying the "sham" exception to the Noerr-Pennington doctrine enunciated in [Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#), and [United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#)); [Badger Cab Co., Inc. v. Soule, 171 Wis.2d 754, 762-765, 492 N.W.2d 375, 379-380 \(Ct. App. 1992\)](#) (applying **California Motor Transport**). This is what

Century contends is the situation here; it has the right under RULE 804.01(2)(a), STATS., to pursue [*33] discovery in that area. Accordingly, we reverse the trial court's order precluding discovery.

Our conclusion that Century may pursue discovery does not mean that it may rummage unchecked through the files of either the trade associations or of O'Neil, Cannon & Hollman, S.C. [HN30](#) RULE 804.01(2)(a), STATS., permits discovery of "any matter, *not privileged*." (Emphasis added.) "Statutory privileges are to be strictly and narrowly construed." **Steinberg v. Jensen**, No. 92-2475, slip op. at 20 (Wis. June 30, 1995). Upon remand, those subject to the notices of deposition are to produce all documents requested and to answer all questions asked, with the exception of those matters or documents claimed to be protected by privilege. Documents that are not produced pursuant to a claim of privilege are to be listed by date, author, recipient, and privilege or privileges asserted, and are to be transmitted to the trial court for its *in camera* inspection. A copy of the list shall also be furnished to all counsel. The trial court is to decide in a written memorandum keyed to each document for which privilege is claimed whether the claimed privilege or privileges apply. See **United** [*34] [**States v. Zolin**, 491 U.S. 554, 568-569, 105 L. Ed. 2d 469, 109 S. Ct. 2619 \(1989\)](#) (*in camera* review is appropriate method to determine applicability of attorney-client privilege) (crime-fraud exception to privilege). All questions that are not answered pursuant to a claim of privilege shall be certified to the trial court. The trial court is to decide in a written memorandum keyed to each question so certified whether the claimed privilege or privileges apply. The trial court may, in the appropriate exercise of its discretion, hold an evidentiary hearing in connection with the applicability of the "sham" exception to the *Noerr-Pennington* doctrine and in connection with any claim of privilege.

By the Court.--Orders reversed.

Publication in the official reports is recommended.

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Saratoga Harness Racing v. Veneglia

United States District Court for the Northern District of New York

August 2, 1995, Decided ; August 3, 1995, FILED

94-CV-1400

Reporter

897 F. Supp. 38 *; 1995 U.S. Dist. LEXIS 11064 **

SARATOGA HARNESS RACING INC., Plaintiffs, -v- PETER VENEGLIA, Individually and as Chairman of UNITED STANDBRED HORSEMEN OF NEW YORK; NORTHEASTERN HARNESS HORSEMEN'S ASSOC. Inc.; JOSEPH A. FARALDO; STANDBRED OWNERS ASSOC. OF NEW YORK; LEONARD D. POWELL; STANDBRED BREEDERS AND OWNERS ASSOC. OF NEW JERSEY, INC., Defendants.

Core Terms

simulcasting, horsemen's, racing, associations, interstate, track, host, negotiated, wagering, broadcasting, contracted, personal jurisdiction, reconsideration, contractual, rights, allegations, supplying, harness, terms

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN1 [down arrow] **Jurisdiction, Jurisdictional Sources**

Where the underlying action is based on a federal statute, in order to subject a non-domiciliary to jurisdiction federal courts must consider both the state statutory basis for jurisdiction and whether application of that statutory jurisdiction comports with the [due process clause of the Fourteenth Amendment](#).

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

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

HN2 [down arrow] **Relief From Judgments, Altering & Amending Judgments**

A court is justified in reconsidering its previous ruling if there is an intervening change in the controlling law, new evidence not previously available comes to light, or it becomes necessary to remedy a clear error of law or to prevent obvious injustice.

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

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN3 Contracts, Sales of Goods

For personal jurisdiction to lie in a New York court under [N.Y. C.P.L.R. 302\(a\)\(1\)](#), the non-domiciliary must have transacted business within New York State or contracted anywhere to supply goods or services in the state and the cause of action must arise out of such transaction.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

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

HN4 Jurisdiction, Jurisdictional Sources

Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith legally sufficient allegations of jurisdiction. At that preliminary stage, then, the plaintiff's *prima facie* showing may be established solely by allegations.

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN5 State & Territorial Government Licensing, Gaming & Lotteries

By federal statute, the host racing association must have a written agreement with the horsemen's group representing the participants in the race that is to be subject to interstate wagering. [15 U.S.C.S. § 3004\(a\)\(1\)\(A\)](#).

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN6 Higher Education & Professional Associations, Professional Associations

One permissible interpretation of the Federal Interstate Horse Wagering Act, [15 U.S.C. § 3001 et seq.](#), suggests that a racetrack obtain the horsemen's consent during regular contract negotiations with the trade association that the horsemen choose to represent them; if a racetrack did not previously negotiate with a representative trade association, the racetrack would be required to obtain the consent directly from the owners.

Counsel: **[**1]** E. Guy Roemer Esq., ROEMER, FEATHERSTONHAUGH LAW FIRM, Capital Center, 99 Pine Street, Albany, NY 12207, For Plaintiff.

Neil L. Levine, Esq., Jonathan P. Nye, Esq., WHITEMAN, OSTERMAN LAW FIRM, One Commerce Plaza, Albany, NY 12260, For Defendants, Peter J. Veneglia, United Standardbred Horsemen of NY, NorthEast Harness Horseman's Assoc., Inc., Joseph A Faraldo, Standardbred Owners Assoc. of NY, Inc., Leonard D. Powell.

Michael S. Stein, Esq., STERNS & WEINROTH LAW FIRM, Trenton, New Jersey, For Defendants, Standardbred Breeders & Owners Assoc. of New Jersey, Inc..

Judges: Thomas J. McAvoy, Chief U.S. District Judge

Opinion by: Thomas J. McAvoy

Opinion

[*39] MEMORANDUM

DECISION & ORDER

ON January 27, 1995, oral argument was heard on plaintiff's motion for a preliminary injunction and defendants' motions under Fed. R. Civ. P. 12. In a decision delivered from the bench on that date the Court denied plaintiff's motion for a preliminary injunction, denied the rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction of all defendants but Standardbred Breeders & Owners Association of New Jersey, and denied the rule 12(b)(2) motion to dismiss for lack of personal jurisdiction [**2] of Standardbred Breeders & Owners Association of New Jersey ("SBOA-NJ"). Comes now SBOA-NJ seeking reconsideration of their motion to dismiss for lack of personal jurisdiction.

I. BACKGROUND

A. Facts:

This action stems from failed contract negotiations between plaintiff **Saratoga Harness Racing, Inc.**, which operates a harness race track at Saratoga, New York, and the horse owners who race at Saratoga. **Defendant Northeastern Harness Horsemen's Association, Inc. ("NHHA")** is the trade organization of horsemen with which Saratoga previously had a contract relating to the terms and conditions of racing at Saratoga. That contract expired on November 30, 1993. **Defendant Powell** is a vice-president of NHHA. **Defendants Faraldo and Veneglia** are styled as members, agents and negotiators for **defendant NHHA**. Defendant Faraldo is also president of **defendant Standardbred Owners Association of New York, Inc. ("SBOA-NY")**, which represents horsemen at Yonkers racetrack. Defendant Veneglia is also an officer and member of **defendant United Standardbred Horsemen of New York ("USH")** an unincorporated group of horsemen's associations. Negotiations [**3] for a new contract between plaintiff and NHHA took place during the fall of 1993 and the Spring of 1994: those negotiations ultimately failed.

Plaintiff essentially states two separate antitrust claims against these defendants ¹ based on their conduct during and since the time that negotiations broke down between plaintiff and the NHHA: **1)** that defendant NHHA, through defendants Faraldo, Powell, and Veneglia both individually and through defendant USH, have organized a boycott of Saratoga by their membership and other horsemen, in violation of § 1 of the Sherman Act; and, **2)** that these defendants and local horsemen's associations at other tracks have engaged in an illegal "tying" operation, whereby these local associations, in combination with other defendants, threatened to withhold their consent to simulcasting of those other tracks' races if those other tracks simulcasted races to Saratoga.

[**4] One of the reasons such concerted undertakings by horsemen's associations are theoretically possible is because under the Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 et seq., local horsemen's associations are guaranteed a power of consent to interstate simulcasting: that act says that consent of the "host-racing association"

¹ Plaintiff also asserts violations of New York State antitrust law, N.Y. G. B. L. § 340, (the "Donnelly Act"), and a common law claim for tortious interference with contract.

(the live-racing track) to interstate simulcasting is valid only if that track has a *written* agreement with its local horsemen's association, setting forth the terms and conditions of interstate wagering (including simulcasting). The Interstate Horseracing Act gives local horsemen's [*40] associations a power of consent meant to be "withdrawn or varied only within the regular contractual process of negotiating an agreement as to terms and conditions between the horsemen's group and the host racing association." See Alabama Sportservice, Inc. v. National Horsemen's Benevolent & Protective Ass'n, 767 F. Supp. 1573, 1579 (M.D. Fla. 1991). "It is the legislative intent of [the act] that [horsemen's associations] give consent in exchange for acceptable 'terms and conditions'--agreements as to money and exclusivity." Id. In short, the act provides [**5] consent powers to be negotiated with reference to the contractual relationship between the host racing association and the local horsemen's association.

Concerning SBOA-NJ, plaintiff alleges that the various defendants caused defendant SBOA-NJ to wrongfully withhold their consent to the simulcasting to Saratoga of harness racing from Meadowlands, Garden State Park and Freehold Raceway, SBOA-NJ's host racing associations' racetracks, whereby Saratoga was deprived of simulcasts from these tracks.²

[6] B. Procedural History:**

SBOA-NJ previously claimed that this court lacked the requisite personal jurisdiction over them to adjudicate plaintiff's claims. Plaintiff claimed that long-arm personal jurisdiction was proper under N.Y. Civ. Prac. L. & R. § 302(a)(1) ("contracts anywhere to supply goods or services in the state"), and § 302(a)(3)("commits a tortious act without the state causing injury to person or property within the state"), under both subdivisions (i) and (ii) of that section.

The Court concluded, construing plaintiff's jurisdictional allegations in the light most favorable to them, that plaintiff had met its *prima facie* burden of demonstrating that jurisdiction over these defendants was proper under 302(a)(1). The Court found that SBOA-NJ, as the representative body of its horsemen membership, had contracted with its host racing associations to supply services into New York. As part of that conclusion, the Court found that the supplying of simulcasting into New York for purposes of interstate wagering constituted the provision of services into New York within the meaning of § 302(a)(1). The Court also concluded that, as agents and negotiators of the [*7] horsemen, SBOA-NJ had agreed to provide its members' services for, and its own negotiated consent to, both the simulcasting of racing in New York and the acceptance of wagers from New York. As such, the Court found that SBOA-NJ's negotiated written consent constituted a contract to provide services into New York.

II. DISCUSSION.

Defendant SBOA-NJ now seeks the Court's reconsideration of its decision that it properly had personal jurisdiction over them under New York's long-arm statute.³

² Further tying allegations through which plaintiff implicates the horsemen's associations' consent power, allegedly exercised in violation of antitrust include: 1) that the **SBOA-NY** threatened management at Yonkers raceway that they would withdraw their consent to interstate simulcasting from Yonkers if Yonkers proceeded to simulcast in-state to Saratoga. Saratoga is now unable to receive simulcasts from Yonkers; and 2) that defendants caused the horsemen's association at Vernon Downs to exercise a contractual provision to withhold their consent to simulcasting of Vernon's races to Saratoga.

³ SBOA-NJ offers no basis for the Court to reconsider its earlier determination that assertion of personal jurisdiction over these defendants would not offend due process. See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104-105, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987); Mareno v. Rowe, 910 F.2d 1043, 1046 (2d Cir. 1990), cert. denied, 498 U.S. 1028, 112 L. Ed. 2d 673, 111 S. Ct. 681 (1991) HN1[↑] (Where the underlying action is based on a federal statute, in order to subject a non-domiciliary to jurisdiction federal courts must consider both the state statutory basis for jurisdiction and whether application of that statutory jurisdiction comports with the *due process clause of the Fourteenth Amendment*).

[**8] A. Standard for Reconsideration

HN2 A court is justified in reconsidering its previous ruling if: (1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; or (3) it becomes necessary to remedy a clear error of law or to prevent obvious [*41] injustice. *Larsen v. Ortega*, 816 F. Supp. 97, 114 (D. Conn. 1992).

SBOA-NJ relies on the third, "clear error of law" ground in seeking reconsideration. "With regard to the third ground, the Court cautions that any litigant considering bringing a motion to reconsider based upon that ground should evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant." *Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625, 626 (S.D. Miss. 1990). The motion for reconsideration is not a device "intended to give an unhappy litigant one additional chance to sway the judge." *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977). It is in light of these considerations that the court undertakes reconsideration of its January 31, 1994 order.

B. Defendants' Bases for Reconsideration:

HN3 For personal jurisdiction [**9] to lie in a New York court under § 302(a)(1), the non-domiciliary must have transacted business within New York State or contracted anywhere to supply goods or services in the state and the cause of action must arise out of such transaction. *Pellegrino v. Stratton Corp.*, 679 F. Supp. 1164, 1172 (N.D.N.Y. 1988).

SBOA-NJ offers three arguments why the Court erred in finding personal jurisdiction in the first instance: 1) that it never contractually consented to simulcasting its members' races; 2) that assuming arguendo it contracted with its host racing association to provide simulcasting into New York, simulcasting is not "supplying goods or services in the state" within the meaning of § 302(a)(1); and 3) that irrespective of the Court's determination of the first two objections, plaintiff's claims did not "arise out of" the alleged contracts.

i. No Contract, No Consent:

When it decided that SBOA-NJ had contracted to supply services in the state, the Court relied on plaintiff's uncontested allegations that SBOA-NJ had "agreed to provide simulcasts and accept wagers from off-track betting systems located in New York State." (Pltff. Memo in Opp. to Motion [**10] to Dismiss, at 4). See *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990), cert. denied, 498 U.S. 854, 111 S. Ct. 150, 112 L. Ed. 2d 116 (1990) ("prior **HN4** to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith . . . legally sufficient allegations of jurisdiction. At that preliminary stage, [then,] the plaintiff's *prima facie* showing may be established solely by *allegations*.") (emphasis added). While it is undisputed that **HN5** by federal statute the host racing association (i.e. the simulcasting track) "must have a written agreement with the horsemen's group" representing the participants in the race which is to be subject to interstate wagering, See 15 U.S.C. § 3004(a)(1)(A),⁴ on the original motion neither party placed the relevant statutorily required written agreement before the Court. Defendant SBOA-NJ now submits to the Court its written agreements with its host racing associations, and claims that these establish that it "never entered into a contract to supply simulcasting services into New York," (Deft. Memo for Recons. at 1). Upon examination of these artfully drafted [**11] agreements, however, the Court concludes that they in fact constitute contracts between the New Jersey host racing associations and SBOA-NJ to provide simulcasting services into New York.

⁴ As the Sixth Circuit recently held, **HN6** "One permissible interpretation of the Act suggests that a racetrack obtain the horsemen's consent during regular contract negotiations with the trade association that the horsemen choose to represent them; if a racetrack did not previously negotiate with a representative trade association, the racetrack would be required to obtain the consent directly from the owners." *Kentucky Division of the Horsemen's Benevolent Assoc. v. Turfway Park*, 20 F.3d 1406 (6th Cir. 1994).

The interstate simulcasting provision of these agreements reads in pertinent part as follows:

TWENTIETH: In the event that the Authority considers proposals for inter-track betting, . . . the following provisions apply:

[*42] A. With regard to . . . simulcasting, the Parties recognize the applicability of the Federal [**12] Interstate Horse Wagering Act, [15 U.S.C. § 3001 et seq.](#) (the "Federal Act") and that the SBOA as the recognized representative of the harness horseman racing under the terms of this agreement, shall have all the rights permitted to horsemen's groups as defined in the Federal Act. The parties agree that the execution of the agreement is not to be construed as the SBOA's consent to the Authority's participation in any activities contemplated by the above-mentioned Federal Act.⁵ If the Authority proposes to enter into Agreements with respect to interstate wagering . . . the SBOA shall be notified of same and a copy of any such proposed agreement shall be submitted to the SBOA and shall not become effective unless the SBOA approves such agreement in writing within 21 days of its receipt. Such approval shall not be unreasonably withheld. In the event that the SBOA shall not have approved or disapproved said agreement within the 21-day period provided for herein, the proposed agreement for interstate . . . wagering shall be deemed to have been approved as submitted by the Authority.

(Stein Recons. Aff. Ex. A, B & C). This consent clause is followed by thirteen paragraphs of [**13] contractual provisions which are to explicitly control the implementation of simulcasting and interstate wagering and the disposition of revenues acquired from simulcasting and interstate wagering, once SBOA-NJ has consented to participate in such proposed simulcasting under this consent provision.

SBOA-NJ claims that the foregoing provision shows that they undeniably refused to provide negotiated written consent to simulcasting in New York. The Court finds, however, that this provision merely establishes [**14] the mechanism by which SBOA-NJ consents to participate in the proposed simulcasting agreements forwarded to them under this agreement--either by expressly responding to the submitted proposal or by failing to respond within twenty-one days. Having approved and consented to various proposed New York simulcasting agreements⁶ (expressly or by silence), and thereby subjected such simulcasting to the previously negotiated terms and conditions contained in their agreements with their host racing associations, the Court finds that SBOA-NJ has contracted with the relevant New Jersey racetracks to participate in providing simulcasting into New York according to the detailed terms of the parties agreements.⁷

[15] ii. No Goods or Services:**

SBOA-NJ also argues on reconsideration that, even assuming their agreements with their host racing associations constitute contracts to provide simulcasting to New York State, providing simulcasting is not "supplying goods or services in the state" within the meaning of [§ 302\(a\)\(1\)](#). The Court adheres to its earlier conclusion that by contractually participating in simulcasting into New York these defendants have supplied a service in New York.

⁵ Defendant places particular emphasis on this sentence as evidence that it never contractually negotiated for or consented to simulcasting. In the Court's view, however, this sentence simply establishes that execution of the *instant* agreement is not of itself consent to simulcasting: consent must be further sought and granted under the contractual consent terms which follow. Nothing in this sentence, however, precludes SBOA-NJ from exercising their power to consent in the future *under this contract*.

⁶ With Monticello Raceway, Vernon Downs, Yonkers Racetrack, Batavia Downs, Buffalo Raceway, and the Capital District and Nassau County OTBs, all in New York. (DeSantis Aff. Ex. A, B).

⁷ In a footnote SBOA-NJ argues that under the Court's analysis, by entering into contracts with New Jersey racetracks wherein they do not consent to interstate simulcasting, they could be found to have contracted to provide simulcasting services in each of the 50 states. Of course this does not follow: it is only where SBOA-NJ consents to simulcasting into a state according to their own contractual consent provision, and participates in that simulcasting and the proceeds therefrom under the negotiated explicit terms of their contract with the New Jersey race tracks, that they can be found to have contracted to provide simulcasting services for that state's jurisdictional purposes.

SBOA-NJ points to [*Broadcasting Rights International Corp. v. Societe du Tour de France, S.A.R.L., 675 F. Supp. 1439 \(S.D.N.Y. \[*43\] 1987\)*](#), for the proposition that broadcasting signals are supplied in the state where an event occurs, not the state to which a signal is transmitted. The Court finds that not only does that case not stand for that proposition, it is in any event not on all fours with this case. Initially, Broadcasting Rights is concerned far more with broadcasting rights than broadcasting *signals*. Cf. [*CBS, Inc. v. Snyder, 798 F. Supp. 1019, 1028 \(S.D.N.Y. 1992\)*](#) (allegation that TV station supplies television broadcast segments into New York insufficient for § 302(a)(1) where claims [**16] against station are not closely related to station's broadcast segments), aff'd, [*989 F.2d 89 \(2d Cir. 1993\)*](#). The contract offered in support of jurisdiction in Broadcasting Rights concerned the one time sale of all broadcast rights to the *Tour de France* by the sponsoring group, to a middleman who later sold those rights to a New York broadcasting entity. There is no indication in that case, however, that the *Tour* sponsor had any notice of, or contractual consent power over, the locations to which the middleman would later provide the *Tour de France* for future broadcast. Thereafter, the New York broadcasting entity "first took possession of and exercised those rights in France by taping the race." [*Broadcasting Rights 675 F. Supp. at 1445.*](#)

Simulcasting, however, has little in common with the one-time taping for future exhibition of a single event for entertainment or informational purposes. Rather, together with their host racing associations, these defendants instantaneously provide the New York receiving track with a live, ongoing sporting exhibition which is in turn "resold" by the receiving track via track admission fees, and which is subject to lucrative [**17] wagering in both locations. Indeed the net result is that by an electronic medium, the horsemen's association provides the same services to the New York track that it provides to its host racing association.

Furthermore, by both the terms of its contract and by statute, SBOA-NJ directly and immediately profits from providing the receiving track with its members' services through its receipt of a portion of the races' handle. The Court notes also that simulcasting involves extensive interaction between the broadcasting and receiving parties, including the contemporaneous exchange of betting information and wagering across state lines.

In short then, the Court finds that just as SBOA-NJ provides services to its host racing associations by negotiating on behalf of and ultimately providing its members as participants for harness races, so to by its contractual consent to, and participation in simulcasting (which provides those self-same services to the receiving tracks, albeit electronically), SBOA-NJ has contracted in New Jersey to provide services into New York.

iii. Not Arising out of:

With respect to the requirement that the cause of action "arise out of" the defendants' [**18] transactions the Court adheres to its earlier conclusion that plaintiff's allegations that SBOA-NJ, by combining and conspiring in violation of antitrust to withhold simulcasting to plaintiff while contractually providing simulcasting and interstate wagering to other New York venues, satisfies the articulable nexus requirement. [*Pellegrino, 679 F. Supp. at 1172*](#) ("the New York Court of Appeals has stated that "there must be some 'articulable nexus between the business transacted and the cause of action sued upon.'") (quoting [*McGowan v. Smith, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 645, 419 N.E.2d 321 \(1981\)*](#)).

Plaintiff here has alleged that SBOA-NJ has wrongfully withheld their consent, which power they possess both by statute and under their contract with their host racing association as discussed *supra*. The Court stresses again that it is not defendant's statutorily empowered denial of consent alone which gives rise to personal jurisdiction. Rather, it is the alleged wrongful denial of consent, under the terms of the self-same contract by which SBOA-NJ has otherwise agreed to reap the benefits of providing their services to other New York race-tracks, which satisfies the [**19] requirements of New York's long-arm statute.

[*44] III. CONCLUSION:

Having considered defendant SBOA-NJ's arguments in support of reconsideration and modification of The Court's earlier determination that plaintiff had properly asserted personal jurisdiction over SBOA-NJ, for all the foregoing reasons the Court declines to modify its earlier determination that jurisdiction is proper under [*N.Y. Civ. Prac. L. & R.*](#)

§ 302(a)(1).⁸ Therefore, the relief sought by Standardbred Breeders & Owners Association of New Jersey is hereby DENIED.

[20] IT IS SO ORDERED**

August 2, 1995

Auburn, New York

Thomas J. McAvoy

Chief U.S. District Judge

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⁸ Although the Court did not reach the question in its original decision from the bench, upon review of the briefing and filings on the original motion as well as plaintiff's response to the motion for reconsideration, the Court has little doubt that personal jurisdiction is likewise proper under N.Y. Civ. Prac. L. & R. § 302(a)(3)(ii), under an analysis similar to that conducted in Broadcasting Rights 675 F. Supp. at 1445-46. See Daniel v. American Bd. of Emergency Medicine, 802 F. Supp. 912, 919 (W.D.N.Y. 1992) ("An action alleging violations of antitrust laws is a claim for injuries sustained, and therefore is in the nature of a tort and long-arm jurisdiction would apply."); Harrison Conference Services, Inc. v. Dolce Conference Services, Inc., 768 F. Supp. 405, 407 (E.D.N.Y. 1991) ("If defendants improperly use the trade secrets to take New York customers from plaintiff, defendants will cause an injury within New York"); see also Roemer Aff. in Opp. to Dismissal, Desantis Aff. in Opp. to Recons. (discussing defendants income from interstate commerce); SBOA-NJ Reply Memo in Support of Dismissal, at 2 ("Admittedly, by operation of statute, SBOA-NJ does receive 3.5% of the retained handle from the New Jersey racetracks, some of which handle comes from interstate simulcasting.").



International Audiotext Network v. American Tel. & Tel. Co.

United States Court of Appeals for the Second Circuit

June 16, 1995, Argued ; August 3, 1995, Decided

Docket No. 95-7128

Reporter

62 F.3d 69 *; 1995 U.S. App. LEXIS 20662 **; 1995-2 Trade Cas. (CCH) P71,093

INTERNATIONAL AUDIOTEXT NETWORK, INC., Plaintiff-Appellant, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendant-Appellee.

Prior History: [\[**1\]](#) Appeal from a judgment of the United States District Court for the Southern District of New York (McKenna, J.), dismissing the complaint for failure to state a claim upon which relief can be granted.

Disposition: Affirmed.

Core Terms

telephone, long-distance, audiotext, caller, monopolize, carrier, traffic, lines

LexisNexis® Headnotes

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

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

[**HN1**](#) **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's [*Fed. R. Civ. P. 12\(b\)\(6\)*](#) dismissal of a complaint and, taking all the plaintiff's factual allegations as true, the appellate court will affirm only where no set of facts could support its claim.

Business & Corporate Compliance > ... > Enforcement > Duties & Liabilities of Parties > Conversion of Instruments

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[**HN2**](#) **Duties & Liabilities of Parties, Conversion of Instruments**

A complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. Moreover, when a plaintiff chooses not to attach to the complaint or incorporate by reference a document upon which it solely relies and which is integral to the complaint, a court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding to one for summary judgment.

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

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

Civil Procedure > Appeals > Standards of Review > General Overview

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

On review of a [Fed. R. Civ. P. 12\(b\)\(6\)](#) dismissal, the reviewing court will draw all reasonable inferences in favor of the non-moving party.

Counsel: JEFFREY M. SCHLOSSBERG, New York, NY (Joel R. Dichter, Klein Zelman, Briton, Rothermel & Dichter, New York, NY, of counsel), for Plaintiff-Appellant.

ELIZABETH M. SACKSTEDER, New York, NY (Sidley & Austin, New York, NY, of counsel), for Defendant-Appellee.

Judges: Before: WINTER, MAHONEY, and JACOBS, Circuit Judges.

Opinion

[*70] Per Curiam:

Plaintiff-appellant International Audiotext Network, Inc. ("IAN") filed a complaint against defendant-appellee American Telephone and Telegraph Company ("AT&T") in the United States District Court for the Southern District of New York (McKenna, J.), alleging, among other claims, violations of [Sections 1 and 2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#). Plaintiff's appeal relates solely to these Sherman Act claims. After limited pre-answer discovery conducted pursuant to a stipulation and order, AT&T filed a motion to dismiss the complaint for failure to state a claim, pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). The district court, in a thorough [**2](#) opinion dated December 14, 1994, granted the motion. *International Audiotext Network, Inc. v. American Telephone & Telegraph Co.*, ___ F. Supp. ___, [1994 U.S. Dist. LEXIS 19217 \(S.D.N.Y. 1994\)](#). [*71] Final judgment having been entered and a timely notice of appeal filed, we have jurisdiction to hear the appeal. After careful consideration of the arguments advanced by the parties, we affirm.

IAN is engaged in the telecommunications industry as an information provider ("IP"). As such, IAN provides audiotext services via telephone, including such information as stock quotes, sports scores, time, weather reports, and horoscopes. IPs may derive revenue for audiotext services in several ways. One way is for the IP to require callers to charge the cost of the service to a credit card, ordinarily at the outset of the call. Another means of collecting charges is to set up a special number with the long-distance carrier. Under this arrangement, the IP levies either a per-minute charge or a flat fee for the call, the long-distance carrier bills the caller accordingly and forwards the balance (net of handling charges) to the IP. The collection method that IAN desires to use in this case entails an agreement between the IP and [\[**3\]](#) the long-distance carrier to split the revenue paid to the carrier, by phone companies in the originating countries, for transmitting the long-distance calls to the IP. Thus the caller abroad pays only the regular cost of the long-distance call. For certain low-cost services, an arrangement that involves no extra charges to the caller offers a competitive advantage.

The complaint alleges that AT&T is the nation's dominant long-distance carrier as a result of its former monopoly position, and that for the same reason AT&T dominates the market for international telephone calls originating or terminating in the United States. In 1991 AT&T carried approximately 70.8 percent of such calls. In respect of inbound telephone traffic to the United States, AT&T enters into individual agreements with foreign telephone companies, undertaking to accept calls originating in those countries, carry the calls over its long-distance lines, and terminate them at the desired destination in the United States. For this service, AT&T charges a fee to the foreign telephone company; that fee is a component of the price of the call billed to the caller by the foreign company, which then remits to AT&T the [\[**4\]](#) amount owed for AT&T's services. AT&T's U.S. competitors for the domestic handling of calls originating abroad have similar arrangements in many countries.

In 1991, AT&T entered into an agreement (the "Agreement") with Malhotra & Associates, Inc., which is an IP. Under the Agreement, Malhotra undertook to "stimulate" international telephone traffic over AT&T's lines by promoting its audiotext services to international callers, who access Malhotra's services by dialing Malhotra's telephone numbers in the United States. Because AT&T receives a fee for in-bound telephone traffic on its international long-distance lines, AT&T's revenues are increased by the incremental telephone traffic generated by Malhotra. The Agreement was initially limited to four countries, but was expanded in scope to cover at least 120 countries. The Agreement provides that Malhotra will receive a commission for each international call to Malhotra that is delivered via AT&T's lines; that commission is calculated as a share of the revenues AT&T receives for the telephone traffic, which varies depending on the fee that each country's telephone company pays to AT&T.

IAN would like to enter what it characterizes [\[**5\]](#) as the international market for American audiotext services, and it unsuccessfully approached AT&T with a business proposal that, as it happens, is similar to the arrangement AT&T has with Malhotra. After being rebuffed by AT&T, IAN discovered that AT&T had a deal with Malhotra that was substantially similar to what it was seeking, and filed this lawsuit, alleging that AT&T's refusal to contract with IAN violates federal [antitrust law](#). The district court has granted AT&T's motion to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#), and entered judgment dismissing the complaint in its entirety. IAN now appeals that dismissal.

[HN1](#)[↑] We review *de novo* the district court's 12(b)(6) dismissal of the complaint and, "taking all the plaintiff's factual allegations as true, we will affirm only where no set of facts could support [its] claim." [Annis v. County of Westchester, New York, 36 F.3d 251, 253 \(2d Cir. 1994\)](#) (citing [Christ Gatzonis Elec. Contractor, Inc. v. New York City](#) [\[*72\]](#) [Const. Auth., 23 F.3d 636, 639 \(2d Cir. 1994\)](#)). [HN2](#)[↑] The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." [Cortec Indus.,](#) [\[**6\]](#) [Inc. v. Sum Holding L.P., 949 F.2d 42, 47 \(2d Cir. 1991\)](#), cert. denied, 503 U.S. 960 (1992). Moreover, "when a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint," the court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding to one for summary judgment. [Id. at 47-48.](#)

Although the amended complaint in this case does not incorporate the Agreement, it relies heavily upon its terms and effect; therefore, the Agreement is "integral" to the complaint, and we consider its terms in deciding whether IAN can prove any set of facts that would entitle it to relief. In so doing, we are not constrained to accept the

allegations of the complaint in respect of the construction of the Agreement, although--at this stage in the proceedings--we will strive to resolve any contractual ambiguities in IAN's favor. See [Doe v. City of New York, 15 F.3d 264, 266 \(2d Cir. 1994\)](#) ([HN3](#)) on review of 12(b)(6) dismissal, reviewing court will "draw all reasonable inferences in favor of[] the non-moving party").

IAN's [**7](#) first and second causes of action allege, respectively, that AT&T has engaged in a monopoly and that AT&T has attempted to engage in a monopoly, in violation of [section 2](#) of the Sherman Antitrust Act, which makes it unlawful 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 . . ." [15 U.S.C. § 2](#). IAN's third cause of action alleges that AT&T has violated [section 1](#) of the Sherman Act, which prohibits "contracts, combinations . . . or conspiracies, in restraint of trade or commerce." [15 U.S.C. § 1](#). Each of these claims is premised on the contention that AT&T has abused its dominant position in the market for international telephone calls to the United States (which, at 70.8 percent, is presumed at this stage in the proceedings to constitute control over the market) in order to prevent IAN from offering its audiotext services to prospective customers in foreign countries. According to IAN, this is being done either to preserve AT&T's monopoly in the market for international audiotext services, or in an attempt to monopolize that market, or to protect [**8](#) Malhotra's position in that market.

Regarding the monopolization claim, the district court noted that this claim is based upon IAN's contention that AT&T is depriving it of access to an essential facility. However, with respect to the essential facilities doctrine, this case does not involve a facility to which IAN seeks access (and for which IAN would be willing to pay). See, e.g., [Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 \(2d Cir. 1990\)](#) (involving advertising space in a magazine and collecting cases involving power lines, sports arenas, newspaper advertisements, and a mountain). Rather, IAN seeks an arrangement by which AT&T would agree to pay IAN and all competitors money for what are essentially advertising or promotional services. The essential facility doctrine does not extend this far. We have carefully considered all arguments put forward by IAN in support of its claims and we affirm the dismissal of the complaint for substantially the reasons stated in the district court's opinion. See *International Audiotext*, ____ F. Supp. ____.

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Paul E. Volpp Tractor Parts v. Caterpillar, Inc.

United States District Court for the Western District of Tennessee, Western Division

August 3, 1995, Decided ; August 3, 1995, FILED, ENTERED

NO. 86-2871-TUA

Reporter

917 F. Supp. 1208 *; 1995 U.S. Dist. LEXIS 18082 **; 1995-2 Trade Cas. (CCH) P71,243

PAUL E. VOLPP TRACTOR PARTS, INC. d/b/a CEM SUPPLY COMPANY, Plaintiff, VS. CATERPILLAR, INC., Defendant.

Core Terms

dealers, non-genuine, products, genuine, tying arrangement, sales, competitors, dealership, anti trust law, manufacturers, consumers, purchasing, summary judgment, vertical, tie, coercion, line-forcing, sourcing, selling, buy, rule of reason, Sherman Act, Machinery, forcing, business relationship, district manager, Clayton Act, tie-in, principles, antitrust

LexisNexis® Headnotes

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

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

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

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

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

HN1[] Discovery, Methods of Discovery

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Civil Procedure > ... > 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

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

HN2 **Summary Judgment, Entitlement as Matter of Law**

Fed. R. Civ. P. 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. However, Fed. R. Civ. P. 56(c) is not a requirement that the moving party negate his opponent's claim, but does require a showing of an absence of evidence supporting the non-moving party's case.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

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

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3 **Summary Judgment, Evidentiary Considerations**

The standard for granting summary judgment mirrors the directed verdict standard under Fed. R. Civ. P. 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; there must be evidence on which the jury could reasonably find for the plaintiff. No genuine issue for trial exists where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.

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

Civil Procedure > ... > Discovery > Methods of Discovery > 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 > 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

HN4 **Summary Judgment, Supporting Materials**

Fed. R. Civ. P. 56 requires the moving party to inform the court of the basis for the motion, and to identify 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. The non-moving party may oppose the motion with any of the evidentiary materials listed in Fed R. Civ. P. 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment.

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

HN5 **Summary Judgment, Entitlement as Matter of Law**

In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all justifiable inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses.

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

HN6 **Summary Judgment, Entitlement as Matter of Law**

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. The issue of fact must be genuine.

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

HN7 **Summary Judgment, Burdens of Proof**

To establish a genuine issue of fact the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts. The non-moving party must come forward with specific facts showing that there is a genuine issue for trial.

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

HN8 **Summary Judgment, Entitlement as Matter of Law**

A summary judgment determination is essentially an inquiry as to 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.

Antitrust & Trade Law > Sherman Act > General Overview

HN9 **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Clayton Act > General Overview

HN10 **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 14](#).

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Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Clayton Act > General Overview

HN11 [] Antitrust & Trade Law, Sherman Act

Section 3 of the Clayton Act, 15 U.S.C.S. § 14, was intended to complement the Sherman Act and to facilitate achievement of its purposes by reaching, in their incipiency, acts and practices that promise, in their full growth, to impair competition in interstate commerce. Specifically, Section 3 of the Clayton Act, 15 U.S.C.S. § 14, intended to declare illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which may substantially lessen competition or tend to create a monopoly.

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

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

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

HN12 [] Tying Arrangements, Clayton Act

A tying arrangement is an agreement by a party to sell one product the tying product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. A tying arrangement may violate either Section 3 of the Clayton Act, 15 U.S.C.S. § 14, or Section 1 of the Sherman Act, 15 U.S.C.S. § 1.

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

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

Antitrust & Trade Law > Clayton Act > General Overview

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

HN13 [] Tying Arrangements, Clayton Act

The Clayton Act makes it unlawful for a person engaged in commerce to make a sale or contract for sale of goods on the condition, agreement or understanding that the purchaser thereof shall not use or deal in the goods of a competitor or competitors of the lessee or seller, where the effect of such sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN14**](#) [] **Tying Arrangements, Clayton Act**

A tying arrangement may violate [Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. Many tying arrangements have long been considered unreasonable restraints of trade under the Sherman Act.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

[**HN15**](#) [] **Tying Arrangements, Clayton Act**

Tying claims may violate [Section 3](#) of the Clayton Act, [15 U.S.C.S. § 14](#), pursuant to the same test as the Sherman Act if the tie-in involves goods, wares, merchandise or other commodities.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN16**](#) [] **Tying Arrangements, Clayton Act**

The Supreme Court has set forth two distinct methods of proving an unlawful tying arrangement pursuant to [Section 3](#) of the Clayton Act and [Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#). The first employs a presumption that an agreement is an antitrust violation, thus invoking a per se illegality rule to classify the agreement; the second, called rule of reason analysis, requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

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

HN17 [blue icon] Vertical Restraints, Nonprice Restraints

A vertical non-price restraint is an agreement between entities at different levels of distribution that does not purport to affect prices or price levels charged for the goods.

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

HN18 [blue icon] 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.

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

HN19 [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

The rule of reason approach requires that the party challenging the alleged unlawful tie set forth the tying arrangement itself and that the arrangement is an unreasonable restraint on competition.

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

HN20 [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

To set forth a per se violation, a plaintiff must show that: 1) There is a tying arrangement between two distinct products or services; 2) The seller has sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and 3) The amount of commerce affected is not insubstantial.

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

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

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

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

HN21[] Sherman Act, Claims

If plaintiff cannot establish a per se tying arrangement, then plaintiff bears the burden of showing that the alleged illegal conduct unreasonably restrained competition.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN22[] Public Enforcement, State Civil Actions

See [Tenn. Code Ann. § 47-25-101.](#)

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN23[] Regulated Practices, Price Fixing & Restraints of Trade

See [Tenn. Code Ann. § 47-25-106.](#)

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

HN24[] Federal & State Interrelationships, Choice of Law

When a federal court is called upon to apply state substantive law to a claim, the conflicts law of the forum determines which state's law to apply.

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Judges: JEROME TURNER, UNITED STATES DISTRICT JUDGE

Opinion by: JEROME TURNER

Opinion

[*1211] ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Paul E. Volpp Tractor Parts, Inc. ("Volpp") d/b/a CEM Supply Company ("CEM"), filed this action alleging federal and state antitrust violations as well as several state common law claims against defendant Caterpillar, Inc. ("Caterpillar"). Volpp subsequently filed an amended complaint. The essence of the claim is that Caterpillar entered into unlawful arrangements with authorized Caterpillar dealers in which Caterpillar conditioned the sale of its machines upon dealers' agreements to purchase genuine Caterpillar parts, to the near exclusion of parts offered for sale by CEM and other competitors. The specific claims alleged in the amended complaint are as follows:

- (1) Action pursuant to Sections 4 and 15 of the Clayton Act, [15 U.S.C. §§ 15 & 26](#), for treble damages, injunctive relief, and costs, including reasonable attorneys' fees, for injuries suffered as a result of unlawful "tying" arrangements, in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), and [Section 3](#) of the Clayton Act, [15 U.S.C. § 14](#);
- (2) Unlawful combination and conspiracy, [\[*1212\]](#) in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#);
- (3) Unlawful agreements made with a view to lessen full and free competition in importation of parts, in violation of [Tenn. Code Ann. § 47-25-101](#); and
- (4) Intentional interference with prospective business relations.

Caterpillar answered and counter-claimed, alleging false representation as to the quality and performance of its parts in violation of section 43(a) of the Lanham Act, [15 U.S.C. § 1125\(a\)](#). Both parties seek damages and injunctive relief.

Caterpillar filed a motion for summary judgment on each claim alleged by Volpp. On Volpp's tie-in claim (Count 1), Caterpillar argues: (a) that there is no evidence that it "tied" the sale of machines to the sale of replacement parts, (b) that there is no evidence [\[*1212\]](#) of coercion, (c) that there is no evidence of antitrust injury, and (d) that Volpp cannot show antitrust damages. On Volpp's conspiracy claim (Count 2), Caterpillar argues that the claim merely duplicates the tie-in claim and that there is no evidence of a conspiracy. On Volpp's Tennessee antitrust claim (Count 3), Caterpillar maintains that (a) Volpp may not seek damages under the Tennessee [\[*1213\]](#) Antitrust Statute, (b) that there is no evidence of an unlawful combination, and (c) that Volpp cannot show an anticompetitive intent or effect. Finally, on Volpp's claim for interference with prospective business relations (Count 4), Caterpillar argues that Tennessee law does not recognize the tort and that the claim should accordingly be dismissed.

The parties have filed extensive memoranda and several volumes of exhibits in support of their respective filings. The court heard oral argument on the motion for summary judgment on June 1, 1994.

I. FACTS

In considering the defendant's motion for summary judgment, the court will believe the evidence of the plaintiff and draw all justifiable inferences in its favor. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#); accord [Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#).

1. Caterpillar, Inc.

Caterpillar is engaged in the business of designing, manufacturing and marketing earth-moving, construction, agricultural and materials-handling equipment, engines and replacement parts. Caterpillar sells its products [\[*1214\]](#) and services through a world-wide network of independent dealerships. Each dealership enters into a contractual "Sales and Service Agreement" with Caterpillar, a portion of which provides as follows:

2. Primary Purpose and [Caterpillar's] Reliance on Principles

- (a) Both Dealer's and [Caterpillar's] primary purpose in entering into this agreement is to develop and promote the sale of products and to provide a high standard of parts availability and mechanical service to insure satisfaction by users of products. Within the service territory described in Exhibit A, Dealer shall be primarily

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responsible for fully and adequately developing and promoting the sale to customers and prospective customers located within such territory and for the servicing of all of the products specified in Exhibit A.

(b) [Caterpillar] and Dealer agree that Dealer's effectiveness and ability in achieving such purpose could be adversely affected by Dealer's affiliation with another organization which is a substantial operator of products. Dealer agrees that during the life of this agreement it will avoid any such affiliation whether by way of capital investment, source of capital, common **[**5]** management, common ownership, or otherwise, except to the extent that [Caterpillar] may otherwise agree in writing.¹ **[**6]**

The agreement may be terminated with or without cause on ninety days written notice.²

2. Paul E. Volpp Tractor Parts, Inc.

Volpp manufactures, assembles and distributes components and parts for off-road heavy construction, mining and logging equipment. These parts, commonly referred to as "non-genuine," "will-fit" or "gypo" are usually less expensive than genuine parts. Volpp distributes its products through two sales divisions, CEM and Heavy Equipment parts. Through CEM, Volpp sells parts primarily to dealers for original equipment manufacturers ("OEMs"), including Caterpillar. The parts distributed by CEM for use in Caterpillar equipment include seals, gaskets and "O" rings. Volpp successfully cultivated several Caterpillar dealerships as its principal clients for its Caterpillar-compatible parts. According to Caterpillar, between **[*1213]** January 1982 and July 1986, over ninety percent of CEM's aggregate sales of Caterpillar-compatible parts were made to fifteen Caterpillar dealers.³

3. Caterpillar's Goal To Regain Lost Parts Sales

Following Caterpillar's first three years of losses in its history, the Caterpillar Product Support Department announced plans to move all programs that contribute to short term profitable sales to "top priority."⁴ One such program was the sale of genuine Caterpillar parts to Caterpillar dealers.⁵ All district managers, sales managers, and parts and service sales representatives were instructed to "do all those things that we know will work to sell parts."⁶ Specifically, Caterpillar aggressively sought to recapture parts sales business which it lost to competitors when dealers sold "will-fit" parts instead of Caterpillar parts.⁷

¹ "Sales and Service Agreement" § 2, Ex. #82 to Caterpillar Inc.'s Mem. in Supp. of its Mot. for Summ. J. ("Caterpillar's Motion") (Vol. III); Ex. #1.15 to Pl.'s Statement of Material Facts in Dispute Responsive to Caterpillar's Mot. to [sic] Summ. J. ("Volpp's Response") (Vol. 1).

² *Id.* § 29.

³ Mem. in Supp. of Def.'s Mot. for Summ. J. at 10.

⁴ See Memo from MD Meadows to District Managers, Sales Representatives, and Parts and Service Sales Representatives (Oct. 12, 1984), Ex. #3.4 to Volpp's Response (Vol. 1).

⁵ *Id.*

⁶ *Id.*

⁷ This effort actually had its origin prior to 1984. At a 1983 meeting of Caterpillar dealer principals, a Caterpillar representative gave the following statement:

Before closing, there is one additional area I'd like to discuss. (Pause)

No doubt due to the recessionary economy, some suppliers and numerous other companies have increased their efforts to secure a portion of your parts orders. Some Caterpillar dealers are utilizing, to varying degrees, these alternative sources.

You may be thinking, "this doesn't apply to us." You might be surprised. Some well-intentioned employee may have found what appears to be a cheaper source for a few parts such as seals, hardware, electrical components, or friction material. This employee probably feels it's the same as Caterpillar supplies, but costs less. Perhaps your company is one of the Caterpillar dealers who has taken on a line of filters to supplement our line. You may find that in certain cases, the other line gets substituted for Caterpillar because "that's what the customer wants." These examples and others are starting to happen all too frequently, even though you may fully intend to totally represent Caterpillar, as your agreement requires.

[**7] 4. *The "Pilot Exercises"*

Caterpillar developed a mathematical formula for the purpose of identifying dealers who were selling competitive parts.⁸ Caterpillar then conducted a "pilot exercise" focused on three dealers: (1) Mustang Tractor & Equipment Co. in Houston, Texas; (2) Taylor Machinery Co. in Memphis, Tennessee; and (3) Pape' Brothers, Inc. in Eugene, Oregon.⁹ This exercise confirmed the accuracy of Caterpillar's formula. Caterpillar "confronted" those dealers and sought to aggressively persuade them to purchase their parts almost exclusively from Caterpillar.¹⁰ [**8] Eventually, these dealers were persuaded to source almost exclusively from Caterpillar.¹¹

5. *Spreading The Word*

Caterpillar's pilot exercise had an effect beyond the three dealers directly involved. [*1214] Word spread throughout the dealer network that Caterpillar was "getting serious" about the practice of selling non-genuine parts.¹² [**9] Caterpillar welcomed and encouraged this effect. Tom Headington at Caterpillar recommended that Caterpillar "take an official position strongly discouraging dealer sourcing non-genuine parts where a genuine Caterpillar part is available to the dealer from Caterpillar."¹³

The issue of non-genuine parts sales was addressed at a Caterpillar "Worldwide Marketing Management Meeting" in October of 1985 in Galesburg, Illinois. It was determined that dealers who "outsource" would be "personally contacted by district/region managers and reminded of their obligations to CTCO."¹⁴ It was further determined that if the personal contact produced no reaction from the dealer, "one or more persuasive measures [could] be employed: suspension of parts returns; 100 percent inspection of warranty parts; [and] a dealer requirement to identify non-genuine parts on customer invoices."¹⁵ Also at the Galesburg meeting, Caterpillar initiated a challenge to increase incremental parts sales worldwide by \$ 200 million.¹⁶ The emphasis on "dealer sourcing loyalty" was

⁸ "1983 Dealer Principal Meetings," p. 9, Ex. #3.0 to Volpp's Response (Vol. 1) (emphasis added). Although the speaker is not identified within the text itself, the immediately preceding document identifies the speaker as Dean Moore. See Memo from RD Murphy to Parts & Service Sales Representatives (June 6, 1983), Ex. #3.0 to Volpp's Response (Vol. 1) ("Attached are two references concerning dealers' use of competitive parts. The first is a copy of the talk Dean Moore gave to dealer principals at the meeting in Colorado Springs").

⁹ See Memo from BJ Hansotia to Steve Larson (Oct. 4, 1984), Ex. #3.5 to Volpp's Response (Vol. 1).

¹⁰ See Memo from TE Headington to JD Keenan (Aug. 15, 1985), Ex. #3.15 to Volpp's Response (Vol. 1).

¹¹ See "Dealer Parts Sourcing Loyalty," Ex. #3.23 to Volpp's Response (Vol. 1) ("Three dealers confronted and changed"); "Dealer Sourcing Loyalty," Ex. #3.26 to Volpp's Response (Vol. 1) ("several dealers confronted and converted"); "Dealer Sourcing Loyalty," Ex. #3.41 to Volpp's Response (Vol. 2) ("several dealers confronted and converted").

¹² See Memo from JG Evans to RP Bonati (Aug. 22, 1985), Ex. #3.16 to Volpp's Response (Vol. 1) ("word is on the streets that Caterpillar is finally serious about their dealers' involvement in competitive parts."); Memo from MD Meadows to Region Managers, BR Clough, LS Goetsch, DA Lewis, & JM Tedford (Aug. 28, 1985), Ex. #5 to Volpp's Supp. Resp. ("from comments we've received, word is apparently spreading throughout the dealer organization that we are at last, getting serious about the practice of not using Caterpillar as the source for parts needs.").

¹³ See Memo from TE Headington to JD Keenan (Aug. 15, 1985), Ex. #3.27 to Volpp's Response (Vol. 2).

¹⁴ Synopsized Minutes of Oct. 27-31 Worldwide Marketing Management Meeting in Galesburg, attached to Memo from RJ Gutierrez to DV Fites (Nov. 7, 1985), Ex. #3.24 to Volpp's Response (Vol. 1). See also Memo from BR Clough to RJ Gutierrez (Nov. 5, 1985), Ex. #3.24 to Volpp's Response (Vol. 1).

¹⁵ *Id.*

expected to account for \$ 40-\$ 50 million toward this total.¹⁷ Caterpillar made the decision that local representatives would have a "Woodshed" talk" with dealers "who are into nongenuine parts" and send out a "sourcing [**10] loyalty letter."¹⁸

[**11] Caterpillar's official position on the issue of non-genuine parts sales went out on May 12, 1986, in the form of a letter from Dave Lewis to all dealers, region managers and district managers. The position statement was as follows:

The basis of our agreements with dealers is our expectation that they will adequately represent the Caterpillar products designated in those agreements to our satisfaction. The use of genuine Caterpillar parts is essential to the performance of our dealers' obligation to support Caterpillar prime products and the fulfillment of their obligation to adequately represent the entire Caterpillar product line -- including parts.¹⁹ [**12]

The letter further informs the dealers that:

District Managers will be discussing this subject with you as appropriate. I encourage those of you affected by this position to review your current sourcing and sales practices and do what is necessary to ensure your practices are consistent with the [*1215] effective representation of Caterpillar and our common interests.²⁰

6. Caterpillar's Instructions To District Managers On Approaching Dealers Who Sell Non-Genuine Parts

Caterpillar sent copies of this letter to all district managers in advance of its distribution to dealers. In addition to the letter, district managers were given several documents for use in communicating with dealers who sell non-genuine parts. One such document attempts to answer the question, "What do you say to the dealer who buys from competitors and says, 'why shouldn't I buy this part from your competitor? It seems like good quality and it's 25% less than your price?'"²¹ The suggested response is as follows:

You can buy from whomever you choose -- we have no control over that. But, I would ask you a similar question. Why shouldn't we sell tractors or parts to your competitor -- perhaps the local Komatsu dealer? They may be happy to buy many items from us at good prices -- our sales and profits could increase.²²

The document goes on to emphasize the importance of Caterpillar and its dealers "helping each other" in their "mutual interest." [**13] It concludes with "one last question -- our agreement implies that you will totally represent

¹⁶ See Memo from MD Meadows to RP Bonati, SB Brush, DE Moore, RD Nitto, and RR Schild (Nov. 8, 1985), Ex. #3.24 to Volpp's Response (Vol. 1); Memo from JD Keenan to RC Brown, FP Cholat, PR Dalton, DW Lahti, MD Meadows, H Neilson, and BM Smith (Nov. 5, 1985), Ex. #3.26 to Volpp's Response (Vol. 1); Memo from JD Keenan to DV Fites (April 3, 1986), Ex. #3.24 to Volpp's Response (Vol. 1); Memo from DA Lewis to SB Brush, RP Bonati, DE Moore, RD Nitto, RR Schild (May 16, 1986), Ex. #3.24 to Volpp's Response (Vol. 1).

¹⁷ "Dealer Sourcing Loyalty," attached to Memo from BR Clough to RC Brown, FP Cholat, RJ Jacobson, DW Lahti, JT McCabe and HC Neilson (Feb. 7, 1986), Ex. #3.26 to Volpp's Response (Vol. 1).

¹⁸ *Id.*

¹⁹ Letter from DA Lewis to Dealer Principals, Region Managers, and District Managers (May 12, 1986), Ex. #3.35 to Volpp's Response (Vol. 2); Ex. #85 to Caterpillar's Motion (Vol III). Caterpillar has submitted proof that the author of this letter believes that dealers "certainly . . . have no contractual obligations to source entirely genuine Caterpillar parts." Confidential Testimony of David Lewis, Ex. #84 to Caterpillar's Motion (Vol. III).

²⁰ *Id.*

²¹ "Loyalty' - It's Not a One Way Street," attached to Memo from MD Meadows to District Managers (April 2, 1986), Ex. #3.36 to Volpp's Response (Vol. 2).

²² *Id.*

Caterpillar -- if you do not represent us for specific items in your service territory, who should we look to be the Caterpillar representative in your territory for these items?"²³

Caterpillar sent another "dealer sourcing" letter to district managers, with "support materials" attached, as a follow-up to the May 12, 1986 "position statement."²⁴ These materials were "designed to assist [district managers] in [their] understanding of this issue, as well as future dealer discussions."²⁵ The first "support material" attachment is the May 12, 1986 letter from Dave Lewis itself. The second attachment is a "position statement" which states, *inter alia*, as follows:

Today dealers consider and/or actively source **[**14]** for resale nongenuine parts. This practice displaces the sale of new/remanufactured genuine Caterpillar parts. It is estimated to cost NACD between \$ 50-\$ 100 M annually in parts sales revenue.

....
Dealer sourcing of nongenuine parts which displace the sale of genuine Caterpillar parts for the purpose of improved gross profit is unacceptable.

....
Districts should advise dealers that Caterpillar is committed to providing competitive prices which generate a reasonable (aggregate) return to the dealer. We realize (and so do most dealers) that there will be situations where an individual transaction may not provide this return. Nevertheless, we expect dealers to pursue the total opportunity.²⁶ **[**15]**

The third attachment is a definition of a genuine Caterpillar part: "A genuine Cat part is a part manufactured by or for Caterpillar which is sold under a Caterpillar trademark."²⁷

The final "support material" attachment to Mr. Meadows' July 18, 1986 Memo includes two documents. The first is a sample copy of a "district action letter" which district managers **[*1216]** could send to dealers.²⁸ The second is a summary of a "successful attempt at encouraging one dealer to source only genuine CAT parts."²⁹ The sample "district action letter" states as follows:

Under our dealership agreement, you have an obligation to adequately represent Caterpillar products including parts. Representation of directly competitive parts adversely affects that obligation. If you choose to stock non-genuine parts, we expect it to be only as an accommodation to customers who insist upon purchasing such parts. We would expect you to not promote such products where we provide genuine Caterpillar parts.

....
In failing to adequately represent us, you create some serious problems which inhibit our ability to do business with

²³ *Id.*

²⁴ Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2).

²⁵ *Id.*

²⁶ "Position Statement," Attachment II to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2) (emphasis added).

²⁷ Attachment III to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2).

²⁸ Sample Letter, Attachment IV to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2).

²⁹ "Summary . . . [of] successful attempt at encouraging one dealer to source only genuine CAT parts" (June 11, 1986), Attachment IV to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2).

[**16] is our only dealer in . You have elected to eliminate your representation of certain Caterpillar products. Will the list be ever growing? If so, we may be forced to consider who will represent us in for such items and whether we wish to have more than one dealer in the area.³⁰

[**17] The "summary" in the final "support material" attachment to Mr. Meadows' Memo describes the manner in which Caterpillar successfully convinced one of the "pilot" dealerships to purchase all of its parts requirements from Caterpillar sources. The summary states that "it is hoped that this document will be beneficial for other districts with similar problems."³¹ The summary explains how Caterpillar representatives prepared for the "showdown" by gathering data indicating a "significant reduction in purchases of certain CAT parts commodities."³² It then details the discussions with dealer principals who were called into the district office and presented with the findings. The discussion included emphasis on all of the reasons why Caterpillar felt that its parts were superior to those of its competitors. The discussion concluded with one last question to the dealer: "our agreement implies that you will **totally represent Caterpillar -- if you do not represent us for specific items in your service territory, who should we look to be the Caterpillar representative in your territory for these items?**"³³ The summary states that "at the conclusion of the meeting, it was made [**18] clear that the dealer was free to represent any product (or parts) line they wished. However, if they chose not to **completely represent our lines, we would have to seek that representation in some other fashion.**"³⁴ Caterpillar then gave the dealer one week to give notice of [*1217] which course of action they would be taking. The summary concludes by stating that the dealer decided "to completely represent CAT parts" and that the dealership continues to be "clean."³⁵

7. Caterpillar's Response To An Anonymous Tip

In late 1986, Caterpillar received a letter from an anonymous "concerned but loyal Caterpillar dealer" who informed the company that certain [**19] dealers were selling non-genuine parts through their used parts departments.

³⁶ [**20] A handwritten note on that letter indicates that a Caterpillar representative "will address it in [his] NACD remarks . . . to the extent agreeable by legal."³⁷ Mr. D.V. Fites then had this to say at the September 1986 NACD Dealer Meeting:

³⁰ Sample Letter, Attachment IV to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2) (emphasis in original).

This form letter appears to have been derived from a letter sent to Rozier Machinery Co. from the Jacksonville District Manager. See *infra* note 66, and accompanying text; Letter from RF Noonan to Dabo Dabasinskas, Rozier Machinery Co. (Feb. 20, 1986), Ex. #3.28c to Volpp's Response (Vol. 2). That dealer responded by objecting to "the threatening nature of the letter." Letter from G. Robert Blanchard to RF Noonan (March 13, 1986), Ex. #3.28d to Volpp's Response (Vol. 2); *but see* Aff. of G. Robert Blanchard, Ex. #73 to Caterpillar's Motion (Vol. II) ("In retrospect, my language [about the 'threatening nature' of Mr. Noonan's letter] was poorly chosen. I knew Mr. Noonan was not threatening me or the dealership in a literal sense."). The dealership subsequently terminated purchases of all non-genuine parts. See Letter from Chuck Bacon to Bob McCreary (March 4, 1986), Ex. #3.28d to Volpp's Response (Vol. 2); *see also* Letter from RF Noonan to Dabo Dabasinskas (May 2, 1986), Ex. #3.28e to Volpp's Response (Vol. 2).

³¹ "Summary . . . [of] successful attempt at encouraging one dealer to source only genuine CAT parts" (June 11, 1986), Attachment IV to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2).

³² *Id.*

³³ *Id.* (emphasis added).

³⁴ *Id.* (emphasis added).

³⁵ *Id.*

³⁶ See Letter from "A concerned but loyal Caterpillar dealer" to Mr. George Schaefer (Aug. 15, 1986), Ex. #3.40 to Volpp's Response (Vol. 2).

³⁷ *Id.*

And speaking of winning the battle and losing the war, let me raise one further point **in the strongest terms possible.** We have recently received a report indicating that several dealers are involved in the nongenuine parts business through their used parts operations. We are currently in the process of investigating this report. Let me just say that I urge all of you to examine your used parts activities. If you are in the nongenuine parts business, I urge you to get out. If you're not in it, don't get in. I can think of nothing more injurious to our mutual long-term future than assisting competitive parts manufacturers to gain a stronger market position through our own distribution organization.³⁸

8. The Success Of Caterpillar's Campaign

Caterpillar's efforts to reduce sales of non-genuine parts by Caterpillar dealers proved quite successful. Sales of Caterpillar parts increased as dealers dropped or decreased their sales of nongenuine parts in favor of genuine Caterpillar parts. Similarly, CEM lost sales to Caterpillar dealers, while their sales in other markets continued to grow.³⁹ At issue in the instant litigation is whether Caterpillar's attempts to increase parts sales, in the manner in which it did, were improper.

9. Caterpillar's Proof

Caterpillar submitted, *inter alia*, seventy-eight affidavits from employees (usually presidents, vice-presidents, chairmen of the board, or other executive positions) **[**21]** at various Caterpillar dealerships throughout the United States. The affidavits detail the policies and practices at dealerships with respect to purchasing parts from sources other than Caterpillar. The affidavits also describe the reasons behind such policies and practices. A common theme in almost every affidavit is either (1) assurances that Caterpillar has not threatened, pressured or coerced the dealership on the issue of purchasing non-genuine parts, or (2) assurances that policy decisions at the dealership are not based on threats, pressure or coercion.⁴⁰ Caterpillar submitted additional evidence challenging Volpp's substantive claims⁴¹ **[**22]** as well as Volpp's damage theory.⁴²

10. Volpp's Proof

In addition to the proof discussed *supra*, Volpp has submitted volumes of anecdotal **[*1218]** evidence pertaining to Caterpillar's communications with various specific dealerships.⁴³ **[**23]** Much of this evidence is inadmissible

³⁸ D.V. Fites Comments at September 1986 NACD Meeting, Ex. #3.40 to Volpp's Response (Vol. 2) (emphasis added).

³⁹ Decl. of Larry Gray, Ex. #1.0 to Volpp's Response (Vol. 1).

⁴⁰ Only two of Caterpillar's seventy-eight affidavits lack such a statement. See Aff. of Gregory Poole, Jr., Ex. #26 to Caterpillar's Motion (Vol. I); Aff. of John R. Traynham, Ex. #76 to Caterpillar's Motion (Vol. II).

⁴¹ See, e.g., Pl.'s Second Resp. to Caterpillar's First Request for Admissions, Ex. #80 to Caterpillar's Motion (Vol. III); Confidential Testimony of Donald V. Fites, Ex. #83 to Caterpillar's Motion (Vol. III); Confidential Testimony of David Lewis, Ex. #84 to Caterpillar's Motion (Vol. III).

⁴² See Dep. of Craig Walter Kugler, Ex. #89 to Caterpillar's Motion (Vol. III).

⁴³ Some of Volpp's evidence indicates that in communicating with dealers Caterpillar emphasized that dealers were free to make their own business decisions. See Letter from DP Walsh to Omer Lamkin (Nov. 19, 1984), Ex. #3.8 to Volpp's Response (Vol. 1) ("we are acutely aware Whayne Supply Company is an independent business and as such has the right to sell any product, to any customers in any area") ("We have no desire to 'force' our dealers into buying genuine parts solely as a method of extending our profitability"); Memo from JG Evans to RP Bonati (July 31, 1985), Ex. #3.16 to Volpp's Response (Vol. 1) ("I made myself clear that Taylor Machinery Company could sell to whomever they chose"); Memo from JG Evans to RP Bonati (Aug. 22, 1985), Ex. #3.16 to Volpp's Response (Vol. 1) ("I made myself clear that Taylor Machinery Company could represent any product (or parts) line they wished"); "Loyalty' - It's Not a One Way Street," attached to Memo from MD Meadows to District Managers (April 2, 1986), Ex. #3.36 to Volpp's Response (Vol. 2) ("We have no control over dealers' decisions to sell or not sell competitive parts"); "Summary . . . [of] successful attempt at encouraging one dealer to source only genuine CAT parts" (June 11, 1986), Attachment IV to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2) ("At the conclusion of the meeting, it was made clear that the dealer was free to represent any product (or parts) line they wished").

hearsay, particularly the evidence contained in "Sales Call Reports" and "Unfair Competition Reports" prepared by CEM to describe conversations with employees at several Caterpillar dealerships.⁴⁴ However, much of the evidence, described *infra*, is admissible.

As noted, one tactic used by Caterpillar to increase parts sales was to inform dealers identified as sellers of non-genuine parts that Caterpillar **[**24]** would take certain protective measures. Among them were: (1) requiring inspections of all warranty claims submitted by the dealer, and (2) suspension or auditing of all year-end parts returns.⁴⁵ **[**25]** Volpp has conceded that these measures are reasonable when employed in order to protect the integrity of Caterpillar's warranty and parts return programs.⁴⁶ However, Volpp has submitted evidence to indicate that Caterpillar may have intended these measures not to further these reasonable goals but in order to "punish" or "sanction" dealers for selling non-genuine parts.⁴⁷ **[**26]** In addition, Volpp has submitted evidence to suggest that Caterpillar was acting with an intent to flex its **[*1219]** muscle over dealers in attempting to increase sales of genuine Caterpillar parts.⁴⁸ **[**27]** Some evidence suggests that this intention was communicated directly to

⁴⁴ Volpp has submitted a motion to strike affidavits and Caterpillar has submitted a motion in limine which it wishes to have considered together with the instant motion for summary judgment. At issue in both motions is the admissibility of certain dealer affidavits, unfair competition reports and sales call reports submitted in connection with the instant motion for summary judgment.

The parties have stipulated and agreed that "it would be onerous for the Court to make individual rulings on the admissibility of all or part of each such dealer affidavit, unfair competition report or sales call report proffered by the parties." Stipulation and Order at 2 (filed June 16, 1994). Thus, for purposes of the instant motion for summary judgment, the parties have agreed "to relinquish any right that they may have to such individual rulings." *Id.* But, should either party find a need for specific individual rulings, a motion to that effect may be filed.

⁴⁵ See, e.g., Memo from RJ Gutierrez (Nov. 7, 1985), Ex. #3.24 to Volpp's Response (Vol. 1); Memo from BR Clough (Nov. 5, 1985), Ex. #3.24 to Volpp's Response (Vol. 1); Letter from DP Walsh to Omer Lamkin, Whayne Supply Co. (Dec. 14, 1984), Ex. #3.8a to Volpp's Response (Vol. 1); Dep. of J. William Pullen, Ex. to Pl.'s Supp. Mem. to Caterpillar Inc.'s Mot. for Summ. J. ("Volpp's Supp. Response").

⁴⁶ In response to requests for admissions, Volpp has admitted that "it is reasonable for Caterpillar to protect the integrity of its warranty system by refusing to honor claims that do not involve the failure of genuine Caterpillar parts." Pl.'s Second Resp. to Caterpillar's First Request for Admissions P 423, Ex. #80 to Caterpillar's Motion (Vol III). Volpp has also admitted that "it is reasonable for Caterpillar to protect the integrity of its annual parts return program by refusing to accept the return of non-genuine parts." Pl.'s Second Resp. to Caterpillar's First Request for Admissions P 425, Ex. #80 to Caterpillar's Motion (Vol. III).

⁴⁷ See, e.g., Memo from JM DeLuca to JG Evans (Nov. 26, 1985), Ex. #3.16 to Volpp's Response (Vol. 1) & Ex. #3.18 to Volpp's Response (Vol. 1) ("sanctions"); Synopsized minutes of Oct. 27-31 Worldwide Marketing Management Meeting in Galesburg, attached to Memo from RJ Gutierrez to DV Fites (Nov. 7, 1985), Ex. #3.24 to Volpp's Response (Vol. 1) ("persuasive measures"); Memo from BR Clough to RJ Gutierrez (Nov. 5, 1985), Ex. #3.24 to Volpp's Response ("persuasive measures"); Memo from BR Clough to RC Brown, FP Cholat, RJ Jacobson, DW Lahti, JT McCabe, & HC Neilson (Feb. 7, 1986), Ex. #3.26 to Volpp's Response (Vol. 1) ("punitive measures").

⁴⁸ See, e.g., Memo from DE Moore to District Managers (Dec. 11, 1984), Ex. #3.9 to Volpp's Response (Vol. 1) ("We expect dealers to purchase their parts and remanufactured components from Caterpillar sources") (emphasis added); Memo from TE Headington to JD Keenan (Aug. 15, 1985), Ex. #3.15 to Volpp's Response (Vol. 1) ("CTCo. should take an official position strongly discouraging dealer sourcing non-genuine parts where a genuine Caterpillar part is available to the dealer from Caterpillar") (emphasis added); Memo from JM DeLuca to JG Evans (July 24, 1985), Ex. #3.16 to Volpp's Response (Vol. 1) ("we should demand Taylor [Machinery Co.] remove all non-genuine parts from their main and branch stores within five working days") (emphasis added).

See also Memo from JD Keenan to RC Brown, FP Cholat, PR Dalton, DW Lahti, MD Meadows, H Neilson and BM Smith (Nov. 5, 1985), Ex. #3.26 to Volpp's Response (Vol. 1). This memo requests input on several items, including ideas for increasing incremental sales. Those ideas are attached to the memo on a sheet styled, "Some Additional Potential Incremental Sales Possibilities." One idea listed on the sheet is "Regain dealer sourcing loyalty." An unknown individual has crossed through the word "Regain" and has written the following below: "Not regain, but demand -- should not even be open to discussion" (emphasis added).

dealers.⁴⁹ Ultimately, Caterpillar's only power over dealers is cancellation of the dealership.⁵⁰ However, to this court's knowledge of the record, Caterpillar has never terminated a dealership on the basis of non-genuine parts sales.

On some occasions in communicating with dealers, Caterpillar characterized the practice of selling non-genuine parts in such a way that a reasonable dealer could conclude that Caterpillar regarded **[**28]** the practice as a violation of the dealer's contractual obligations under the Sales and Service Agreement.⁵¹ Caterpillar did this by describing the practice of selling non-genuine parts and then stating that this may be occurring despite the dealer's intention to "totally represent Caterpillar, as the agreement requires."⁵²

(a) Boyce Machinery

Volpp has submitted evidence **[**29]** that a Caterpillar representative named Tom Neely made an arguably threatening statement to an employee at Boyce Machinery Co. Boyce had been involved in purchasing non-genuine parts, including CEM parts, beginning in the early 1980s. When Mr. Neeley began making telephone inquiries, Boyce employees took actions to hide their purchases of non-genuine parts because they felt Mr. Neeley would "disapprove."⁵³ On at least one occasion, Mr. Neeley did disapprove.⁵⁴ At a later time, in reference to the purchase of non-genuine parts at other dealerships, Mr. Neeley indicated to Paul Hubert, Inventory Control Manager at Boyce, that "somebody could lose their contract over it -- somebody could lose their dealership over it."⁵⁵ Boyce "slowed down" their outside purchases for **[*1220]** two or three months because such purchases made Caterpillar "unhappy."⁵⁶

[30] (b) Carlton Co.**

Volpp has submitted evidence that Carlton Co. attempted to prevent Caterpillar from discovering its purchases of CEM parts.⁵⁷ Carlton would split its orders for seals and gaskets between Caterpillar parts and CEM parts in order to hide the CEM purchases.⁵⁸

⁴⁹ See, e.g., Memo from TE Headington to JD Keenan (Aug. 15, 1985), Ex. #3.15 to Volpp's Response (Vol. 1) ("District is taking a strong posture [with Taylor Machinery Co.] and fully expects the dealer's commitment to stop.") (emphasis added); Memo from JG Evans to RP Bonati (Aug. 9, 1985), Ex. #3.16 to Volpp's Response (Vol. 1) ("Jon Thompson and Ed Newton . . . were confronted regarding their involvement in selling competitive parts and their active pursuit of parts, service, and machine sales outside their service territory. Although he initially denied participation in this activity, Jon later confessed his intent . . . when confronted with overwhelming evidence") (emphasis added).

⁵⁰ See, e.g., Memo from RD Page to BR Clough (Oct. 22, 1985), Ex. #3.27 to Volpp's Response (Vol. 2) ("Ultimately there is still no identified basis for enforcement short of threat of cancellation.").

⁵¹ See "1983 Dealer Principal Meetings," p. 9, Ex. #3.0 to Volpp's Response [Vol. 1]; see also "'Loyalty' - It's Not a One Way Street," attached to Memo from MD Meadows to District Managers (April 2, 1986), Ex. #3.36 to Volpp's Response (Vol. 2); Sample Letter, Attachment IV to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2); "Summary . . . [of] successful attempt at encouraging one dealer to source only genuine CAT parts" (June 11, 1986), Attachment IV to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2).

⁵² *Id.*

⁵³ Hubert Dep., pp. 37-43; Trosclair Dep., pp. 15-16, 71-73, 78.

⁵⁴ Hubert Dep. at 37-43.

⁵⁵ Hubert Dep. at 44.

⁵⁶ Hubert Dep., pp. 53-55.

⁵⁷ Dep. of William Gerald Grimsley, Jr., Ex. #3.39 to Volpp's Response (Vol. 2).

⁵⁸ *Id.*

(c) Mustang Tractor Co.

As noted, Mustang Tractor Co. was one of three dealerships selected by Caterpillar in its "pilot exercise."⁵⁹ Caterpillar representatives had discussions with Mustang about its practice of selling non-genuine parts. The result of those discussions was that Mustang was to "develop an action plan to return to sourcing from Cat."⁶⁰ Caterpillar "directed" Mustang to "selectively disengage from most [of its]" alternatively sourced parts business by the end of November 1985.⁶¹ Mustang was permitted to continue dealing with CEM "for now."⁶² Mustang later agreed to "stop doing business with CEM . . . in exchange for [Caterpillar's] assistance on hydraulic and turbocharger repair option development."⁶³

(d) Rozier Machinery Co.

Caterpillar learned about Rozier's practice of buying from alternative sources. Caterpillar representatives asked "about the quality of the parts, [stated] the fact that they were unhappy with the fact that [Rozier was] doing it, and [stated] that there was an agreement between Caterpillar and the dealers that parts would be purchased, replacement parts would be purchased from Caterpillar."⁶⁴ **[**32]** Caterpillar pressed this in terms of an obligation.⁶⁵

The district manager of the Jacksonville District at Caterpillar, Mr. R. F. Noonan, sent a letter to Dabo Dabasinskas, the General Manager at Rozier, on February 26, 1986. That letter stated as follows:

Under our dealership agreement you have an obligation to adequately represent Caterpillar products including parts. Representation of directly competitive parts adversely affects that obligation. If you choose to stock non-genuine parts, we expect it to be only as an accommodation to customers who *insist* upon purchasing such parts. We would expect you to not promote such products where we provide genuine Caterpillar parts.

. . .

In failing to adequately represent us, you create some serious problems which inhibit our ability to do business with Rozier. . . .

. . .

Rozier is our only dealer in central Florida. You have elected to eliminate your representation of certain Caterpillar products. Will the list be ever growing? If so, we may be forced to consider who will represent us in central Florida for such items and whether we wish to have more **[**33]** than one dealer in the area.⁶⁶

The letter from Mr. Noonan prompted an angry response from the dealer principal at Rozier, Mr. Robert Blanchard. Mr. Blanchard **[*1221]** wrote to Mr. Noonan and objected to "the threatening nature of the letter."⁶⁷

⁵⁹ See *supra* notes 7-10, and accompanying text.

⁶⁰ Memo from TE Headington to JD Keenan (Aug. 15, 1985), Ex. #3.15 to Volpp's Response (Vol. 1).

⁶¹ Memo from Jeff Alt to John Chalmers (September 9, 1985), Ex. #5 to Dep. of John C. Chalmers, Volpp's Supp. Response.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Dep. of James T. Badger, Ex. #3.28b to Volpp's Response (Vol. 2).

⁶⁵ *Id.*

⁶⁶ Letter from RF Noonan to Dabo Dabasinskas (Feb. 20, 1986), Ex. #3.28c to Volpp's Response (Vol. 2) (emphasis in original). As noted, this letter appears to be the source for a "sample letter" sent to all district managers as a model for addressing the problem of alternatively sourced parts with dealers. See *supra* note 30, and accompanying text; Sample Letter, Attachment IV to Memo from MD Meadows to District Managers (July 18, 1986), Ex. #3.36 to Volpp's Response (Vol. 2).

[**34] In early 1986, Rozier decided to stop buying outside parts "because Caterpillar was unhappy and [Caterpillar was] telling [Rozier] they were very unhappy about it." ⁶⁸ Chuck Bacon at Rozier notified CEM by letter that it would no longer be purchasing CEM products. ⁶⁹ Mr. Bacon expressed "regret" at "having to write this letter." ⁷⁰

(e) Taylor Machinery Co.

As noted, Taylor Machinery Co. was one of three dealerships selected by Caterpillar in its "pilot exercise." ⁷¹ Caterpillar representatives had discussions with Taylor about their practice of selling non-genuine parts. The district management took a "strong posture" and "fully expected the practice to stop." ⁷² Mr. J. G. Evans from Caterpillar "confronted" Jon Thompson and Ed Newton at Taylor with "overwhelming evidence" of Taylor's involvement [**35] in competitive parts. ⁷³ Mr. Thompson eventually "confessed," and Mr. Evans asked them to "consider the consequences of their actions." ⁷⁴ Mr. Evans met later with Mr. Thompson on August 13, 1985, making himself clear that Taylor was free to purchase from whomever it chose. Mr. Evans then stated that "if [Taylor] chose not to completely represent [Caterpillar's] lines, [Caterpillar] would have to seek that representation in some other fashion." ⁷⁵

Taylor made the decision to purchase parts only from Caterpillar in [**36] order to "clear their bad name" and have all "sanctions" against them removed. ⁷⁶ Taylor apparently stood by this decision and "cleaned up their act," dealing solely with genuine Caterpillar parts. ⁷⁷

(f) West Texas Equipment Co.

Volpp has submitted evidence that Mr. Burdett at Caterpillar approached Mr. Bill Caudy at West Texas Equipment Co. (West Texas was involved in selling parts from CEM and S.K. Wellman) and "in a heavy handed manner and tone," asked why and where Caudy was buying these non-genuine parts. ⁷⁸ Mr. Burdett then told Mr. Caudy "in an accusatory tone" that West Texas Equipment was the only dealership in the territory that was buying competitive

⁶⁷ Letter from G. Robert Blanchard to R. F. Noonan (March 8, 1986), Ex. #3.28d to Volpp's Response (Vol. 2). See *supra* note 29. Mr. Blanchard subsequently recanted his objection to Mr. Noonan's letter. Aff. of G. Robert Blanchard, Ex. #73 to Caterpillar's Motion (Vol. II) ("In retrospect, my language [about the 'threatening nature' of Mr. Noonan's letter] was poorly chosen. I knew Mr. Noonan was not threatening me or the dealership in a literal sense").

⁶⁸ Dep. of James T. Badger, Ex. #3.28b to Volpp's Response (Vol. 2).

⁶⁹ Letter from Chuck Bacon to Bob McCreary (March 4, 1986), Ex. #3.28d to Volpp's Response (Vol. 2).

⁷⁰ *Id.*

⁷¹ See *supra* notes 8-11, and accompanying text.

⁷² Memo from TE Headington to JD Keenan (Aug. 15, 1985), Ex. #3.15 to Volpp's Response (Vol. 1).

⁷³ Memo from JG Evans to RP Bonati (Aug. 9, 1985), Ex. #3.16 to Volpp's Response (Vol. 1).

⁷⁴ *Id.*

⁷⁵ Memo from JG Evans to RP Bonati (July 31, 1985), Ex. #3.16 to Volpp's Response (Vol. 1) (emphasis added); see also Memo from JG Evans to RP Bonati (Aug. 22, 1985), Ex. #3.16 to Volpp's Response (Vol. 1).

⁷⁶ Memo from JM DeLuca to JG Evans (Nov. 26, 1985), Ex. #3.16 to Volpp's Response (Vol. 1) and Ex. #3.18 to Volpp's Response (Vol. 1).

⁷⁷ Memo from JG Evans to MD Meadows (Dec. 12, 1985), Ex. #3.18 to Volpp's Response (Vol. 1).

⁷⁸ Decl. of Bill Caudy (filed March 9, 1992).

parts.⁷⁹ Shortly after this confrontation, Mr. Burdett's boss, Mr. Stephenson, instructed Mr. Burdett [**37] to stop all outside purchasing.⁸⁰

(g) Whayne Supply Co.

In late 1984, Mr. Dan Walsh at Caterpillar sent a letter to Mr. Omer Lamkin at Whayne Supply Co. That letter stated, in pertinent part, as follows:

This letter expresses our concern over Whayne's current practice of sourcing non-genuine parts and reiterates some of our [*1222] opinions as to "why you should buy from us". At the advent, let me say we are acutely aware Whayne Supply Company is an independent business and as such has the right to sell any product, to any customers in any area. We, as a supplier to Whayne, have an obligation to provide you with quality, high-value products which you can merchandise at a profit. You and I both know the Caterpillar/dealer enterprise has grown far above that simple definition--and I propose its success is due largely to that increased commitment. We also haven't lost track of the success you have had with the Caterpillar [**38] products you do represent.

Omer, no doubt due to the difficult economy, some current suppliers and numerous other companies have increased their efforts to secure a portion of your parts orders. While we all may be surprised to the extent this happens in the Caterpillar family, we suspect it isn't management's intention, but rather the action of some well-intentioned employee. What results is dealers that fully intend to represent CAT (as the agreement requires) find themselves offering competitive parts⁸¹ [**39]

The letter goes on to detail many of the advantages of Caterpillar parts, including product quality, distribution, price and other concerns. It concludes as follows:

. . . . That Whayne has chosen to use non-genuine parts is very disturbing. Situations such as these severely limit your Caterpillar contacts' motivation to "fight" for your special requests (i.e. re-instating the GET Specialist or increasing our participation in u/c merchandising). . . .

. . . .

We are committed to merchandising our parts only through a strong Caterpillar dealer organization. We ask you to make a similar commitment in return.⁸²

Mr. Lamkin responded to Mr. Walsh by defending Whayne's practice of purchasing a "limited" quantity of non-genuine parts.⁸³ Mr. Walsh then notified Mr. Lamkin that Caterpillar would "monitor all transmission warranty claims until source of the parts and cause of failure can be verified."⁸⁴ Mr. Walsh also notified Mr. Lamkin that "similar limitations" would be required on Whayne's surplus parts returns.⁸⁵ Mr. Walsh informed Mr. Lamkin that these were protective measures to be put in place "until [Caterpillar] can respond to [Whayne's] concerns and regain [Whayne's] business."⁸⁶

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Letter from DP Walsh to Omer Lamkin (Nov. 19, 1984), Ex. #3.8 to Volpp's Response (Vol. 1).

⁸² *Id.*

⁸³ Letter from Omer Lamkin to Dan Walsh (Dec. 14, 1984), Ex. #3.8a to Volpp's Response (Vol. 1).

⁸⁴ Letter from DP Walsh to Omer Lamkin (Feb. 14, 1985), Ex. #3.8a to Volpp's Response (Vol. 1).

⁸⁵ *Id.*

⁸⁶ *Id.*

Whayne Supply Co. thereafter changed its policy and ceased the practice of buying [**40] competitive parts for stock.⁸⁷ Whayne's new policy permitted the purchase of non-genuine parts only in repairing downed machines and only where unacceptable delays in delivery prevented the use of authorized parts.⁸⁸ Whayne's new policy absolutely prohibited the purchase of competitive parts where the part was "such that its failure would lead to potential warranty claims against the manufacturer if it should fail."⁸⁹ This was viewed as a "positive action" by Caterpillar.⁹⁰

II. DISCUSSION

1. Summary Judgment Standards

HN1[] 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 [*1223] the moving party is [**41] entitled to a judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). **HN2**[] [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." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). However, [Rule 56\(c\)](#) is not a requirement that the moving party negate his opponent's claim, but does require a showing of an absence of evidence supporting the non-moving party's case. [U.S. v. Currency](#) \$ 267,961.07, 916 F.2d 1104, 1108 (6th Cir. 1990) (citing [Celotex](#), 477 U.S. at 323).

HN3[] The standard for granting summary judgment mirrors the directed verdict standard under [Rule 50\(a\)](#), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence [**42] on which the jury could reasonably find for the plaintiff." [Pierce v. Commonwealth Life Ins. Co.](#), 40 F.3d 796, 800 (6th Cir. 1994) (quoting [Anderson](#), 477 U.S. at 252). No genuine issue for trial exists "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

HN4[] Initially, [Rule 56](#) requires the moving party to inform the court of the basis for the motion, and to identify 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." [Celotex](#), 477 U.S. at 323. The non-moving party may oppose the motion with any of the evidentiary materials listed in [Rule 56\(c\)](#), but reliance on the pleadings alone is not sufficient to withstand summary judgment. [Anderson](#), 477 U.S. at 248. **HN5**[] In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all justifiable inferences in favor of the non-moving party, and does not weigh the [**43] evidence or the credibility of witnesses. [Id. at 255](#).

HN6[] Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. [Id. at 248](#). Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. [Id.](#) The issue of fact must be genuine. [Fed. R. Civ. P. 56\(c\), \(e\)](#). **HN7**[] To establish a genuine issue of fact the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." [Matsushita](#), 475 U.S. at 586; [Pierce](#), 40 F.3d at 800. The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. [Matsushita](#), 475 U.S. at 587; [Pierce](#), 40

⁸⁷ Memo from Frank Applegate to Byrl Bell (July 31, 1985), Ex. #3.8b to Volpp's Response (Vol. 1).

⁸⁸ [Id.](#)

⁸⁹ [Id.](#)

⁹⁰ Memo from D Waddilove to MD Meadows (Aug. 7, 1985), Ex. #3.8b to Volpp's Response (Vol. 1).

F.3d at 800. **HN8** A summary judgment determination is essentially an inquiry as to "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*, 477 U.S. at 251-52.

The Supreme Court has affirmed the appropriateness of summary judgment in antitrust cases. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468, 119 **J**441** L. Ed. 2d 265, 112 S. Ct. 2072 ("If plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted); *Matsushita*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (antitrust conspiracy claim dismissed because of plaintiffs' failure, after several years of detailed discovery, to put forward significant probative evidence of the alleged conspiracy); *First Nat'l Bank of Arizona, etc. v. Cities Serv. Co.*, 391 U.S. 253, 284-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968); *White Motor Co. v. United States*, 372 U.S. 253, 259, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963). Here, both parties have engaged in significant discovery, and in the absence of any material factual dispute, summary judgment is an appropriate procedural tool for this case.

The Sixth Circuit has also recognized the propriety of summary judgment in antitrust [*1224] cases. See, e.g., *Bouldis v. Suzuki Motor Corp.*, 711 F.2d 1319, 1324-25 (6th Cir. 1983); *Smith M.D. v. Northern Michigan Hosp., Inc.*, 703 F.2d 942, 947-48 (6th Cir. 1983). Therefore, the court agrees with defendant's assertion that if it demonstrates that no factual dispute is present and that [**45] it should prevail as a matter of law, summary judgment should be rendered in its favor.

2. Volpp's Federal Antitrust Claims (Counts I and II)

Volpp has alleged two federal antitrust claims in its complaint (Counts I and II). Count I alleges unlawful "tying" arrangements under both Section 1 of the Sherman Act⁹¹ [**46] and Section 3 of the Clayton Act.⁹² Count II alleges unlawful combination and conspiracy under Section 1 of the Sherman Act. Volpp has standing to bring this action for injunctive relief, treble damages, and costs, including a reasonable attorney's fee, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15,⁹³ [**47] and Section 15 of the Clayton Act, 15 U.S.C. § 26.⁹⁴

⁹¹ Section 1 of the Sherman Act provides as follows:

HN9 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1985). The punishments provided for in this provision were increased by amendment in 1990. See Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4(a), 104 Stat. 2879, 2880 (1990) (now codified at 15 U.S.C. § 1). The amended provisions are not applicable to the instant complaint.

⁹² Section 3 of the Clayton Act provides as follows:

HN10 It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities . . . or fix a price charged therefor, 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.

15 U.S.C. § 14 (1985).

⁹³ Section 4 of the Clayton Act provides, in pertinent part, as follows:

The Supreme Court has explained the purpose of the Sherman Act as follows:

The [**48] Sherman Act was designed to be a comprehensive charter of economic liberty [*1225] aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). The Court has consistently held that Section 1 of the Sherman Act only proscribes *unreasonable restraints of trade*. See Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) (citing those cases).

HN11 [+] Section 3 of the Clayton Act was intended "to complement the Sherman Act and to facilitate achievement of its purposes by reaching, in their incipiency, acts and practices that promise, in their full growth, to impair competition in interstate [**49] commerce." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974). Specifically, Section 3 of the Clayton Act intended to declare illegal "contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which may 'substantially lessen competition or tend to create a monopoly.'" Standard Co. v. Magrane-Houston Co., 258 U.S. 346, 356, 66 L. Ed. 653, 42 S. Ct. 360 (1922).

(a) Volpp's Tying Arrangement Claim (Count I)

(a) Amount of recovery; prejudgment interest. . . . 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, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award is just in the circumstances, the court shall consider only --

- (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
- (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
- (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

15 U.S.C. § 15 (1985).

⁹⁴ Section 15 of the Clayton Act provides, in pertinent part, as follows:

Injunctive relief for private parties; exception; costs.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C. § 26 (1985).

i. Elements of a Tying Claim

HN12 A tying arrangement is "an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific, 356 U.S. at 5-6* (emphasis added). A tying arrangement may violate either Section 3 of the Clayton Act or Section 1 of the Sherman Act. *Davis v. Marathon Oil Co., 528 F.2d 395, 398 (6th Cir. 1975)*, cert. denied, 429 U.S. 823, 50 L. Ed. 2d 85, 97 S. Ct. 75 (1976).

HN13 The Clayton Act makes it "unlawful for a person engaged [**50] in commerce" to "make a sale or contract for sale of goods" on the "condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessee or seller, where the effect of such . . . sale[] or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *15 U.S.C. § 14*. Although the language of the Clayton Act does not specifically address tying claims, concern regarding the "anticompetitive character of tying arrangements" was expressed during the enactment of *§ 3. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 10, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; See H.R. Rep. No. 627, 63d Cong., 2d Sess., 101-3 (1914); S. Rep. No. 698 63d Cong., 2d Sess., 6-9 (1914). Thus, the language of the Clayton Act coupled with its legislative history provided an impetus for the courts' subsequent development of tying arrangement theory.

HN14 A tying arrangement may violate Section 1 of the Sherman Act "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects [**51] a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* (quoting *Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 503, 22 L. Ed. 2d 495, 89 S. Ct. 1252*, (1969)). Many tying arrangements have long been considered unreasonable restraints of trade under the Sherman Act. See *Int'l Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*; *Fortner Enters., Inc., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252*. **HN15** Tying claims may violate Section 3 of the Clayton Act pursuant to the same test as the Sherman Act if the tie-in involves goods, wares, merchandise or other commodities. *Jefferson Parish, 466 U.S. at 23-24, n.39* (same substantive standards used by Sherman and Clayton Acts); *Bouldis, 711 F.2d at 1330*; *Marathon Oil Co., 528 F.2d at 398* ("The standard of illegality under the two statutes [Sherman and Clayton Acts] are similar.").

HN16 The Supreme Court has set forth two distinct methods of proving an unlawful tying arrangement pursuant to Section 3 of the Clayton Act and Section 1 of the Sherman Act.

The first [**52] employs a presumption that an agreement is an antitrust violation, thus invoking a *per se* illegality rule to classify the agreement; the second, called "rule of reason" analysis, "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition."

Lie v. St. Joseph Hosp., 964 F.2d 567, 569 (6th Cir. 1992) (quoting *Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*). Therefore, the two acknowledged methods of proving the existence of a tying arrangement are the *per se* and "rule of reason" approaches. In determining which analysis the court should apply, it must first decide whether the specific factual context of this case warrants *per se* treatment. See *Business Electronics, 485 U.S. at 726* (there is a "presumption in favor of the rule-of-reason standard, [and] departure from that standard must be justified by demonstrable economic effect"); *Smith Mach. Co. Inc. v. Hesston Corp., 878 F.2d 1290, 1296 (10th Cir. 1989)*, cert. denied, 493 U.S. 1073, 107 L. Ed. 2d 1026, 110 S. Ct. 1119 (1990) (*per se* rules appropriate [**53] only for "conduct that is manifestly anticompetitive," . . . [and] "ordinarily rule of reason analysis should be employed to determine whether a practice violates the Sherman Act") (citing *Business Electronics, 485 U.S. at 723-24*).

ii. Vertical Non-Price Restraints: Line Forcing v. Tying Arrangements

The facts of this case resemble a line forcing situation where "a manufacturer agrees to license or grant a franchise to a dealer to sell its products only if the dealer sells a full or representative line of those products." David Pester,

Antitrust Law: Removing the Confusion in Tying Arrangement Jurisprudence, 1990 Ann. Surv. Am. L. 699, 737 (1992). Line-forcing is, to a great extent, a type of tying arrangement. *Id.* at 741. The plaintiff in this case alleges that Caterpillar is "forcing" its dealers to fully stock Caterpillar parts. However, in the typical line-forcing arrangement competitors of the defendant manufacturer are not foreclosed from selling to the dealer; the dealer is simply forced to carry a full line of the manufacturer's products (including some products the dealer may not have wanted, or may have chosen to buy elsewhere). See [Smith Machinery, I**541 878 F.2d at 1296](#) (In most line-forcing situations the manufacturer does not prohibit the dealer from carrying competing lines). In the instant case, Volpp claims that not only is Caterpillar requiring that its dealers fully stock genuine parts, but that Caterpillar is also foreclosing competitors, such as itself, from selling non-genuine parts to its dealers. Therefore, although this case has some characteristics generally associated with a line-forcing arrangement, it is not wholly representative of a pure line-forcing situation. Instead, this case most closely resembles a line-forcing exclusive dealing arrangement because the manufacturer is forcing the dealer to buy its full line, to the exclusion of all other competitors. See [Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379 \(5th Cir. 1994\)](#), cert. denied, 130 L. Ed. 2d 673, 115 S. Ct. 779 (1995) (involving an exclusive dealing line-forcing arrangement).

[*1227] Plaintiff alleges that Caterpillar unlawfully tied sales of its equipment to sales of Caterpillar replacement parts, thereby excluding Caterpillar's competitors in the parts market from access to Caterpillar dealerships. Plaintiff contends that Caterpillar sales [**55] of machinery represent the tying product, while replacement parts are the tied product. For the purposes of this portion of the analysis, the court will accept those allegations of plaintiff's as true and will assume the presence of a tie. With this assumption, the court will focus its inquiry on whether or not that tie is illegal. See [Jefferson Parish, 466 U.S. at 11](#) (finding that not all tying arrangements, or refusals to sell two products separately, necessarily restrain competition).

The distinction between line-forcing and traditional tying arrangements is significant because several courts have treated them differently when deciding whether a particular scenario violates the antitrust laws. Pester, *Removing the Confusion* at 737; see [Smith Machinery, 878 F.2d 1290](#); [Parts & Electric I, 826 F.2d 712 \(7th Cir. 1987\)](#), aff'd, [Parts & Electric II, 866 F.2d 228 \(7th Cir. 1988\)](#), cert. denied, 493 U.S. 847, 107 L. Ed. 2d 100, 110 S. Ct. 141 (1989). Most importantly, some courts have held that *per se* treatment is inappropriate for line-forcing situations and that in such cases rule of reason analysis should be applied. *Id.* Because the court finds persuasive [**56] the position that the circumstances underlying line-forcing are different from standard tie-in arrangements, the court adopts the analysis of those courts that have recognized the distinction. Thus, in considering that the facts of this case fall somewhere between pure line-forcing and a tie, the question before the court becomes whether or not *per se* analysis is appropriate here. While reconciling these competing principles, the court remains mindful of the admonition of the *Jefferson Parish* Court that "the legality of [the challenged] conduct depends on its competitive consequences, not on whether it can be labeled 'tying.'" [466 U.S. at 21 n.34](#). Therefore, because the facts of this case do not fall clearly within any pre-delineated scenario, the court abandons the myriad of confusing labels in favor of following the basic principles underlying **antitrust law**. See [Eastman Kodak, 504 U.S. at 466](#) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in **antitrust law**.").

iii. *Smith Machinery & Roy B. Taylor Sales*

Most significant to the court's analysis are the Tenth Circuit's decision in *Smith Mach.* [**57] [Co. v. Hesston Corp., 878 F.2d 1290 \(10th Cir. 1989\)](#), cert. denied, 493 U.S. 1073, 107 L. Ed. 2d 1026, 110 S. Ct. 1119 (1990), and the Fifth Circuit's decision in [Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379 \(5th Cir. 1994\)](#), cert. denied, 130 L. Ed. 2d 673, 115 S. Ct. 779 (1995). In *Smith Machinery*, the plaintiff alleged that the defendant, a manufacturer of farm machinery, had unlawfully tied the sale of its tractors to other farm machinery products. In affirming the district court's grant of summary judgment for the defendant, the court noted that line forcing is a vertical non-price restraint. *Id.* [878 F.2d at 1295](#). **HN17** A vertical non-price restraint is "an agreement between entities at different levels of distribution that does not purport to affect prices or price levels charged for the goods." *Id.*

Relying on the Supreme Court's decision in [*Business Electronics*, 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808](#), which held that vertical non-price restraints are not *per se* illegal, the Tenth Circuit concluded that line forcing arrangements, because they are vertical non-price restraints, should likewise be exempt from *per se* treatment. See *id.* ("We concluded [in [**58\] *Continental Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#)] that vertical nonprice restraints had not been shown to have such a 'pernicious effect on competition' and to be so lacking in redeeming value' as to justify *per se* illegality.").

Tying arrangements between manufacturers and dealers are also a form of vertical restraint and under certain circumstances should only be subject to rule of reason analysis. See Jean Wegman Burns, *The New Role of Coercion in Antitrust*, [60 Fordham J. 12281 L. Rev. 379, 435 n.3 \(1991\)](#) ("Vertical restraints (in the form of vertical pricing, territory, and customer restrictions) and tying arrangements are both vertical restraints in the sense that both affect (and usually limit) the freedom of choice of a party on another level of the distribution chain."); [*Jefferson Parish*, 466 U.S. at 35, n.2](#) (O'Connor, J. concurring) ("Exclusive contracts, that, like tie-ins, require the buyer to purchase a product from one seller, are subject only to the rule of reason."); [*Business Electronics*, 485 U.S. at 717](#) ("Although vertical agreements on resale prices are illegal *per se*, extension of that treatment to other [**59](#) vertical restraints must be based on demonstrable economic effect rather than upon formalistic line-drawing."). ⁹⁵

In *Taylor*, the Fifth Circuit reversed the jury's finding of an unlawful tie and instead held in favor of the defendant [**60](#) manufacturer. [28 F.3d 1379](#). Hollymatic was a manufacturer of hamburger patty products and sold hamburger patty machines and paper products to its dealer (plaintiff). *Id. at 1381*. Hollymatic and Taylor had a contractual agreement that Taylor would use its "best efforts" to sell and service the full line of Hollymatic products. *Id.* Implicit in that agreement was that Taylor would not purchase patty paper from any of Hollymatic's competitors. *Id.* After selling only Hollymatic patty paper for several years, Taylor began to purchase a substitute. *Id.* Hollymatic confronted Taylor about its purchases from Hollymatic's competitors, and the parties attempted to forge a new agreement. *Id.* When they could not come to terms over the amount of patty paper that Taylor would be required to purchase each month, Hollymatic severed its relationship with Taylor. *Id.* Taylor then brought suit against Hollymatic alleging that it unlawfully tied the sale of hamburger patty machines to patty paper.

While assuming the presence of a tie, the *Taylor* court found that the tie between patty machines and paper did not violate the antitrust laws because it had no anticompetitive effect [**61](#) on the market. The court based its decision on the fact that the tie did not limit the ultimate choices available to consumers because customers purchasing patty machines from Taylor were free to purchase their patty paper elsewhere. See [*Taylor*, 28 F.3d at 1383](#) ("Where, however, *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.") (emphasis in original). Relying on the cardinal antitrust principle that "the antitrust laws protect competition, not competitors," (quoting [*Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#)), the *Taylor* court decided that the absence of any anticompetitive harm to the consumer prevented the court from allowing the jury verdict to stand. The court further explained that not all tying arrangements, or refusals to sell two products separately, necessarily restrain competition. [*Taylor*, 28 F.3d at 1382](#) (citing [*Jefferson Parish*, 466 U.S. 2, 11](#)). Because the alleged tie in the *Taylor* case was also a vertical nonprice restraint, the court was further convinced that it should not be subject to *per se* analysis. [**62\] 28 F.3d at 1383](#). The court reasoned that "there must be proof 'as a threshold matter of a substantial potential for impact on competition in order to justify *per se* condemnation.'" *Id. at 1382* (quoting [*Jefferson Parish*, 466 U.S. at 16](#)).

The instant case involves a vertical restraint because Caterpillar and its dealers are "at different levels of distribution" and the alleged restraint has not resulted in Caterpillar charging significantly higher prices for its parts

⁹⁵ See also [*Business Electronics*, 485 U.S. at 723](#) ("Per *se* rules are appropriate only for conduct that is manifestly anticompetitive"); [*Lie*, 964 F.2d at 569](#) ("[A *per se* violation involves an] agreement[] whose nature and necessary effect [is] so plainly anticompetitive, no elaborate study of the industry is needed to establish its illegality"); [*National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\); *National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 103-104, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1977\)](#) ("Per *se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.").

as is normally associated with [*1229] monopolist activity.⁹⁶ In *Business Electronics*, 485 U.S. at 735, the Court held that "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." Therefore, although the facts of this case amount to a hybrid between line-forcing and tying, they are most definitely characteristic of a vertical non-price restraint. Because vertical non-price restraints are generally not subject to *per se* analysis, the *per se* test should not be applied in this case.⁹⁷ See *Int'l Logistics Group, LTD. v. Chrysler Corp.*, that all competitors were allegedly foreclosed [**63] from selling parts 884 F.2d 904, 906 (6th Cir. 1989) ("[vertical restraints] must be judged by the criteria of a 'rule of reason' analysis rather than the rubric of 'per se' illegality."); *Business Electronics*, 485 U.S. at 717 (vertical non-price restraints, such as exclusive territory agreements, are not illegal *per se*).

[**64] iv. Effect on the Consumer

Most significant to the courts' decisions in *Smith Machinery* and *Taylor*, and extremely relevant to this case, is the courts' reliance on the fact that in most line-forcing situations, even those that involve exclusive-dealing arrangements like *Taylor*,⁹⁸ the ultimate consumer is not harmed by the arrangement. See *Taylor*, 28 F.3d at 1378-79 ("Such an arrangement [exclusive-dealing line-forcing/tie] is not the sort that would always or almost always tend to restrict competition and decrease output. It does not threaten competition to the same extent as tying arrangements that bind ultimate consumers."). Focusing on ultimate consumers is encouraged by the antitrust laws themselves. See e.g., *Smith Machinery*, 878 F.2d at 1296 ("The primary objective of the Sherman Act is to benefit consumers by promoting efficient and beneficial competition"); ("[We have always] considered alleged antitrust violations in light of their effect on consumers, not on competitors.") (citing *Westman*, 796 F.2d 1216, 1220). The Supreme Court has also focused on the alleged antitrust violation's effect on the consumer to determine whether an illegal tying [**65] arrangement exists. See e.g., *Jefferson Parish*, 466 U.S. at 18 ("Our analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services."). Because consumers are not hurt by vertical non-price restraints between manufacturers and dealers, the type of line-forcing/exclusive arrangement found in this case should not be subject to the same *per se* treatment as traditional tying arrangements.⁹⁹ It is true [*1230] that competitors such as Volpp may be harmed by line-forcing situations that limit their opportunities with particular outlets; however, the antitrust laws were "designed to protect competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).

⁹⁶ Even if the prices have been increased to some degree, this fact only aids the plaintiff's competitive position with consumers. The higher the prices that Caterpillar charges for its parts, the more likely the consumer will shop elsewhere (i.e., look to Caterpillar's competitors).

⁹⁷ The *Smith Machinery* scenario is not the typical vertical restraint because competitors can still sell their products to the dealer, while they arguably cannot in the instant case. See *Smith Machinery*, 878 F.2d at 1295 n.5 ("In this particular case, the alleged line forcing might better be termed a vertical 'arrangement' rather than 'restraint' since Smith was not prohibited from carrying the product lines of competitors as it would be under an exclusive dealing arrangement, the classic 'vertical restraint.'"). Nevertheless, the Tenth Circuit's analysis is still relevant here, and its relevance is demonstrated by the applicability of the *Smith Machinery* analysis to the *Taylor* case which is very similar to this case. In *Taylor*, the dealer was prohibited from buying patty paper from Hollymatic's competitors like the dealers in this case; a typical vertical non-price restraint. Yet, despite that difference between *Smith Machinery* and *Taylor*, *Taylor* was still decided on the same basis and consistent with the same principles as *Smith Machinery*. Therefore, the fact that this case is distinguishable from *Smith Machinery* in to Caterpillar dealers does not undermine the relevancy of the *Smith Machinery* analysis to this case.

⁹⁸ See *Taylor*, 28 F.3d at 1384 ("It [the agreement between Taylor and Hollymatic] was in effect an exclusive-dealing agreement in which Hollymatic required Taylor to sell Hollymatic, and only Hollymatic, patty paper.").

⁹⁹ This court is not convinced that even typical tying arrangements should be subject to *per se* analysis and would likely agree with Justice O'Connor's concurring opinion in *Jefferson Parish*. See *Jefferson Parish*, 466 U.S. 2, 34-35 (O'Connor, J. concurring) (arguing in favor of abandoning *per se* test for tying arrangements and applying rule of reason analysis instead). However, the law in its current form retains quasi-*per se* treatment for some tying claims. See *infra* pp. 18-19.

[**66] The consumers in this case still have significant *choice* as well as a guarantee of price competition in the replacement parts market, both of which the antitrust laws protect. The only negative consequence for a consumer of an exclusive line-forcing arrangement, like the one here, is the potential loss of convenience. It is true that the affected consumers in this case may not be able to purchase everything they want in the same place (i.e. machinery, service and parts). However, the *Taylor* court held that [HN18](#) "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." [Taylor, 28 F.3d at 1385](#). What the plaintiff in the instant case must demonstrate is that the tie "as it actually operated in the marketplace" harmed competition. [Breaux Brothers, 21 F.3d 83, 86 \(5th Cir. 1994\)](#) (quoting [Jefferson Parish, 466 U.S. at 31](#)). Plaintiff has not produced such evidence.

Although consumers of Caterpillar machinery may not be able to buy non-genuine parts at Caterpillar dealerships, they may still purchase non-genuine parts on the open market. Volpp has alternative paths to consumers [**67] through its HEP marketing arm and its related chain of distribution. The HEP marketing arm sells its parts to repair shops, tractor parts operations, seal houses, OEM attachment manufacturers and to exporters. See Martin Tr. at 61-62, 75-76, 106-08; Request for Admission Nos. 242, 252, 253, 255, 294-305 and plaintiff's responses Ex. 91-93 (DX 180-82). Plaintiff can also still sell to other OEM dealers besides Caterpillar. See [supra p. 4](#). Further, although Plaintiff may have lost sales to Caterpillar dealers, their sales in other markets have continued to grow. Decl. of Larry Gray, p. 41, Ex. #1.0 to Volpp's Response (Vol. 1). These facts demonstrate that the only exclusion that plaintiff has experienced as a result of the alleged tie is its "exclusion" from free-riding on defendant's own dealer distribution system.

The only drawback for Caterpillar consumers, with whom the antitrust laws are most concerned, is that they may ¹⁰⁰ be prevented from purchasing a non-genuine part at a Caterpillar dealer. For Caterpillar equipment owners that prefer to have their equipment serviced at Caterpillar dealers and also prefer to use non-genuine parts, Caterpillar's line-forcing will [**68] likely cause inconvenience. However, the antitrust laws were not designed to protect convenience, but were enacted to safeguard competition. Caterpillar equipment owners can service their equipment at places other than Caterpillar dealerships where non-genuine parts are stocked and sold. There is no guarantee implicit in the antitrust laws that manufacturers will always have unrestricted access to any and all outlets through which they desire to sell their products. This is particularly true where a competitor, such as Caterpillar, has exerted tremendous effort to set up a dealer distribution chain for its own products. Plaintiff has no federally protected right to access the Caterpillar dealership market - - there is no free-rider guarantee in the antitrust laws. Accordingly, plaintiff has failed to produce evidence that the alleged tie in this case, as it actually operated in the market, harmed competition or created a substantial potential for impacting competition negatively. Therefore, in paying heed to the venerable principles of [antitrust law](#), the court finds that *per se* analysis is inappropriate [*1231] here and will accordingly review this case under rule of reason principles. [**69]

v. Rule of Reason Analysis

[HN19](#) The "rule of reason" approach requires that the party challenging the alleged unlawful tie set forth the tying arrangement itself and that the arrangement is "an unreasonable restraint on competition." [Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343, 73 L. Ed. 2d 48, 102 S. Ct. 2466 \(1982\)](#); [Beard v. Parkview Hosp., 912 F.2d 138, 140 \(6th Cir. 1990\)](#). As the Supreme Court held in [Nat'l Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 \(1978\)](#), "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." See also [Taylor, 28 F.3d at 1386](#) ("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

¹⁰⁰ Caterpillar dealers have not completely stopped purchasing non-genuine parts. Many dealers still use such parts in emergency situations and others still use them on occasion. See e.g., Blake Quinn Aff. (Dealer principal of Quinn Co., a California Caterpillar dealership) (noting dealership's policy of using non-genuine parts on occasion if the part is unavailable from Caterpillar, if a customer requests a non-genuine part on a particular job, or due to price considerations). It is notable that Volpp has not been completely cut out of the Caterpillar dealership "mini-market," and Caterpillar has never terminated a dealership for stocking non-genuine parts.

adverse impact on competition.") (citations omitted). Volpp bears the burden of demonstrating that Caterpillar's actions had such an "actual adverse effect on competition."

"Assessing such an impact requires an inquiry into the conditions of the relevant market." *Smith Machinery, 878 F.2d at 1296*. Under certain circumstances, tying arrangements may actually promote competition. See IX Phillip E. Areeda, *Antitrust Law* P 1703g, at 50 (1991) ("suggesting that tying sometimes benefits society by protecting quality, lowering costs or increasing value, increasing price competition, aiding entry, or rewarding a valuable patent."). [**71] Thus, "to the extent that a manufacturer's distribution practices enhance competition in the consumer market, they should be encouraged despite their effect on suppliers in an intermediate distribution market." *Smith Machinery, 878 F.2d at 1296*.

Even considering the facts in the light most favorable to the non-moving party, Volpp has not set forth any evidence that competition in the marketplace for replacement parts has been suppressed or is likely to be suppressed. Rather, the evidence in the record suggests that Caterpillar's aggressive promotion of its own products may have actually stimulated competition and resulted in Caterpillar becoming more price and service conscious when urging their products on their own dealers. See e.g., *supra p.11* and n.26 ("Districts should advise dealers that Caterpillar is committed to providing competitive prices which generate a reasonable (aggregate) return to the dealer"); *supra p.22* and n.63 (Caterpillar and Mustang reaching an agreement whereby Mustang was to disengage from sourcing alternative parts by a certain date *in exchange for* Caterpillar's assistance on hydraulic and turbocharger repair option development). For Volpp [**72] to prevail under the facts and circumstances of this case, "it would have to show that [Caterpillar's] line requirement so restricted the marketing of Volpp products that it impeded competition in the consumer market." *Smith Machinery at 1296*. As has already been discussed in the preceding section, the consumer is not hurt by Caterpillar's alleged actions in this case. Accordingly, under the rule of reason analysis, plaintiff's claim must fail.

vi. Per Se Analysis

As set forth above, the court believes that a rule of reason analysis is most appropriate in the instant case. However, even if the court were to apply the *per se* test, plaintiff's claim would still fail.

HN20 To set forth a *per se* violation, a plaintiff must show that:

- 1) There is a tying arrangement between two distinct products or services;
- 2) The seller has sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and
- 3) The amount of commerce affected is not insubstantial.

Virtual Maintenance v. Prime Computer, Inc., 11 F.3d 660, 664, n.6 (6th Cir. 1993) (citations and internal quotations omitted), cert. dismissed sub [**73] nom. *Virtual Maintenance v. Computervision Corp.*, U.S. , 114 S. Ct. 2700, 129 L. Ed. 2d 829 (1994). Establishing a tying claim where the plaintiff [**1232] has concrete proof of a tie, such as a contract that has been reduced to writing, is fairly simple. See *Bell v. Cherokee Aviation Corp., 660 F.2d 1123, 1126 (6th Cir. 1981)*. However, in the absence of such an express tying arrangement, a plaintiff can also demonstrate that an unlawful tie exists by showing that a seller forced the tied product on an unwilling buyer. *Jefferson Parish, 466 U.S. at 15*; *Breaux Brothers, 21 F.3d at 86*; *Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982)* ("Actual coercion by the seller that in fact forces the buyer to purchase the tied product is an indispensable element of a tying violation"); *Ogden Food Serv. v. Mitchell, 614 F.2d 1001, 1002 (5th Cir. 1980)* (coercion is an element of an illegal tie-in); *but see Cherokee Aviation Corp., 660 F.2d 1123* (coercion is not an element of an illegal tie-in). Here, no express agreement exists.¹⁰¹ Therefore, to prove a tying claim plaintiff must rely on evidence of coercion.

¹⁰¹ The Sales and Service Agreement between Caterpillar and its dealers contains no provision that expressly requires the purchase of replacement parts in order to also buy Caterpillar equipment. Plaintiff alleges, however, that the contract's mandate

[**74] In the post-Jefferson Parish era, the modern *per se* rule abandons the former strict *per se* treatment in favor of a modified approach.¹⁰² This quasi *per se* test is really "a hybrid between *per se* and rule of reason analysis because of the threshold examination of market power." Timothy S. Cragin, *Antitrust and Trade Regulation Law*, 42 La. B. J. 386, 387 (1994); Lazaroff, *Reflections of Eastman Kodak* at 115 ("[The Jefferson Parish Court] endorsed a method of analysis that does not entail all the elements of a full-blown rule of reason approach, but also does not label a tie-in illegal without some threshold demonstration of market power in the tying product."). Pure *per se* treatment would automatically invalidate a tying arrangement without inquiring into market power. However, quasi *per se* condemnation is only appropriate "if the existence of forcing is probable." *Id.*

[**75] Therefore, the presence of coercion is a critical factor in the determination of whether the particular circumstances of a case give rise to an illegal tying arrangement. See *Unijax*, 683 F.2d at 686 ("[A] finding of the actual exercise of economic muscle [is] an indispensable element for proving a tying violation."). As the Supreme Court held in *Jefferson Parish*:

Our cases have concluded that 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 Sherman Act is violated.

Jefferson Parish, 466 U.S. at 12 (emphasis added). The burden of proving coercion rests with the plaintiff. *Ogden Food Serv.*, 614 F.2d at 1002; *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 377 (5th Cir. 1977). [*1233] Even when the facts are considered in the light most favorable to the non-moving party, [**76] plaintiff cannot sustain its burden of demonstrating that, in the context of a distributor-dealer relationship, Caterpillar dealers were forced to purchase Caterpillar parts in violation of the antitrust laws.

In deciding these types of cases, courts must be wary of the difference between forcing that amounts to an illegal tie under the antitrust laws, and aggressive salesmanship that is encouraged by those same antitrust laws. As the Fifth Circuit noted in *Unijax*:

A manufacturer's use of "strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce [its] retailer to buy its full line of products" does not, however, amount to actual coercion.

683 F.2d at 685 (quoting *Bob Maxfield Inc. v. Am. Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir. 1981)); see also *Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1225 (3d Cir. 1976) ("The purpose of the antitrust laws is to stimulate economic competition, the essence of which is the presence of many competing sellers; salesmanship -- the art of persuasion and influence -- is inherent in competition among sellers."). Here, defendant's representatives did use "strong persuasion" and hard-line [**77] tactics to lure dealers into sourcing almost exclusively genuine parts. However, as the *Unijax* court found (even though the manufacturers in that case actually terminated plaintiff's distribution outlets in two states), such cajolery is not the sort of coercion proscribed by the antitrust laws. See also *Marathon Oil*, 528 F.2d 395 (rejecting a tie-in claim even though defendant's sales representative told plaintiff that

to "adequately promote the sale of Caterpillar products" and its provision that dealer affiliation with other organizations that are "substantial operator[s] of products" would adversely affect that obligation to promote Caterpillar products, amounts to the express conditioning necessary to set out a tying arrangement. Such strong language, although indicative of Caterpillar's serious commitment to regaining lost sales of replacement parts, is not an express tie. There is nothing in the language of the agreement that absolutely requires Caterpillar dealers to stock only genuine parts. For that reason, plaintiff cannot prove that an express tying agreement between Caterpillar and its dealers exists.

¹⁰² Commentators have recognized that *Jefferson Parish* limited the scope of the *per se* rule. See e.g., Daniel E. Lazaroff, *Reflections of Eastman Kodak Co. v. Image Technical Services, Inc.: Continued Confusion Regarding Tying Arrangements and Antitrust Jurisprudence*, 69 Wash. L. Rev. 101, 114 (1994) ("The shift in the Supreme Court's general attitude regarding tying arrangements became strikingly evident in *Jefferson Parish Hospital District No.2 v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). In *Hyde*, four justices concurred with a five justice majority and specifically called for a repudiation of any *per se* approach to tie-ins. These four justices were, in essence, calling for rule of reason treatment of tie-ins as just another non-price vertical restraint. Even the majority, which did not wish to repudiate the *per se* approach, severely limited its applicability.").

his lease might be cancelled unless he purchased more of defendant's products and plaintiff's lease was ultimately cancelled).

Plaintiff has set forth numerous examples of alleged coercion, all of which essentially highlight the aggressive direction that Caterpillar undertook in order to increase revenue from genuine parts sales. The majority of these examples are contained in the fact section of this order. See [supra pp. 1-28](#). The court will analyze those typical instances of Caterpillar's general behavior.¹⁰³ When Caterpillar committed itself to the task of regaining the replacement part sales it had lost to non-genuine parts manufacturers, managers were instructed to "do all those things that we know will work to sell parts." See [supra p.5](#). Such **[**78]** a company statement embodies the very principles that the antitrust laws were designed to protect -- competitive initiative. Caterpillar recognized that non-genuine parts sales were increasing and cutting into genuine parts sales profits. It is antithetical to American corporate culture, grounded in capitalist principles, to expect Caterpillar to ignore a potential profit center and decline to aggressively compete.

One example of Caterpillar's alleged "forcing" is the Caterpillar "Worldwide Marketing Management Meeting" where it was determined that dealers who outsource would be personally contacted by district/region managers and reminded of their obligations to Caterpillar. See [supra p. 8](#) and n.14. In that meeting, the various measures for dealing with those situations were outlined. Those measures were: suspension of parts **[**79]** returns, one hundred percent inspection of warranty parts, and a dealer requirement that all non-genuine parts be identified on customer invoices. See [supra p. 8](#). None of those responses amount to termination of a dealership or rise to the level of unlawful coercion within the context of a tying arrangement. Since its inception in 1925, Caterpillar has established itself as a leader in the heavy equipment machinery market, and as such is certainly entitled to ensure that it is not covering the cost for warranties on parts not manufactured by Caterpillar by paying for non-genuine parts on return. Non-genuine parts manufacturers, such as the plaintiff, do not have a right to free-ride on Caterpillar's distribution system. If Caterpillar did not attempt to safeguard its investment in its own distribution system and its warranty and return parts programs, it would be declining to aggressively compete. **[*1234]** This kind of monitoring should simply be expected in a dealer-distributor relationship and does not rise to the level of coercion necessary to establish a tying arrangement.

After this meeting, Caterpillar decided that local representatives would have a "Woodshed talk" with dealers "who **[**80]** are into nongenuine parts" and send out a "sourcing loyalty letter." See [supra p. 8](#) and n.18. The sourcing loyalty letter provided in relevant part:

The basis of our agreements with dealers is our expectation that they will adequately represent the Caterpillar products designated in those agreements to our satisfaction. The use of genuine Caterpillar parts is essential to the performance of our dealers' obligation to support Caterpillar prime products and the fulfillment of their obligation to adequately represent the entire Caterpillar product line -- including parts.

See [supra p. 9](#) and n.19. This letter does not contain unlawful coercion when viewed within the context of a distributor-dealer relationship. Caterpillar may be attempting to use its influence to cajole its dealers into sourcing almost exclusively from Caterpillar -- but such conduct does not rise to the level of the forcing required for a- tying claim. Further, Caterpillar has submitted proof that the author of this sourcing letter believes that dealers "certainly . . . have no contractual obligations to source entirely genuine Caterpillar parts." Confidential Testimony of David Lewis, Ex. #84 **[**81]** to Caterpillar's Motion (Vol. III).

As a follow-up to the loyalty sourcing letter, Caterpillar also suggested that district managers respond to dealers who sell non-genuine parts with the following statement:

You can buy from whomever you choose -- we have no control over that. But, I would ask you a similar question. Why shouldn't we sell tractors or parts to your competitor -- perhaps the local Komatsu dealer? They may be happy to buy many items from us at good prices -- our sales and profits could increase.

¹⁰³ The court will not discuss each individual act of alleged "coercion," but the typical instances reflect the type of conduct alleged and suffice to explain the court's conclusion.

See [supra p. 10](#) and n.22. The very first statement of the response, "you can buy from whomever you choose," clearly indicates that Caterpillar understood that it could not implement a strict requirement that dealers only stock genuine parts. However, there is a distinction between an absolute requirement and the sort of procompetitive focused persuasion found here.

A second dealer-sourcing letter, designed to assist district managers in their understanding of the parts issue, was sent as a follow-up to "suggested responses" such as the one quoted above. This letter strongly discouraged sourcing non-genuine parts by calling such conduct "unacceptable." Most [\[**82\]](#) significantly, however, the letter also contained a position statement that included the following declaration:

Districts should advise dealers that Caterpillar is committed to providing competitive prices which generate a reasonable (aggregate) return to the dealer. We realize (and so do most dealers) that there will be situations where an individual transaction may not provide this return. Nevertheless, we expect dealers to pursue the total opportunity.

See [supra p. 11](#) and n.26. This statement demonstrates that Caterpillar recognized it must compete and potentially lower its prices in order to guarantee sourcing loyalty from its dealers. It is true that Caterpillar may be able to leverage its influence as a distributor to more successfully persuade its dealers to source only genuine parts; however, such power is inherent in a distributor-dealer relationship and does not constitute unlawful forcing when considered in that context.

Other materials comprised within Caterpillar's campaign to sway its dealers to return to purchasing more genuine parts include a "district action letter" and a summary of a "successful attempt at encouraging one dealer to source only [\[**83\]](#) genuine CAT parts." The district action letter provides in relevant part:

Under our dealership agreement, you have an obligation to adequately represent Caterpillar products including parts. Representation of directly competitive parts adversely affects that obligation. If you choose to stock non-genuine parts, we expect it to be only as an accommodation to customers who insist upon purchasing such [\[*1235\]](#) parts. We would expect you to not promote such products where we provide genuine Caterpillar parts.

See [supra p. 12](#) and n.30. This statement indicates that Caterpillar recognizes that dealers will continue to stock non-genuine parts; however, Caterpillar's position as a distributor gives it some "extra muscle" to promote its best interests. Nevertheless, such muscle is a probable consequence of its relationship with its dealers and should be expected within that economic mini-system. Further, the summary of the successful attempt at encouraging one dealer to source only genuine Caterpillar parts indicates, by definition, that there are "unsuccessful attempts" and that Caterpillar does not assume it has the power to force dealers to obey its requests under any and all [\[**84\]](#) circumstances.

At a Caterpillar dealer meeting a Caterpillar representative explained Caterpillar's disapproval of the selling of non-genuine parts by stating that:

I can think of nothing more injurious to our mutual long-term future than assisting competitive parts manufacturers to gain a stronger market position through our own distribution organization.

See [supra p. 15](#) and n.38. As mentioned previously, Caterpillar is right to be concerned about the network it has painstakingly constructed over the years to profitably market its own products, and in a competitive system it should be protective of its own goodwill. Therefore, even strong measures to ensure that its own distribution system inures to the benefit of Caterpillar machinery and products, and not Caterpillar's and its dealers' competitors, are not coercive. Such measures are sound and expected competition.¹⁰⁴

[\[**85\]](#) The contract between the individual dealers in this case and Caterpillar calls for the dealers to represent Caterpillar's full line, in return for which the dealers get an exclusive territory to sell Caterpillar products. By granting

¹⁰⁴ The court notes that plaintiff has not provided any testimony from the more than 70 dealer principals that plaintiff claims were coerced. Instead, plaintiff focused its discovery on low-level employees in dealer parts departments even though plaintiff's expert conceded the relevance of dealer testimony on the issue of coercion. Kyler Tr. 463, Ex. 89.

its dealers exclusive territories, Caterpillar essentially selected one individual dealer in each area to whom it could look to promote its sales in that area. If any individual dealer did not live up to its agreement, then Caterpillar would not make any sales in that "exclusive territory." And if Caterpillar did not make any sales in its territory, competition would diminish because then only the plaintiff would have an outlet to sell its products in that area. Therefore, Caterpillar's aggressive promotion of its genuine parts, which may have risen to the level of extreme persistence and cajolery, do not, in the context of the relationships between the parties in this case, rise to the level of coercion necessary to satisfy a tying arrangement. Accordingly, plaintiff has failed to submit sufficient evidence for a reasonable jury to return a verdict in Volpp's favor on its *per se* tying claim.

HN21 [↑] If plaintiff cannot establish a *per se* tying arrangement, [**86] then plaintiff bears the burden of showing that the alleged illegal conduct "unreasonably restrained competition." See *Jefferson Parish, 466 U.S. at 29* ("In order to prevail in the absence of *per se* liability, respondent has the burden of proving that the Roux contract [alleged tie] violated the Sherman Act because it restrained competition."). The court has already applied the rule of reason analysis to the facts of this case and explained why the alleged antitrust violation in this case does not unreasonably restrain competition. See *supra pp. 48-50*.

vii. Conclusion: Tying Arrangement Claim

The court concludes that even if it were to accept *all* of plaintiff's allegations as true, the antitrust claim asserted simply makes no economic sense. See *Eastman Kodak, 504 U.S. at 468* (Finding that if plaintiff's theory is "economically senseless" no reasonable jury could find in its favor and summary judgment should be granted). Aggressive salesmanship is protected and encouraged by the antitrust laws and therefore cannot, in the context of distributors who award exclusive territories to dealers, form [*1236] the coercion necessary to prove a tie-in claim. To trigger federal [**87] protection under the antitrust laws, a violation must have an actual anticompetitive effect -- it must hinder the machinations of the free market system. See *Jefferson Parish, 466 U.S. at 31* ("Without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws, and no such showing has been made."). Nothing in this case has such an impact on the market, particularly the consumer for whom the antitrust laws were created. Therefore, even considering all the facts in the light most favorable to plaintiff, Volpp's claim must fail because it has not set forth any evidence of a tying claim that has an adverse effect on the consumer marketplace (rule of reason analysis). Nor has it established the presence of coercion necessary to justify *per se* treatment on a tying claim (*per se* analysis). Accordingly, and for the reasons discussed above, the court grants defendant's motion for summary judgment on the tying claim and on the issue of coercion.¹⁰⁵

[**88] (b) Volpp's Conspiracy Claim (Count II)

Caterpillar claims that it is entitled to judgment as a matter of law on Volpp's conspiracy claim (Count II) because it merely duplicates the tie-in claim (Count I) and also because there is no evidence of a conspiracy. Because Caterpillar is entitled to judgment as a matter of law on the tie-in claim, its argument for summary judgment on the conspiracy claim is well taken. Without an underlying unlawful tie or antitrust violation, there is no illegal conduct on which to base a conspiracy. Therefore, the court grants summary judgment on plaintiff's conspiracy claim.

3. Volpp's State Antitrust Claim (Count III)

In Count III of its amended complaint, Volpp has alleged state antitrust violations under *Tenn. Code Ann. § 47-25-101*¹⁰⁶ [**89] and seeks compensatory and punitive damages as well as injunctive relief. Caterpillar contends,

¹⁰⁵ Because the court has already held that no unlawful tying arrangement exists in this case, it need not reach the antitrust injury or damages issues.

¹⁰⁶ *Tenn. Code Ann. § 47-25-101* provides as follows:

HN22 [↑] All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state,

inter alia, that the damages section of the statute, [§ 47-25-106](#),¹⁰⁷ provides only a consumer remedy and that no remedy at all is available to a competitor such as Volpp.

Caterpillar notes that the exclusive remedy of the statute is that the person injured "may sue for and recover . . . the full consideration or sum paid by him" for any goods sold in violation of the statute. As a competitor, Volpp never paid any consideration or sum for any product sold in violation of the statute. Caterpillar argues that as a consequence, Volpp may recover nothing. At oral argument, Volpp conceded that a competitor such as itself has no remedy under the Tennessee antitrust statute. The court agrees. Viewing all evidence in the light most favorable to Volpp, Caterpillar is entitled to judgment as a matter of [\[**90\]](#) law on Count III. The court will accordingly grant Caterpillar's motion for summary judgment on Count III.

4. Volpp's Claim for Intentional Interference with Prospective Business Relations (Count IV)

Count IV of Volpp's complaint alleges that Caterpillar "intentionally interfered with [\[*1237\]](#) [plaintiff's] on-going and prospective business relations with authorized Caterpillar dealers." Amended Compl. at P 21. On its face, Count IV appears to be a claim for interference with an existing contractual relationship as well as an action for interference with prospective business relations.

Caterpillar contends that it is entitled to judgment as a matter of law on this claim because: (1) Volpp has failed to establish certain elements of the tort of interference with ongoing business relations, and (2) Tennessee law does not recognize the tort of interference with prospective business relations. Specifically, as to the claim for interference with on-going business relations, Caterpillar cites cases applying Tennessee law to argue: (1) that Caterpillar cannot be held liable for interfering with Volpp's at-will business relationship with Caterpillar dealers; (2) that there is no [\[**91\]](#) evidence that Caterpillar was motivated by malice; and (3) that there is no evidence to show that but for Caterpillar's actions, Volpp would have entered into a business relationship with any Caterpillar dealer. As to the claim for interference with prospective business relations, Caterpillar argues Tennessee law does not recognize the tort and that the claim should accordingly be dismissed.

An assumption underlying Caterpillar's arguments is that Tennessee law should be applied to Count IV. This assumption is stated explicitly with respect to Caterpillar's argument on the claim for interference with prospective business relations. Caterpillar argues that Tennessee law applies to that claim, relying on the old choice of law principle of *lex loci delecti*. See *Restatement of Conflict of Laws* § 377 (1934) ("First Restatement"); see also [Winters v. Maxey, 481 S.W.2d 755 \(Tenn. 1972\)](#), overruled by [Hataway v. McKinley, 830 S.W.2d 53 \(Tenn. 1992\)](#). Caterpillar makes no choice of law argument on the claim for interference with on-going business relations but relies on cases applying Tennessee law in arguing that it is entitled to judgment as a matter of law on that claim.

[\[**92\]](#) [HN24](#)[] When a federal court is called upon to apply state substantive law to a claim, the conflicts law of the forum determines which state's law to apply. [Telecommunications, Eng'g Sales & Serv. Co. v. Southern Tel. Supply Co., 518 F.2d 392, 394 \(6th Cir. 1975\)](#). Caterpillar is thus correct in looking to choice of law principles of Tennessee to determine the applicable substantive law. However, after the briefs on the instant motion were filed, the Tennessee Supreme Court rendered its decision in [Hataway v. McKinley, 830 S.W.2d 53 \(Tenn. 1992\)](#). In *Hataway*, the court abandoned the *lex loci delecti* choice of law doctrine embodied within the First Restatement,

or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful and void.

¹⁰⁷ [Tenn. Code Ann. § 47-25-106](#) provides as follows:

[HN23](#)[] Any person who may be injured or damaged by any such arrangement, contract agreement, trust, or combination, described in this part may sue for and recover, in any court of competent jurisdiction, of any person operating such trust or combination, the full consideration or sum paid by him for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.

adopting instead the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws ("Second Restatement"). [830 S.W.2d at 57, 59](#). Under this approach, "the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation." The court adopted the following provision of the Second Restatement:

§ 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined [\[**93\]](#) by the local law of the state, which with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (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,
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

[Hataway, 830 S.W.2d at 59](#). The Tennessee Supreme Court also adopted Section 6 of the Second Restatement, referenced in Section 145 (quoted above), as follows:

[*1238] § 6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate [\[**94\]](#) and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability, and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Id.

Caterpillar has not addressed the prevailing choice of law principles in Tennessee and therefore at this point has failed to show that Tennessee substantive law applies to Volpp's claim(s) for either on-going or prospective business relations. In the absence of such a showing, Caterpillar's attempt to demonstrate that it is entitled to judgment as a matter of Tennessee substantive law on Count IV must fail. The court will accordingly deny Caterpillar's motion for summary judgment on Count IV.¹⁰⁸

¹⁰⁸ The court further notes that even if Tennessee law applied, plaintiff's claim for intentional interference with prospective economic advantage would fail because that tort has never been recognized by the Tennessee courts. See [Chilton Air Cooled Engines, Inc. v. Omark Indus., Inc.](#), 721 F. Supp. 151, 156 (M.D. Tenn. 1988) (finding that Tennessee has not developed any case law concerning interference with prospective business relations). Although the Tennessee courts have never expressly rejected such a cause of action, [quality Auto Parts v. Bluff City Buick](#), 876 S.W.2d 818, 823-24 (Tenn. 1994) ("We conclude that the question of whether Tennessee law recognizes the tort of intentional interference with prospective economic advantage should be postponed to another day"), this court declined to create a cause of action for interference with economic advantage in [Valley Prods. Co., Inc. v. Landmark](#), 877 F. Supp. 1087, 1994 WL 772307 (W.D. Tenn. 1994). Because such a claim does not presently exist under Tennessee law, this court would once again decline to create a cause of action that has never before been recognized. See [Chilton Air](#), 721 F. Supp. at 156 (dismissing claim because "Tennessee has not recognized tort of interference with prospective business relations.").

[95] CONCLUSION**

Caterpillar's motion for summary judgment on all of Volpp's federal claims is granted and accordingly the federal claims are dismissed with prejudice. The court also grants Caterpillar's motion for summary judgment on Volpp's state antitrust claim. The court denies Caterpillar's motion for summary judgment on Volpp's state claim for intentional interference with prospective economic advantage.

IT IS SO ORDERED this 3rd day of August, 1995.

JEROME TURNER

UNITED STATES DISTRICT JUDGE

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United States v. Eastman Kodak Co.

United States Court of Appeals for the Second Circuit

February 14, 1995, Argued ; August 4, 1995, Decided

Docket No. 94-6190

Reporter

63 F.3d 95 *; 1995 U.S. App. LEXIS 20755 **; 1995-2 Trade Cas. (CCH) P71,078

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. EASTMAN KODAK CO., A Corporation of New Jersey, and EASTMAN KODAK, CO., A Corporation of New York, Defendants-Appellees.

Prior History: [\[**1\]](#) Appeal from an order entered on May 20, 1994 in the United States District Court for the Western District of New York (Telesca, Chief Judge) granting defendants-appellees' motion to terminate two antitrust consent decrees, one entered in 1921 and the other in 1954, the district court having found that the purposes of both consent decrees had been achieved and that termination of the decrees would benefit consumers.

Disposition: Affirmed.

Core Terms

film, district court, Decree, market power, geographic, world-wide, consumers, prices, consent decree, photofinishing, percent, terminate, premium, elasticity, antitrust, price discrimination, argues, market share, manufacturers, sales, Cellophane, seller, markets, products, cases, costs, possesses, wholesale, contends, monopolistic

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Antitrust & Trade Law > ... > Settlements > Consent Judgments > Modification & Termination

[HN1](#) [down arrow] Settlements, Consent Judgments

The power of a court to modify or terminate a consent decree is, at bottom, guided by equitable considerations. Indeed, [Fed. R. Civ. P. 60\(b\)\(5\)](#) makes no exception for antitrust decrees. An antitrust defendant requesting to modify or terminate a consent decree should be prepared to demonstrate that the basic purposes of the consent decrees -- the elimination of monopoly and unduly restrictive practices -- has been achieved.

Antitrust & Trade Law > Regulated Industries > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Antitrust & Trade Law > ... > Settlements > Consent Judgments > Modification & Termination

HN2 [+] Antitrust & Trade Law, Regulated Industries

Cases may arise in which modification or termination of a consent decree is appropriate even though the purpose of the decree has not been achieved. However, as a general matter, an antitrust defendant should not be relieved of restrictions that it voluntarily accepted until the purpose of the decree has been substantially effectuated, or when time and experience demonstrate that the decree is not properly adapted to accomplishing its purposes.

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

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

HN3 [+] Market Definition, Relevant Market

In determining whether a firm possesses market power, the first step in a court's analysis must be a definition of the relevant markets. Without a definition of the relevant market, there is no way to measure a company's ability to act as a monopolist.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

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

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

HN4 [+] Relevant Market, Geographic Market Definition

The relevant geographic market is defined as the area of effective competition in which the seller operates, and to which the purchaser can practicably turn for supplies.

International Trade Law > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

63 F.3d 95, *95 1995 U.S. App. LEXIS 20755, **1

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Market Definition

HN5 International Trade Law

The 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (Merger Guidelines) provide that a geographic market generally will be defined as a region in which a "hypothetical monopolist" could exact a small but significant and nontransitory increase in price, holding constant the terms of sale for all products produced elsewhere. While this standard fully encompasses foreign competition and can result in the definition of a world-wide market, it applies only in the absence of "geographic price discrimination." If the company is capable of geographic price discrimination, then smaller geographic markets, defined by the regions in which the company is able to price discriminate, will be recognized. Thus, the Merger Guidelines recognize that a geographic market is limited to the area in which prices are relatively uniform.

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

HN6 Regulated Practices, Market Definition

A company's ability to price discriminate against certain classes of consumers may be evidence of power in a particular market.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

International Law > Dispute Resolution > Tribunals

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN7 Standards of Review, Abuse of Discretion

The court's review of a district court's decision to terminate a consent decree is limited to ensuring that the district court exercised its broad discretion in a proper manner.

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DAVID M. LASCELL, Rochester, N.Y. (Hallenbeck, Lascell, Norris & Zorn, Rochester, N.Y., Robert B. Bell, Wiley, Rein & Fielding, Washington, D.C., of counsel) for Defendants-Appellees.

Judges: Before: MINER and JACOBS, Circuit Judges, and CEDARBAUM, District Judge. *

Opinion by: MINER

Opinion

* The Honorable Miriam Goldman Cedarbaum of the United States District Court for the Southern District of New York, sitting by designation.

[*97] MINER, Circuit Judge:

Plaintiff-appellant, the United States of America, appeals from [*2] an order entered on May 20, 1994 in the United States District Court for the Western District of New York (Telesca, Chief Judge) granting a motion made by defendant-appellee Eastman Kodak Co. ("Kodak") to terminate two antitrust consent decrees. The first decree was entered in 1921 ("the 1921 Decree") after a finding by the district court that Kodak had monopolized the sale of cameras and photographic supplies. The 1921 Decree continues to impose a variety of restrictions on Kodak's business practices. Most notably, Section X of the 1921 Decree prevents Kodak from selling "private label" film, which is film marketed under a brand name other than Kodak's, typically that of a retail outlet. The second decree was entered in 1954 ("the 1954 Decree") without any adjudication of law or facts. Section V of the 1954 Decree continues to prevent Kodak from selling its film in a "bundle" with its photofinishing services.

After a nine-day evidentiary hearing, the district court granted Kodak's motion to terminate both decrees. See *United States v. Eastman Kodak Co., 853 F. Supp. 1454, 1487-88 (W.D.N.Y. 1994)*. In deciding to terminate the 1921 Decree, the district court relied on its findings [*3] that Kodak no longer possesses market power over the sale of film and that the elimination of the decree's remaining provisions would benefit consumers. With respect to the 1954 Decree, the district court found that the purpose of the decree -- the [*98] creation of a competitive photofinishing market -- had been accomplished, that neither Kodak nor its affiliates had market power in the photofinishing or film markets, and that allowing Kodak to sell film and photofinishing as a bundle would enhance competition. For the reasons that follow, we affirm the order of the district court terminating both the 1921 and the 1954 Decrees.

BACKGROUND

1. The Consent Decrees

a. The 1921 Decree

The 1921 Decree arose out of antitrust enforcement proceedings initiated by the government more than 80 years ago. These proceedings led to a finding by the district court in 1915 that Kodak had monopolized the amateur camera, film, and photofinishing industries through acquisitions and a variety of exclusionary practices. See *United States v. Eastman Kodak Co., 226 F. 62, 79-80 (W.D.N.Y. 1915)*, appeal dismissed, 255 U.S. 578, 65 L. Ed. 795, 41 S. Ct. 321 (1921). Six years later, while its appeal [*4] of the district court's decision still was pending in the Supreme Court, Kodak entered into the 1921 Decree with the government and withdrew its appeal.

The 1921 Decree imposed both short- and long-term obligations on Kodak. In the short term, the decree required Kodak to divest itself of many of its acquisitions so as to "effectually dissolve the combination found to exist in violation of the [antitrust] statute." *Id. at 81*. These provisions were satisfied long ago. In the longer term, the consent decree proscribed certain sales and distribution practices that the government believed to be anti-competitive. A number of these restrictions remain in force today. Section X of the decree prevents Kodak from selling private-label film by requiring its products to "be labeled in such manner as to show clearly that the [product] is manufactured by [Kodak]." Sections VI and VII of the decree enjoin Kodak from entering into exclusive dealing contracts and from imposing other restraints on its dealers.

b. The 1954 Decree

The 1954 Decree concerned Kodak's practice of tying its photographic film and photofinishing services. Until the 1954 Decree, the sales price of Kodak [*5] color film included Kodak photofinishing. Since Kodak sold approximately 90 percent of the color film in the United States during that time, this practice allowed Kodak to

maintain a 90-percent share of the photofinishing market as well. The government filed suit to stop this practice, and, prior to trial, Kodak and the government entered into the 1954 Decree. The decree principally required Kodak to make its color photofinishing technology available to competitors. Kodak fully complied with this requirement. The only provision of the 1954 Decree that remains operative today is Section V, which prevents Kodak from "tying or otherwise connecting in any manner the sale of its color film to the processing thereof." The broad language of Section V precludes Kodak from engaging in the otherwise lawful practice of bundling its film and photofinishing services.

2. Today's Markets for Film and Photofinishing

a. Film

The marketplace for film has changed considerably in the last 80 years. Today, five companies manufacture all of the amateur color negative film (hereinafter "film") sold in the United States: Kodak, Fuji, Konica, Agfa, and 3M. All five are "well-financed, **[**6]** billion-dollar, multinational corporations selling film all over the world." [853 F. Supp. at 1471](#). On a world-wide basis, Kodak is the leading seller of film, with a 36-percent market share, followed closely by Fuji, which has 34 percent of the market. [Id. at 1471](#) & n.10. Konica has a 16-percent share of the world-wide market, followed by Agfa, with ten percent, and 3M, which has a four-percent market share.

In the United States, Kodak is far and away the leading seller of film with 67 percent of the market. [Id. at 1472](#). It is followed by Fuji, which has between eleven and twelve percent of the United States market. When market share is measured in dollar **[*99]** terms, rather than in unit sales, Kodak's market share in the United States is even more impressive. Kodak accounts for 75 percent of United States films sales in dollar terms.¹ *Id.* Part of Kodak's high market share in the United States is attributable to the large number of retail outlets that carry its products. Almost all retail outlets that sell film carry Kodak film. Only thirty percent of retail outlets carry Fuji film. However, Fuji film tends to be carried by mass-merchandisers, such as K-Mart and Wal-Mart, **[**7]** which account for between 45 and 50 percent of all film sales. [Id. at 1474](#).

Notwithstanding Kodak's success in the United States, photographic experts agree that there is very little difference in quality among the various brands of film. Kodak and Fuji films are both considered excellent, and "it would be very hard for any one to tell a good Fuji print from a good Kodak print." Konica and Agfa film, while slightly coarser-grained, also produce very good photographs. While 3M film is of slightly lower quality than the four other brands, it still is of acceptable quality to most consumers.

b. Photofinishing

Today, there are three principal types of photofinishers: mail-order macrolabs, wholesale and captive macrolabs, and minilabs. See [853 F. Supp. at 1482-84](#). Mail-order photofinishers operate large film processing labs ("macrolabs") and often have the lowest prices, but **[**8]** with the disadvantage of a longer turn-around time. Construction of a macrolab requires a several million dollar investment and takes six to nine months. Wholesale or "captive" macrolabs process film dropped off at retailers, such as drug stores.² Wholesale labs tend to process film in two or three days, but also can provide overnight service at an additional price. Minilabs, the third and newest type of photofinisher, are installed at retail locations, such as supermarkets, to provide on-site photofinishing. A new minilab can be purchased for as little as \$ 40,000 and can provide one-hour film developing. However, minilabs

¹ Kodak attributes its higher dollar-volume share to its competitors' ability to sell less-expensive private-label film.

² A "captive" lab is a macrolab owned by a large retailer that processes only the retailer's film. Only the largest retailers produce sufficient volume of photofinishing work so as to make a captive lab cost-effective.

have a somewhat higher per-print cost and cannot handle the volume of work required by large retail customers. In 1992, minilabs and wholesale labs each processed 36 percent of the film in the United States, captive labs processed 21 percent, and mail-order labs processed only 7 percent.

[**9] In the last ten years, Kodak has reclaimed a large share of the photofinishing market through acquisitions. The most important was a joint venture to establish Qualex, Inc., a company that accounts for approximately 30 percent of the overall United States photofinishing business. *Id. at 1486*. In the United States, Qualex is the largest wholesale photofinisher, with more than 70 percent of the wholesale market, and the second largest operator of minilabs.

3. Proceedings Below

After a nine-day evidentiary hearing, the district court granted Kodak's motion to terminate both the 1921 and 1954 Consent Decrees in their entirieties. See *853 F. Supp. at 1487-88*. The first issue addressed in the district court's comprehensive opinion was the legal standard under which to evaluate Kodak's request to terminate or modify the consent decrees. The district court decided that the "flexible" standard that the Supreme Court recently set forth in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992), should be applied. See *853 F. Supp. at 1465*. Applying *Rufo*, the district court reasoned that the consent decrees could be modified or terminated on the basis of significant [**10] changes in market conditions. See *id. at 1487-88*.

With respect to the 1921 Decree, the district court first determined that Kodak no longer possesses market power over the sale of film. *Id. at 1471-73*. In so doing, the court defined the relevant geographic market to include not only the United States, but also Japan and Western Europe (collectively "the world-wide market"). *Id. at 1471*. [*100] Finding that Kodak only has a 36-percent share of the highly competitive world-wide market, the district court concluded that Kodak does not possess market power over film. *Id.*

Alternatively, the district court determined that, even if the relevant geographic market were defined as the United States, its determination that Kodak lacks market power would not be altered, despite Kodak's 67-percent market share in the United States. The district court reasoned that "price elasticities are better measures of market power" than market share data, *id. at 1472-73*, and found that Kodak would lose ten percent of its sales to its foreign competitors if it raised its price for film by five percent, a finding that the court deemed incompatible with the presence of market power. The district [**11] court also determined that, although Kodak film sells for a small price premium in certain types of retail outlets, the premium simply is evidence "of the perceived quality difference that exists in the minds of consumers who are satisfied with Kodak products." *Id. at 1477*. Having determined that Kodak no longer possesses market power under either geographic market definition, the court determined that termination of the 1921 Decree would enhance competition in the sale of film.

With respect to the 1954 Decree, the court found that the decree's purpose of creating a competitive photofinishing market had been accomplished. The court determined that the relevant product market includes all three types of photofinishers, and that the relevant geographic market is the United States. *Id. at 1483-86*. In this market, Kodak has only a thirty-percent share, which the court found to be too small to give rise to an inference of market power, particularly in light of the low barriers to entry. *Id. at 1486*. Finally, the court determined that allowing Kodak to bundle film and photofinishing would enhance competition in both markets. *Id. at 1486-87*.

DISCUSSION

1. Standard [**12] for Terminating Antitrust Consent Decrees

The government contends that the district court misunderstood and misapplied the legal standard governing termination of an antitrust decree. In opposing Kodak's motion, the government argued that the modification of an antitrust consent decree was governed by [*United States v. Swift & Co.*, 286 U.S. 106, 76 L. Ed. 999, 52 S. Ct. 460 \(1932\)](#), where the Supreme Court stated that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" permits modification or termination of an antitrust decree. [*Id. at 119*](#). Kodak argued for the "less stringent and more flexible" standard set forth in [*Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 116 L. Ed. 2d 867, 112 S. Ct. 748 \(1992\)](#). The trial court agreed with Kodak and indicated that it was applying the *Rufo* standard. [*853 F. Supp. at 1463-66*](#).

On appeal, the government does not argue for application of *Swift's* "grievous wrong" standard, but it rejects the *Rufo* test as too lenient in antitrust cases. The government contends that the controlling standard for antitrust cases is set forth in [*United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 20 L. Ed. 2d 562, 88 S. Ct. 1496 \(1968\)](#), in which the Court explained that the "grievous [**13] wrong" standard of *Swift* was, in large part, the product of the peculiar circumstances of the case: a defendant's attempt to escape the impact of a consent decree a short time after its entry, where the same dangers of monopoly and unfair restraint of trade still were present. [*Id. at 248*](#); see also [*Rufo*, 502 U.S. at 379-80](#). Looking beyond the "grievous wrong" language, the *United Shoe* Court explained *Swift* as teaching that an antitrust decree

may be changed upon an appropriate showing, and . . . that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved.

[*391 U.S. at 248*](#). The government therefore argues that Kodak should not be relieved from the 1921 and 1954 Decrees absent a showing that the purposes of the decrees have been fully achieved.

[*101] In response, Kodak argues that the Court's recent decision in *Rufo* is controlling. The *Rufo* case involved attempts by state and county officials to modify a consent decree governing conditions in a correctional institution. In rejecting the district [**14] court's reliance on the "grievous wrong" standard of *Swift*, the Court recognized that [*Federal Rule of Civil Procedure 60\(b\)\(5\)*](#), "in providing that . . . a party may be relieved from a final judgement or decree where it is no longer equitable that the judgment have prospective application, permits a less stringent, more flexible standard" for modifying or terminating a consent decree. [*502 U.S. at 380*](#). Specifically addressing the case "when a party seeks modification of a . . . consent decree that arguably relates to vindication of a constitutional right," [*id. at 383 n.7*](#), the Court held that a party seeking to modify or terminate a consent decree "bears the burden of establishing that a significant change in circumstances warrants revision of the decree," [*id. at 383*](#).³ In formulating this standard, the Court drew upon a number of cases from this court. See, e.g., [*New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 \(2d Cir.\), cert. denied, 464 U.S. 915, 78 L. Ed. 2d 257, 104 S. Ct. 277 \(1983\); *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 34 \(2d Cir. 1969\).](#)

[**15] Although the *Rufo* Court seemed to limit the "significant change in circumstances" test to the type of decree presented in that case -- one relating to the vindication of constitutional rights -- this court has, on two occasions, applied *Rufo* in other contexts. First, in [*Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632, 636-37 \(2d Cir. 1992\)](#), we applied the *Rufo* standard to a consent decree relating to New York State's compliance with federal Medicaid regulations. Our most recent case to address the applicability of the *Rufo* standard is [*Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33 \(2d Cir. 1993\)](#), cert. denied, 130 L. Ed. 2d 16, 115 S. Ct. 58 (1994), where an action had been brought by a union and its employees to set aside an affirmative-action consent decree. We held

that the flexible standard outlined in [[*Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 247, 112 L. Ed. 2d 715, 111 S. Ct. 630 \(1991\)](#)] and *Rufo* is not limited to cases in which institutional reform is achieved in

³The Court discussed a number of situations that may constitute a showing of changed circumstances, including: where changed factual conditions make compliance with the decree "substantially more onerous"; where the decree proves unworkable because of unforeseen obstacles; or where enforcement of the decree would be detrimental to the public interest. See [*502 U.S. at 383-84*](#).

litigation brought directly against a governmental entity. . . . If a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought [**16] to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard

13 F.3d at 38. Applying this standard, we upheld an order of a district court vacating a consent decree where, although not every provision of the decree had been satisfied, we were satisfied that the decree had served its primary purpose. Id. at 39.

In this case, the parties devote a considerable portion of their briefs to the issue of whether *Rufo* or *United Shoe* is controlling in the context of an antitrust consent decree. We think that both cases bear on the issue at hand. *Rufo* teaches that HN1[[↑]] the power of a court to modify or terminate a consent decree is, at bottom, guided by equitable considerations. Indeed, Federal Rule of Civil Procedure 60(b)(5) makes no exception for antitrust decrees. However, we also believe that *United Shoe* provides a useful starting point for evaluating an antitrust defendant's request to modify or terminate a consent decree. In most cases, the antitrust defendant should be prepared to demonstrate that the basic purposes of the consent decrees -- the elimination of monopoly and unduly restrictive practices -- have been [**17] achieved. See United Shoe, 391 U.S. at 248.

Contrary to Kodak's arguments, we see nothing in *Rufo* that undermines the vitality of this approach. The decision in [*102] *United Shoe* was cited favorably by the Court in *Rufo*, 502 U.S. at 379-80, and it was both cited and applied one year earlier in *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 247, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991) (concluding that the termination of a decree was warranted where "the purposes of the desegregation litigation had been fully achieved"). The *United Shoe* standard promotes adherence to settlement agreements voluntarily entered into by parties to a litigation and ensures that consent decrees are not so easily modifiable as to discourage parties from reaching constructive settlements. See Patterson, 13 F.3d at 38.

Of course, HN2[[↑]] cases may arise in which modification or termination of a consent decree is appropriate even though the purpose of the decree has not been achieved. For example, there may be significant changes in the factual or legal climate. See *Rufo*, 502 U.S. at 383. Cf. *United States v. Western Elec. Co.*, 46 F.3d 1198, 1207 (D.C. Cir. 1995) (holding that unanticipated developments in telecommunications [**18] industry warranted waiver of consent decree provision). However, as a general matter, we believe that an antitrust defendant should not be relieved of the restrictions that it voluntarily accepted until the purpose of the decree has been substantially effectuated, or when time and experience demonstrate that the decree "is not properly adapted to accomplishing its purposes." King-Seeley, 418 F.2d at 35.

In view of the foregoing, we reject the government's contention that the district court misapplied the legal standards governing termination of an antitrust decree. The district court properly rejected the government's reliance on *Swift* and recognized that parties should be released from consent decrees when it is no longer equitable to enforce the decrees. In exercising its equitable discretion to terminate the 1921 and 1954 Decrees, the district court required Kodak to prove that: (1) it no longer possesses market power over film and photofinishing, and therefore that the primary purposes of the decrees -- the elimination of monopoly and unduly restrictive practices -- have been achieved; and (2) termination of the consent decrees would benefit consumers. We conclude that, [**19] under the legal standards established by *Rufo* and *United Shoe*, the district court's resolution of these issues in Kodak's favor provided a proper basis for the court's decision to terminate the consent decrees.

2. The Relevant Geographic Market

The district court found that the relevant geographic market for film is world-wide. The government contends that this determination is clearly erroneous and that the relevant geographic market in this case should be limited to the United States. In contending that the district court's world-wide market definition is overbroad, the government argues that the district court's own factual findings and certain items of undisputed evidence provide direct empirical proof that Kodak exercises market power in the United States. This, the government argues, is inconsistent with the world-wide geographic market found by the district court and weighs heavily in favor of a more narrowly defined geographic market, the United States.

a. The District Court Decision

The district court defined the relevant geographic market as the "area of effective competition in which the seller operates, and to which the purchaser can [**20] practicably turn for supplies." [853 F. Supp. at 1468](#) (quoting [Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 \(1961\)](#)). Applying this definition, the court found that the market for film is world-wide. In so doing, the court relied on findings that "each [film] manufacturer produces film for world-wide distribution using generally the same emulsions, and that the films are of comparable quality," [853 F. Supp. at 1469](#), that foreign film manufacturers have excess production capacity, and that the supply of film is "elastic," meaning that foreign film manufacturers quickly could increase the supply of film for consumption in the United States if Kodak attempted to increase prices and reduce output. See [id. at 1468](#).

In defining the geographic market, the district court also relied on two journal articles [*103] that address the process of defining the relevant geographic market in antitrust cases: William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981) (hereinafter "Landes & Posner"), and Kenneth G. Elzinga and Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bulletin 45 (1973) [**21] (hereinafter "Elzinga & Hogarty"). Landes & Posner advocate a general rule that, "if a distant seller has some sales in a local market, *all* its sales, wherever made, should be considered a part of that local market for purposes of computing the market share of a local seller." Landes & Posner, *supra*, at 963. They reason that a foreign seller with a United States presence has proved its ability to sell in this market -- overcoming such factors as higher transportation costs as well as political and economic barriers -- and could increase its sales here should local prices rise. See *id.* at 963-66. Elzinga and Hogarty advocate a more empirical approach to defining markets, contending that markets properly are defined by determining the areas from which, and to which, a significant amount of the relevant product is shipped. See Elzinga & Hogarty, *supra*, at 73-75. This approach is sometimes referred to as the "shipments" or the "imports/exports" approach.

The district court found that application of these two approaches also supported the definition of the relevant market as the world, rather than the United States. In particular, the court relied on the testimony of [**22] Kodak's economics expert, Professor Hausman, who opined that the Landes & Posner test was satisfied because: (1) each of the foreign film manufacturers had proven its ability to establish market share in the United States; (2) the foreign film manufacturers have excess production capacity; and (3) the supply of film is elastic. See [853 F. Supp. at 1468](#). With respect to the Elzinga & Hogarty approach, Professor Hausman testified that he applied the imports/exports analysis and determined that the world-wide flow of imports and exports of film were "significant," also leading to the conclusion that the relevant geographic market was world-wide. *Id.*

The district court rejected the government's contention that Professor Hausman's economic analysis was tainted by the so-called Cellophane⁴ fallacy. The issue in *Cellophane* was whether du Pont had monopoly power over the sale of cellophane, and, in resolving this issue, the Court defined the relevant product market as comprising "flexible wrapping materials." In defining the product market, the Court relied heavily on the high cross-elasticity of demand between cellophane and other wrapping materials, such as wax paper. [**23] This decision was criticized by many commentators because it failed to recognize that a monopolist -- i.e., a seller that has reduced output and raised prices -- always faces a highly elastic demand; its products are so overpriced that even inferior substitutes begin to look good to consumers. See, e.g., Landes and Posner, *supra*, at 960-61. In this case, the government argued that foreign film is an adequate substitute for Kodak film only because Kodak's film prices in this country are excessive. The district court found the government's *Cellophane* argument to be misplaced, because foreign film is

⁴ *Cellophane* is a reference to [United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#), an antitrust enforcement action brought by the government to put an end to du Pont's alleged monopoly over cellophane wrap.

an excellent substitute for Kodak film, whereas the other wrapping products discussed in *Cellophane* were inferior for many applications. See [853 F. Supp. at 1469-70](#).

While **[**24]** conceding that foreign competition should be taken into account in defining markets, the government argued that Kodak's ability to engage in price discrimination against this country's consumers directly shows that Kodak is exercising market power in the United States, and, therefore, that the world-wide geographic market proposed by Kodak is too broad. In support of this contention, the government noted that Kodak's average wholesale prices were lower in Europe (where Kodak has a 43-percent market share) than in the United States (where Kodak has a 67-percent market share), and its prices are even lower in Japan (where Kodak has less than a ten-percent market share) **[*104]** than in Europe. The district court rejected the government's price discrimination argument on two grounds. First, the court noted that the data upon which the government relied represented Kodak's prices at only a single point in time. [853 F. Supp. at 1475](#). This, even the government's expert acknowledged, is not necessarily evidence of *systematic* price discrimination. *Id.* The court also found that differing currency exchange rates and costs of distribution in different parts of the world made the government's price **[**25]** comparisons of "limited evidentiary value." *Id.*

The district court also rejected the government's argument that the "premium" price that Kodak film commands in the United States was evidence of market power in this country. The court found that Kodak film was priced 4.5 percent higher than Fuji film in the smaller retail outlets for film, and that this price premium has declined over time. [Id. at 1474](#). This small difference in pricing, the court found, "results not from an intention on Kodak's part to extract a premium price for its film, but from a purposeful marketing strategy on Fuji's part to undercut whatever price Kodak is charging for its film, which Fuji considers to be the industry standard." *Id.* Also contributing to the price premium is "the perceived quality difference that exists in the minds of consumers who are satisfied with Kodak products." [Id. at 1477](#).

Having rejected the government's arguments that Kodak engages in price discrimination and that Kodak film is priced at monopolistic levels, the district court stood by its definition of a world-wide market.

b. Definition of the Relevant Market

HN3 In determining whether a firm possesses market **[**26]** power, "the first step in a court's analysis must be a definition of the relevant markets." [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 \(2d Cir. 1979\)](#), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980). Without a definition of the relevant market, there is no way to measure a company's ability to act as a monopolist. [Walker Process Equip., Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 \(1965\)](#). The relevant product market here -- amateur color negative photographic film -- is not in dispute. Kodak and the government disagree, however, as to the relevant geographic market. As the district court properly noted, **HN4** the relevant geographic market is defined as the "area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." [Tampa Electric, 365 U.S. at 327](#). The district court applied this definition and found that an examination of the elasticities of supply and demand supported a world-wide geographic market for film. We see no error in the district court's analysis.

Looking first to the area where film sellers operate, we find strong support for the district court's determination that film sellers **[**27]** operate on a world-wide scale. Kodak is the only domestic film manufacturer. Of its four competitors, all of which sell film in the United States, "Fuji manufactures film in Japan and in the Netherlands, Konica manufactures film in Japan, Agfa manufactures film in Germany, and 3M manufactures film in Italy." [853 F. Supp. at 1468](#). Since Kodak has two-thirds of the United States film market, a full one-third of all film used in the United States comes from abroad. Additionally, the district court accepted Professor Hausman's opinion that "foreign manufacturers could quickly increase the supply of film for U.S. consumption if Kodak attempted to restrict output and raise prices." *Id.* Moreover, the flow of imported film has been continuous and systematic through the entire United States, and there is no evidence in the record of transportation costs or tariffs that put imported film at

a significant cost disadvantage. The foregoing provides an ample basis for the district court's finding that foreign film producers act as a check on Kodak's ability to raise domestic prices.

Looking to the area in which film purchasers turn for supplies, the district court found that film purchasers [**28] are, for the most part, price sensitive and will shift among Fuji, Kodak, and private label film on the basis of changes in price. Id. at 1473. Thus, while many consumers state a preference for the familiar Kodak brand name, the empirical [*105] evidence of what consumers actually do indicates that consumers find non-Kodak film to be an acceptable substitute. The increasing price sensitivity of consumers is evidenced by the fact that private label film has become the fastest growing segment of the film market, with at least a 12.8-percent share of the market. Id. at 1473. Also, as noted above, one-third of all the film purchased in the United States is manufactured abroad. These findings amply support the district court's factual determination that a significant segment of United States film purchasers turn to foreign sources of film.

The government, however, contends that, by relying on the significant cross-elasticity of demand between Kodak film and other brands, the district court fell victim to the *Cellophane* fallacy. It contends that, because Kodak already is pricing its products at monopolistic levels in the United States, consumers' willingness to switch to other brands [**29] of film when the price of Kodak film rises actually demonstrates that Kodak possesses market power in the United States. We disagree.

The economic error allegedly committed by the Court in *Cellophane* was in failing to recognize that a high cross-elasticity of demand may, in some cases, be the product of monopoly power rather than a belief on the part of consumers that the products are good substitutes for one another. As the district court succinctly stated: "At a high enough price, even poor substitutes look good to the consumer." 853 F. Supp. at 1469. That is, in the *Cellophane* case, the high cross-elasticity between cellophane and wax paper simply may have been a function of the high price that du Pont demanded for cellophane. This case, however, does not involve a comparison of two highly-differentiated products like cellophane and wax paper. The district court found, and we agree, that the film produced by Kodak's competitors is of comparable quality to Kodak's film and is an excellent substitute. Moreover, the government's contention assumes that Kodak film is priced well above competitive levels, and we do not believe that the small but declining price premium that [**30] Kodak obtains for its film bears out this assumption.⁵ Under these circumstances, we do not believe that the district court fell victim to the *Cellophane* fallacy.

Based on the foregoing evidence that foreign film sellers operate as a check on Kodak's ability to raise prices and that a substantial segment of United States film purchasers turn to foreign sources of film, we agree with the district court that the "area of effective competition" for film encompasses the entire world.

c. Empirical Challenges to a World-Wide Market

While conceding that "foreign competition should be taken into account in defining markets, and that the prospect of foreign firms increasing their sales into the United States may sometimes prevent American firms from maintaining prices above competitive levels," the government argues that the world-wide geographic market [**31] found by the district court is overly broad and that the relevant geographic market should be limited to the United States. In making this argument, the government relies on certain empirical evidence before the district court that allegedly establishes that Kodak exercises market power over film in the United States. In particular, the government relies on the following "direct proof" of Kodak's market power in the United States: (1) Kodak's ability to engage in price discrimination against United States customers; (2) Kodak's ability to sell film no better than the film sold by its rivals at a substantial price premium; and (3) Kodak's excessive profits, as evidenced by an "own elasticity" of two. Kodak's ability to exercise market power in this country, the government argues, conflicts with the world-wide market definition that resulted from examination of the elasticities of supply and demand for film. For this reason, the government asserts, the relevant geographic market should be limited to the United States, an area in which

⁵ The government's contention that Kodak film commands a significant premium price in the United States is discussed *infra* in sub-section (c)(ii).

Kodak can and does exercise market power. We address each of [*106] the three types of direct evidence of market power offered by the government in turn.

[**32] *i. Price Discrimination*

The government first argues that Kodak's ability to engage in geographical price discrimination against its United States customers establishes that the world-wide market definition adopted by the district court is overly broad. It is the position of the government that Kodak charges a higher price for its film in the United States than it charges for the same film in other parts of the world. This, the government argues, is proof that Kodak exercises market power in the United States. The district court disagreed, finding that the factual record did not support the government's price-discrimination theory. [853 F. Supp. at 1474-75](#). In response, the government further argues that the district court compounded its error by "suggesting that the government had not carried [its] burden of persuasion" on this point.

Support for the government's theory that a market can be defined on the basis of price discrimination can be found in [HN5](#)¹ the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("the Merger Guidelines"). The Merger Guidelines provide that a geographic market generally will be defined as a region in which a "hypothetical [**33] monopolist" could exact a "'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere." Merger Guidelines § 1.12. While this standard fully encompasses foreign competition and can result in the definition of a world-wide market, it applies only in the absence of "geographic price discrimination." *Id.* § 1.22. If the company is capable of geographic price discrimination, then smaller geographic markets, defined by the regions in which the company is able to price discriminate, will be recognized. See *id.* Thus, the Merger Guidelines recognize that a geographic market is limited to the area in which prices are relatively uniform.

The Supreme Court's recent decision in [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#), also recognizes that [HN6](#)¹ a company's ability to price discriminate against certain classes of consumers may be evidence of power in a particular market. In that case, the Court rejected Kodak's theory that its lack of market power in the photocopier and micrographics market precluded, as a matter of law, the possibility that it could exercise market power in derivative [**34] aftermarkets, i.e., parts and service for equipment that it sold. [Id. at 455, 475-78](#). In rejecting Kodak's theory, the court relied, in part, on the possibility that Kodak could price-discriminate against various classes of consumers. [Id. at 475-78](#); see also [U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 997 \(11th Cir. 1993\)](#) (relying on "unusual circumstance of severe price discrimination against a distinct group of consumers based solely on brand preference"), cert. denied, 129 L. Ed. 2d 837, 114 S. Ct. 2710 (1994).⁶

[**35] Even if we accept the government's theory that the relevant geographic market may be defined on the basis of price discrimination, there simply is no probative evidence in the record to support the assertion that Kodak engages in geographic price discrimination. To support its argument, the government relies upon pricing data supplied by Kodak in response to an interrogatory. This data indicates that the price of Kodak film is subject to regional variations. However, evidence that Kodak film sells for different prices in different parts of the world is insufficient to establish price discrimination without proof that Kodak's costs are uniform [*107] throughout the world. See Areeda *et al.*, *supra*, § 522, at 125. While there was no evidence in the record that Kodak's costs are the same in each region, there is evidence that Kodak's marketing and distribution systems differ markedly from country to country. Even the government's expert conceded that such variations would have to be "factored . . . in" to determine whether there was price discrimination. Further, as the district court noted, fluctuations in currency

⁶The theory that price discrimination is one of the indicia of market power also has received acceptance in the academic community. See, e.g., Phillip E. Areeda *et al.*, [Antitrust Law](#) § 522, at 125 (1995) (price discrimination "can usefully show the existence and degree of market power if cost differences (or their absence) are readily determinable"); *id.* § 534d, at 183-85 (price discrimination also is relevant to market definition process); Robert Pitofsky, [New Definitions of Relevant Market and the Assault on Antitrust](#), [90 Colum. L. Rev. 1805 \(1990\)](#) (arguing that definition of relevant market should be adjusted if seller can discriminate against certain classes of consumers).

exchange rates also are relevant to this inquiry. See [853 F. Supp. at 1475](#). Absent proof that Kodak's costs are uniform throughout the world, the government's price-discrimination argument simply is conjecture.

We also reject the government's argument that the district court improperly placed upon it the burden of persuasion on this point. In this proceeding, Kodak had the burden of proving that it no longer possessed market power over film in the relevant geographic market. To discharge its burden of establishing that the market for film is a world-wide one, Kodak put forth evidence that foreign film producers act as a check on its ability to raise prices and that consumers in the United States look to foreign sources of film. As discussed above, this evidence provides a sufficient basis for the definition of a world-wide market for film. In rebuttal, the government argued that the market definition proposed by Kodak was overbroad in view of, *inter alia*, Kodak's ability to price discriminate against its United States customers. Having chosen to rebut Kodak's proposed market definition by relying on its theory of price discrimination, it was incumbent upon the government to produce probative evidence of systematic price discrimination, [\[**37\]](#) which it failed to do. In the absence of such proof, the district court properly rejected the government's theory.

ii. Premium Pricing and Consumer Perception

In a similar vein, the government argues that the district court erred in failing to appreciate the significance of United States customers' strong preference for Kodak film and the resulting premium price that Kodak is able to obtain for its film in this country. This, the government contends, demonstrates that Kodak possesses market power over film in the United States and, therefore, that the relevant geographic market should be limited to the United States.

In addressing Kodak's argument regarding consumer loyalty, the district court recognized that "50 percent of [surveyed] consumers will only buy Kodak film, while another 40 percent of consumers prefer Kodak film, but are willing to purchase another brand of film." [853 F. Supp. at 1475](#) (footnote omitted). The court attributed this loyalty "to the fact that Kodak has earned consumer trust by producing a product the consumer perceives to be superior." [Id. at 1477](#). With respect to the government's contention that Kodak sells for a monopolistic premium, [\[**38\]](#) the district court found that, in mass merchandisers, which account for approximately one-half of all film sales, Kodak and Fuji film are priced within one percent of each other; on occasions, Fuji film is the higher priced, while at other times, Kodak film is more expensive. [Id. at 1474](#). In smaller food and drug stores, which account for the vast majority of other sales of film, the court found evidence of an average price difference of 4.5 percent. The court determined that these small price differences resulted from Fuji's policy of undercutting Kodak's price in order to make its product more attractive to retailers as well as from consumers' preference for Kodak film.

The government argues here, as it did below, that Kodak's ability to sell film of similar quality as its competitors for a price premium while maintaining a very high market share is strong empirical evidence of Kodak's market power within the United States, and that the district court erred in failing to recognize this. In support of this argument, the government relies on the 4.5-percent retail price premium charged in the smaller outlets, and the ten-percent premium that Kodak film allegedly commands at the [\[**39\]](#) wholesale level. Since Fuji's strategy is to undercut Kodak's wholesale prices, the government argues, "it is all the more significant that Kodak nevertheless maintains a dominance of 67% to 10% over Fuji in U.S. sales." [\[*108\]](#) With regard to consumers' preference to Kodak film, the government argues that the issue is not how Kodak obtained its market power -- whether as a result of its illegal monopoly ninety years ago or through a perceived difference in quality resulting from Kodak's leadership in the photography field -- but only whether Kodak has market power.

The government's arguments here are not without some force. While Fuji may be Kodak's equal on a world-wide basis, Kodak's dominant position in the United States cannot seriously be disputed. However, the evidence before the district court demonstrates that the difference in price between Kodak film and that of its competitors is small and declining. The district court found, and the government does not dispute, that one-half of Kodak's film is sold at virtually no premium and the rest is sold at an average premium of less than five percent. These price differences are not of the magnitude to raise significant market power concerns. [\[**40\]](#) Moreover, the declining nature of this premium is evident from the fact that, only five years ago, Kodak film fetched a 6.3-percent price premium at mass merchandisers, and this premium has since fallen to less than one percent. See [853 F. Supp. at 1474](#). This supports the district court's finding that the premium paid for Kodak film is dissipating rapidly as its competitors'

favorable reputations continue to grow. Under these circumstances, we believe that the small and declining price premium paid for Kodak film in the United States was not sufficient to call in question the district court's definition of a world-wide market.

For similar reasons, we must reject the government's contention that the strong preference of United States customers for Kodak film demonstrates Kodak's market power in the United States. Although consumers do state a strong preference for Kodak film when surveyed, empirical evidence introduced at trial by Kodak demonstrates, and the district court found, that "film purchasers are . . . price sensitive, and will shift between Kodak, Fuji and private label film on the basis of changes in price." [853 F. Supp. at 1473](#). In this regard, the district court accepted [**41] Professor Hausman's conclusion that if Kodak were to raise prices by five percent, it would lose ten percent of its film sales. Accepting these factual findings -- as we must, since they are well supported by the record -- in conjunction with the small price premium for Kodak film, we cannot say that the district court erred in rejecting the government's argument that the preference of American consumers gives Kodak market power over the sale of film in the United States. Accordingly, this evidence is not inconsistent with a world-wide market definition.

iii. "Own Elasticity of Demand"

The last item of direct evidence relied upon by the government to support a finding that Kodak has market power within the United States is the fact that Kodak's "own elasticity of demand" is two. According to the government, an "own elasticity" of two indicates that Kodak is earning excessive profits from its film. This, the government argues, is strong evidence that Kodak exercises market power in the United States and weighs against a world-wide market definition.

The economist's term "own elasticity of demand" expresses the change in quantity of goods a firm will sell in response to [**42] a change in the price it charges for the goods. For a firm operating with an own elasticity of two, a price increase by the firm would result in its sales dropping by twice the percentage of the price change. Kodak's expert, Professor Hausman, opined that Kodak film is subject to an own elasticity of two, and, therefore, that Kodak would lose ten percent of film sales if it were to raise the price of its film by five percent.

The significance of an own elasticity of two, in the government's view, is that it indicates that the sales price of Kodak film is twice the short-run marginal cost. This conclusion follows from the "Lerner index," a mathematical formula expressing the relationship between a firm's own elasticity and the marginal cost of the goods sold. See Landes & Posner, *supra*, at 939-40. From this, the government argues that Kodak is [*109] earning monopolistic profits from the sale of its film. Thus, from Kodak's own elasticity of two, the government concludes that Kodak is exercising significant market power in the United States.

We are unpersuaded by this argument for a number of reasons. First, the government contends that the Lerner index applies to Kodak as the seller [**43] of a differentiated product that sets prices independently of its rivals. But, the contention that Kodak film is differentiated from the film sold by its rivals is directly contradicted by the district court's findings with respect to the elasticities of supply and demand for film. Accordingly, we believe that the use of the Lerner index in this manner rests on unwarranted factual assumptions.

Second, even if we were to accept the government's contention that Kodak's short-run marginal costs equal one-half of the product's sales price, we do not think that it necessarily follows that Kodak is earning monopolistic profits. Certain deviations between marginal cost and price, such as those resulting from high fixed costs, are not evidence of market power. See Landes & Posner, *supra*, at 939. In this case, there was overwhelming evidence that Kodak's film business is subject to enormous expenses that are not reflected in its short-run marginal costs. In particular, Professor Hausman testified that (1) Kodak uses between eight and nine percent of its revenues for research and development, and (2) Kodak's film is produced at plants costing hundreds of millions of dollars. See [**44] [853 F. Supp. at 1473](#). The government's own witnesses and submissions confirm that the fixed costs in the film industry are huge. In light of these considerations, we do not believe that the district court erred in rejecting the government's argument that Kodak's own elasticity of two proves that Kodak is exercising market power in the United States. Even if the government's evidence in this regard supported an inference of market power, and we are not persuaded that it does, it certainly did not compel such an inference. Accordingly, we do not believe that the

government's "own elasticity" argument calls in question the district court's determination that the market for film is world-wide.

d. Conclusions as to the Relevant Geographic Market

To prevail on this appeal, the government was obliged to show that the district court abused its discretion in defining the geographic market for film as a world-wide one. We conclude that the government has failed to make such a showing. The district court applied the correct legal principles, and its factual findings relied upon herein are well supported by the evidence in the record. While another fact-finder might have weighed [**45] the evidence differently, HNT [↑] our review of the district court's decision is limited to ensuring that the district court exercised its broad discretion in a proper manner. We are convinced that it did so, and we therefore affirm its definition of a world-wide geographic market.

3. Termination of the Decrees

Having upheld the district court's world-wide market definition, we also must uphold its determination that Kodak lacks market power over film. On a world-wide basis, Kodak has only a 36-percent share of the market for film. This low market share, in connection with the other factors addressed in the district court's opinion, see 853 F. Supp. at 1471-72, strongly supports the finding that Kodak no longer possesses market power. Since the government concedes that the restrictions set forth in the 1921 Decree should not be maintained if we affirm the district court's finding that Kodak lacks market power, we therefore affirm the district court's decision to terminate the 1921 Decree. With respect to the 1954 Decree, which prohibits Kodak from bundling its film with photofinishing, the government does not challenge the district court's finding that Kodak lacks market [**46] power over photofinishing. Given that Kodak lacks market power over both film and photofinishing, we see no abuse of discretion in the district court's decision to terminate the 1954 Decree.

[*110] CONCLUSION

For the foregoing reasons, the order of the district court is affirmed.

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Little Caesar Enters. v. Smith

United States District Court for the Eastern District of Michigan, Southern Division

August 7, 1995, Decided

CIVIL ACTION NO. 93-73354, CIVIL ACTION NO. 93-74041

Reporter

895 F. Supp. 884 *; 1995 U.S. Dist. LEXIS 11300 **; 1996-1 Trade Cas. (CCH) P71,411

LITTLE CAESAR ENTERPRISES, INC., Plaintiff, v. GARY G. SMITH ET AL., Defendants. GARY G. SMITH ET AL., Plaintiffs, v. LITTLE CAESAR ENTERPRISES, INC. ET AL., Defendants.

Core Terms

franchisees, supplies, logoed, distributor, independent distributor, products, franchise agreement, class certification, prices, plaintiffs', tying arrangement, advertising, license agreement, contends, regional, magistrate judge, certification, recommended, suppliers, summary judgment, antitrust, franchise, forcing, tie-in, alternate, coercion, parties, partial summary judgment, class action, price-fixing

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

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 > 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

HN1[] Supporting Materials, Discovery Materials

Under Fed. R. Civ. P. 56(c), summary judgment may be granted 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. A fact is "material" and precludes grant of summary judgment if proof of that fact would have the effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect the application of appropriate principles of law to the rights and obligations of the parties. The court must view the

evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor.

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes](#)

HN2 **Summary Judgment, Burdens of Proof**

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact. Rather, the burden on the moving party 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. Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue.

[Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

HN3 **Summary Judgment, Evidentiary Considerations**

There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the nonmovant's evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

[Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

[Civil Procedure > Trials > Judgment as Matter of Law > General Overview](#)

HN4 **Judgment as Matter of Law, Directed Verdicts**

A nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact. The evidence itself need not be the sort admissible at trial. However, the evidence must be more than the nonmovant's own pleadings.

[Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment](#)

[Governments > Legislation > Statute of Limitations > General Overview](#)

HN5[] Tolling of Statute of Limitations, Fraudulent Concealment

In order to establish fraudulent concealment in order to defeat the bar posed by a statute of limitations, plaintiff must show the following: (1) Wrongful affirmative concealment; (2) Failure to discover within the limitations period; and (3) Due diligence until discovery.

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

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

See [15 U.S.C.S. § 1](#).

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

HN7[] 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. When such "forcing" is present, competition on the merits for the tied item is restrained and the Sherman Act at [15 U.S.C.S. § 1](#) is violated.

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

HN8[] Price Fixing & Restraints of Trade, Tying Arrangements

An approved source requirement is not, alone, illegal. Only if a franchisee is coerced into purchasing products from a company in which the franchisor has a financial interest does an illegal tie exist.

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

Contracts Law > Contract Conditions & Provisions > General Overview

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

HN9[] Price Fixing & Restraints of Trade, Tying Arrangements

In order to prove a tying claim, plaintiffs must produce evidence that the undesired condition was imposed over plaintiff's objection, or at the explicit refusal of the defendant to do otherwise. When a condition is accepted without objection, the element of coercion becomes totally speculative. Similarly, if two products are sold together, there must be evidence that the buyer objected to the package, that the buyer was only interested in one of the two products or that the tied product was forced upon him. Where the tying arrangement is admitted or where the arrangement is imposed as part of a contract, there is no further need to demonstrate the forcing element. All courts agree, however, that absent contractual tie-in provisions, actual coercion must be demonstrated.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Revival

895 F. Supp. 884, *884 1995 U.S. Dist. LEXIS 11300, **11300

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN10 [] **Statute of Limitations, Revival**

A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded. First, when a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants. Second, in the context of a continuing conspiracy, the statute of limitations runs from the commission of the act that causes the plaintiff's damage. Thus, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act. For statute of limitations purposes, therefore, the focus is on the timing of the causes of injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts.

Governments > Legislation > Interpretation

HN11 [] **Legislation, Interpretation**

Pursuant to [Mich. Comp. Laws Ann. § 445.784\(2\)](#), in construing Michigan **antitrust law**, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes.

Civil Procedure > Parties > Joinder of Parties > General Overview

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN12 [] **Parties, Joinder of Parties**

See [Fed. R. Civ. P. 23\(a\)](#).

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

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

HN13 [] **Class Actions, Certification of Classes**

The burden is on the party seeking class certification to show that the prerequisites of [Fed. R. Civ. P. 23\(a\)](#) have been satisfied.

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

HN14 [] **Class Actions, Prerequisites for Class Action**

See [Fed. R. Civ. P. 23\(b\)](#).

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

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

[HN15](#) [blue icon] Class Actions, Certification of Classes

In deciding whether to certify a class action, the court should not inquire into the merits of plaintiffs' claims.

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

[HN16](#) [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

Where plaintiff franchisees place no reliance on express contractual tie-ins, each, individually, must prove that his purchases were coerced as an element of establishing a *prima facie* case of illegal tying. The district court's class certification with respect to the tying claims was expressly premised on its rejection of the individual coercion doctrine.

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Judges: HONORABLE PAUL V. GADOLA, U.S. DISTRICT JUDGE

Opinion by: PAUL V. GADOLA

Opinion

[*886] MEMORANDUM OPINION AND ORDER

These two consolidated cases involve various claims made by three disgruntled franchisees against Little Caesar Enterprises, Inc. ("Little Caesar") and various affiliate companies or subsidiaries. The first action, [Little Caesar Enterprises v. Smith, 1995 U.S. Dist. LEXIS 11300](#), No. 93-73354, is a declaratory judgment action by Little Caesar against one of its franchisees, Gary Smith and his company, for a determination of contract rights under their franchise agreement. The center of this dispute and the subject of the three motions being considered, however, is the second suit, [Smith \[*2\] v. Little Caesar Enterprises, 1995 U.S. Dist. LEXIS 11300](#), No. 93-74041. In the second suit, the three franchisees have brought a putative class action against Little Caesar for various antitrust violations, conversion, and for breach of their franchise agreements.

Before the court are Little Caesar's two motions for partial summary judgment and the parties' objections to the magistrate judge's report and recommendation on the franchisees' motion for class certification. For the reasons stated below, the court will grant Little Caesar's motions for partial summary judgment, accept in part and reject in part the magistrate judge's report and recommendation, and deny the franchisees' motion for class certification.

[*887] I. Background

The franchisee-plaintiffs in this action are Gary Smith, John Hennessy, and Sharon Fields. Gary Smith owns three Little Caesar stores in Florida, and Linda Smith, Brian Smith, and Smith Family Foods, Inc. are also plaintiffs in this action who are associated with Gary Smith. John Hennessy owns one store in Minneapolis, Minnesota, and Hennessy's company, Pizza Farm, Inc. is also a plaintiff. Sharon Fields owns four stores in Tennessee. Each of Fields' four companies affiliated **[**3]** with these stores are also plaintiffs: LCP of Lenoir City, Inc., LCP of East Maryville, Inc., LCP of Chapman Square, Inc., and LCP of Powell Place, Inc. These franchisee-plaintiffs are seeking damages and other relief on their own behalf and on behalf of a proposed class of Little Caesar franchisees from across the country. As of June 1, 1994, there are a total of 536 franchisees who operate 2,867 restaurants, in addition to about 550 restaurants that opened in K-mart stores and 1,275 company-owned restaurants.

Defendant Little Caesar Enterprises, Inc. is a privately owned franchisor of pizza/fast food restaurants. Defendant Blue Line Distributing, Inc. was a wholly owned subsidiary of Little Caesar until early 1994 when it merged into its parent company. Blue Line has acted as a distributor of supplies to Little Caesar franchisees. Defendant Little Caesar International, Inc. was the passive shareholder of Little Caesar until it merged with that company in early 1994. Defendant Little Caesar National Advertising Program, Inc. ("LCNAP") is a non-profit corporation that pools and collects money from each franchisee pursuant to the franchise agreements and then uses the money to conduct **[**4]** national advertising campaigns. Throughout this opinion, the court will refer to the Little Caesar defendants as "Little Caesar" unless it is necessary to refer separately to one of the defendant companies.

A. Plaintiffs' Complaint

In their complaint, plaintiffs allege a mixture of antitrust and contract claims. Plaintiffs' antitrust claims are based upon allegations of price-fixing and an illegal tying arrangement. In Count I, plaintiffs seek damages and other relief pursuant to 15 U.S.C. § 1 of the Sherman Act. Plaintiffs contend that Little Caesar conspired to fix the price of supplies--food, beverages, equipment, smallwares, graphics, and logoed paper products--sold to its franchisees. Count III is an identical claim under MCLA § 445.772 of Michigan's antitrust statute.

In Count II, plaintiffs allege that Little Caesar engaged in an illegal tying arrangement in violation of the Sherman Act, by forcing franchisees to buy their supplies from Blue Line, rather than independent distributors, in order to remain as viable franchisees. The same claim is expressed in Count IV under section 445.772 of Michigan law.

Plaintiffs' three breach of contract claims are presented in **[**5]** Count V. In their first contract claim, plaintiffs contend that Little Caesar has breached a common provision of the standard franchise agreement that gives franchisees the freedom to set their own retail prices. Plaintiffs argue that Little Caesar conducts national advertising campaigns based upon price which force its franchisees to follow the prices set by Little Caesar in breach of the franchise agreements.

In their second contract claim, plaintiffs allege that Little Caesar has breached the covenant of good faith and fair dealing by failing to pay its franchisees any rebates and discounts that it receives from suppliers. Plaintiffs' final contract claim is that Little Caesar has also breached the franchise agreements by causing defendant LCNAP to implement advertising campaigns that are detrimental to franchisees and to misuse pooled franchisee funds for improper purposes. A similar claim is stated in Count VI, where plaintiffs allege conversion by Little Caesar and LCNAP for taking franchisee advertising funds and using them for purposes other than advertising that benefits franchisees.

B. Tying Arrangement

The claim upon which plaintiffs rely most heavily, as expressed **[**6]** in Count II, is that Little Caesar has conducted a systematic campaign, pursuant to a "master plan," to replace independent distributors of food and other supplies to franchisees with a Little **[*888]** Caesar subsidiary, Blue Line, now merged into Little Caesar. Plaintiffs contend that Little Caesar has forced all franchisees to purchase food and other supplies from itself, and that Little Caesar's conduct constitutes an illegal tying arrangement under the federal and state antitrust laws.

Originally, Blue Line was only able to service franchisees located in the Midwest. Over the past twelve years, however, Blue Line/Little Caesar has expanded and now has sixteen distribution centers all over the country capable of servicing all franchisees except for certain remote areas of Idaho and North Dakota. Plaintiffs contend that Little Caesar and Blue Line had a master plan to force franchisees to cease buying their supplies from independent distributors and have them buy exclusively from Blue Line instead. As part of this scheme, plaintiffs allege that Little Caesar used its market power, selective rejection of requests for alternate suppliers, and the attractiveness of one-stop shopping to franchisees **[**7]** in order to take control of the distribution of supplies to its franchisees.

The essence of the illegal tying claim is that in order to own a Little Caesar franchise (the tying product), franchisees are forced to buy their food and other supplies (the tied product) from Little Caesar. The price-fixing claim centers around plaintiffs' claim that Little Caesar has conspired with others, including the independent distributors, to fix the price of supplies charged to franchisees.

Under the franchise agreements, franchisees are free to buy food and other supplies from approved, independent distributors. However, franchisees are only allowed to buy a secret spice mix and special Pan!Pan! dough mix from Little Caesar and no other source. Plaintiffs do not challenge Little Caesar's right to control the distribution of these two special proprietary items and they are not part of this lawsuit. Plaintiffs are, however, challenging the control of all other food and supplies. Furthermore, starting in mid-1990, all newly signed franchisees, through a provision in their franchise agreements, were not allowed to request alternate distributors of paper products that have the Little Caesar logo on **[**8]** them. Because Little Caesar/Blue Line is the exclusive distributor of "logoed paper products," plaintiffs contend that franchisees are thus forced to buy such items from Little Caesar. However, plaintiffs' tying claim is not limited to logoed paper products or agreements signed after mid-1990. Instead, plaintiffs' claim encompasses all franchisees and all supplies necessary to run a franchise except for the special proprietary items mentioned above.

This lawsuit appears to have arisen from an incident in 1992, when plaintiff Smith sought to have Ameriserv, an independent distributor of fast food supplies, approved by Little Caesar as a distributor to its franchisees. The approval process is supposed to be a determination of whether the distributor can provide supplies that meet specifications set by Little Caesar. Ultimately, Little Caesar rejected Ameriserv's application. It appears that the rejection of Ameriserv led to the filing of this lawsuit. Since the inception of this action, however, Little Caesar has approved franchisee requests for three independent distributors--Gordons, PYA Monarch, and Schloss & Kahn--to be authorized to sell supplies to franchisees. In addition, Little **[**9]** Caesar contends that the rejection of Ameriserv was an isolated occurrence and that it has received only six requests over the decade before this lawsuit for approval of new independent distributors. Two of these requests were rejected and four were withdrawn.

C. Breach of Contract

The second main claim of plaintiffs, as expressed in a portion of Count V, is that Little Caesar has breached the franchise agreements that allow franchisees to set their own retail prices. Plaintiffs contend that Little Caesar has used national advertising campaigns that mention specific prices to force its franchisees to match those prices. Because the franchisees are forced to match the nationally advertised prices as a result of consumer expectations, plaintiffs contend that Little Caesar has breached the franchise agreement provision allowing individual franchisees to set their own retail prices. Little Caesar points out, however, that each of the national ads contain the following disclaimer: "Limited time offer at participating stores. Prices may vary." In addition, Little Caesar **[*889]** relies on the fact that all three of the plaintiff-franchisees admit that on occasion they do not follow the nationally **[**10]** advertised prices, and instead, set higher prices or encourage alternate special deals that are more profitable.

The third major area of the lawsuit, expressed in portions of Count V and VI, concerns the handling of franchisee money given to LCNAP. LCNAP is a non-profit company that collects and pools money from all of the franchisees and uses it to advertise Little Caesar pizza. In Count VI, plaintiffs contend that LCNAP and Little Caesar have converted franchisee money in the LCNAP advertising fund for purposes beneficial to Little Caesar only and not the franchisees. In addition, plaintiffs allege that Little Caesar and LCNAP have breached the franchise agreements by

failing to use the LCNAP funds for the benefit of the franchisees. An example of the alleged breach includes the use of \$ 670,000 of LCNAP funds as sponsorship money for the Detroit Drive, an arena football team owned by Mike Ilitch, Little Caesar's primary owner. As another example, \$ 200,000 in LCNAP funds were allegedly used to pay a former Little Caesar executive to sponsor his racing boat which appeared in nationally televised racing competitions.

In this memorandum opinion, the court will address two motions [**11] for partial summary judgment filed by Little Caesar in January and February of 1995. In addition, the court will consider the parties objections to the magistrate judge's March 31, 1995 report and recommendation regarding plaintiffs' motion for class certification. In its first [Rule 56\(c\)](#) motion, Little Caesar is seeking a finding limiting the applicability of a 1989 licensing agreement between Little Caesar and Blue Line to certain specified logoed products. This issue is important as it impacts upon contentions made by plaintiffs in their class certification motion. Little Caesar's second motion for partial summary judgment seeks judgment as to many, but not all, of plaintiffs' individual claims presented in Counts I-V.

In his March 31, 1995 report, Magistrate Judge Stephen Pepe recommended that the court certify sixteen regional classes as to plaintiffs' tying claim and a national class on the breach of contract claims. Both sides have filed objections to this report. In their June 1994 motion for class certification, plaintiffs did not seek class certification as to all of their claims. Instead, plaintiffs are only seeking [Rule 23\(b\)\(3\)](#) certification of Count II, the tying arrangement. [**12] In addition, plaintiffs are seeking [Rule 23\(b\)\(2\)](#) certification for injunctive and declaratory relief, of Count II, the breach of contract claims based upon the use of LCNAP funds and the national advertising campaigns as presented in Count V, and the conversion claim in Count VI.

II. Standard of Review

A. Summary Judgment

HN1[] Under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), summary judgment may be granted "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." "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (citation omitted) (quoting Black's Law Dictionary 881 (6th ed. 1979)). The court must view the [**13] evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. See *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962); *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984).

HN2[] The movant bears the burden of demonstrating the absence of all genuine issues of material fact. See *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 861 (6th Cir. 1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of [*890] material fact. Rather, "the burden on the moving party 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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. *Fed. R. Civ. P. 56(e)*; *Gregg*, 801 F.2d at 861.

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the [**14] United States Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986),

HN3[¹⁵] There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted). See [Catrett, 477 U.S. at 322-23; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). The standard for summary judgment mirrors the standard for a directed verdict under [Fed. R. Civ. P. 50\(a\); Anderson, 477 U.S. at 250](#). Consequently, **HN4**[¹⁶] a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact. [Lucas v. Leaseway Multi Transp. Serv., Inc., 738 F. Supp. 214, 217 \(E.D. Mich. 1990\)](#), aff'd, 929 F.2d 701 (6th Cir. 1991). The evidence itself need not be the sort admissible at trial. [Ashbrook v. Block, 917 F.2d 918, 921 \(6th Cir. 1990\)](#). However, the evidence must be more than the nonmovant's own pleadings. ****15** *Id.*

B. Review of a Magistrate Judge's Report and Recommendation

Pursuant to [Rule 72\(b\) of the Federal Rules of Civil Procedure, 28 U.S.C. § 636\(b\)\(1\)\(B\)](#), and LR 72.1(d)(2) (E.D. Mich. Jan. 1, 1992), the court will review the magistrate judge's March 31, 1995 report and recommendation as well as the objections filed by the parties. Because of the nature of plaintiffs' motion for class certification, the court will conduct a *de novo* review of the report and recommendation.

III. Little Caesar's First motion for Partial Summary Judgment

In its first motion for partial summary judgment, Little Caesar is asking the court to determine the scope of a 1989 licensing agreement between Little Caesar and its former subsidiary, Blue Line. This issue is important because plaintiffs have relied heavily on this document as a basis for their request for class certification. As a result, should the court construe the licensing agreement more narrowly, it may have a tangential effect upon plaintiffs' certification motion.

The June 1989 agreement gave Blue Line an exclusive license to distribute logoed products to franchisees. Little Caesar contends that this agreement only covers ****16** those items that bear a Little Caesar's registered mark, and thus is asking this court to find that the 1989 agreement only applies to items given to a retail customer that bear a registered mark, such as logo paper items and individual packages of condiments marked with logos. This only includes only such items as bags, cups, napkins, and logo condiments used by retail customers, such as individual salad dressings. Plaintiffs, however, seek to define "logo products" much more broadly.

In exchange for the license, Blue Line agreed to pay Little Caesar 1% of its gross sales of these items. After the agreement was executed in May 1989, all third-party distributors and suppliers were informed by memo that Blue Line would be the exclusive supplier of the logo items. The memos listed only the items discussed above. In the agreement itself, the following language defines the covered logo items:

WHEREAS Little Caesar desires to grant an exclusive license to Blue Line to contract with third parties for the manufacture and production of certain supplies and ***891** paper products which utilize the Proprietary Marks, including without limitation, carry out bags, wrappers, dishes, napkins, cups ****17** and boxes ("Logo Products").

Little Caesar has presented evidence demonstrating that the logo items amount to only a small percentage of the purchases made by franchisees. Little Caesar has also shown that it was the consistent course of conduct of itself and Blue Line to have the agreement only apply to those few logoed items going to retail customers. Under the agreement, Blue Line is required to submit monthly reports to Little Caesar detailing the amount of sales of the logoed products so that the 1% royalty can be determined. Little Caesar has presented numerous examples of these monthly reports that confirm that only the sales of paper products and individual salad dressings bearing a registered mark are covered by the licensing agreement. In the 1989 memos sent to independent distributors and

suppliers about the new licensing arrangement, Little Caesar told them that only the following items were covered: cups, lids, straws, bags, salad containers, napkins, cup carriers, dressings, and convenience packs. In essence, Little Caesar is asking the court to rule that the licensing agreement only covers items given out to customers with the Little Caesar logo on them.

Plaintiffs [**18] argue that the licensing agreement covers virtually all supplies delivered in bulk to franchisees by Blue Line that have a Little Caesar logo somewhere on the packaging. Under this interpretation, the licensing agreement would apply to most supplies bought by franchisees. This is because many of the supplies purchased by franchisees are provided according to Little Caesar specifications and thus have Little Caesar logo on the bulk packaging even though the supplies were sold by an independent distributor.

If plaintiffs' interpretation is correct, then franchisees would be required to purchase much of their supplies through Blue Line, thereby seemingly establishing a tying arrangement on the basis of the national 1989 agreement that appears to be applicable to all franchisees. This is important because plaintiffs' interpretation would strengthen their argument for class certification.

In support of their interpretation of the licensing agreement, plaintiffs point to the language of the agreement that says that the license applies to "certain supplies . . . including without limitation . . ." Plaintiffs contend that the without limitation language means that the agreement could apply [**19] to any supplies named by Little Caesar. In addition, plaintiffs cite other documents in which Little Caesar lists specific logoed products as being covered by the licensing agreement, but also indicates that the agreement's coverage is not limited to the list.

In response, Little Caesar argues that the "without limitation" language was included so that new products given out to retail customers that bear the company's registered mark would be covered by the agreement. This was the case when certain franchisees started to issue promotional plastic cups to its customers that had the Little Caesar logo on them, and Little Caesar informed the franchisees and their suppliers that Blue Line had the exclusive right to distribute such logoed products. In addition, Little Caesar has indicated that signs, uniforms, and logoed promotional items are restricted in their distribution, but that this is not a result of the 1989 licensing agreement.

Plaintiffs also rely upon various statements by Little Caesar officials concerning logoed products. However, some of the statements cited by plaintiffs actually support Little Caesar's motion. For example, in a 1992 memo from David Deal, the head of Blue [**20] Line, to Mike Ilitch, Little Caesar's primary owner, about the prospect of a new independent distributor that would compete with Blue Line, Deal said that franchisees would be less likely to contract with the new distributors because of the necessity of taking two deliveries, one from Blue Line for logoed products and one from the distributor for all other products. In addition, the president of Ameriserv, William Burgess, testified that his company had to have access to the logoed products as defined by Little Caesar in order to compete. Although these facts support plaintiffs' contention that Little Caesar was trying to control the supplies going to its franchisees, they also support Little Caesar's position in its motion for partial summary [*892] judgment on the issue of the scope of the term "logoed products."

Finally, plaintiffs oppose Little Caesar's motion because they claim that Little Caesar is trying to inject merit issues into the class certification determination through this motion for partial summary judgment. Additionally, plaintiffs argue that the motion is improper because it seeks to determine a single, non-dispositive issue of fact. However, in France Stone Co., Inc. f**21 v. Charter Township of Monroe, 790 F. Supp. 707, 710 (E.D. Mich. 1992), this court addressed a similarly narrow issue of particular concern to the parties that significantly advanced the progress of that litigation. In the same way, the court finds that the scope of the 1989 licensing agreement in this case is of sufficient import so as to justify an examination of Little Caesar's motion. Furthermore, the court also finds that this motion does not inject merit issues into the class certification motion, but instead clarifies an issue that the court finds to be clear from the facts and evidence presented by both sides.

In this vein, the court concludes that the 1989 licensing agreement between Little Caesar and Blue Line only applies to items given to a retail customer that bear a Little Caesar's registered mark, such as logo paper items and individual packages of logo condiments. This is the only rational interpretation of the licensing agreement given its explicit language and the long and established course of conduct demonstrated between Little Caesar and Blue

Line. It also is consistent with the way Little Caesar has explained the agreement to independent distributors and suppliers. **[**22]** In this instance, plaintiffs have attempted to stretch the language of the agreement to apply to virtually all supplies purchased by franchisees. Such an interpretation contradicts the language of the agreement, the way the agreement has been carried out, and common sense. As a result, the court concludes that there is no genuine issue of material fact as to the interpretation of the 1989 agreement, and it will grant Little Caesar's motion for summary judgment.

IV. Little Caesar's second Motion to Dismiss and/or for Partial Summary Judgment

In this motion, Little Caesar is seeking summary judgment and/or dismissal of the claims presented in portions of Counts I-V.

A. Count I--Price-fixing

In Count I, plaintiffs allege that Little Caesar conspired with independent distributors to fix prices of the supplies sold to franchisees. From 1982 until January 1988, Blue Line told independent distributors what prices to charge Little Caesar restaurants for supplies, which generally was a national price. From January 1988 until May 1988, Little Caesar established "regional pricing" whereby independent distributors were directed to charge the same prices as those charged by a Blue **[**23]** Line warehouse in the same or nearby region. In this way, Little Caesar argues, prices would more accurately reflect the actual freight costs of suppliers to the various regional distributors. From May 1988 until Blue Line opened a warehouse in a particular region, Blue Line suggested maximum percentage markup ranges for various categories of supplies.

Little Caesar claims it began suggesting prices to independent distributors in 1982 when it was discovered that the prices charged to franchisees by distributors were too *high*. By suggesting maximum prices, Little Caesar allegedly hoped to protect its franchisees from unscrupulous distributors trying to gouge the unwary.

In responding to the price-fixing claim, Little Caesar has focused upon the particular distributor that serviced each of the plaintiffs. Plaintiff Smith's franchise was serviced by Continental Meats, an independent distributor, until January 1986, when Blue Line began selling supplies to Smith. Plaintiff Fields' distributor was PYA Monarch. In February 1989, Blue Line opened a warehouse that serviced Fields' region. When PYA Monarch withdrew from the market in July 1989, Fields switched to Blue Line. Plaintiff **[**24]** Hennessy has at all times purchased his supplies from Blue Line.

[*893] 1. Plaintiffs Smith and Hennessy

Little Caesar contends that plaintiffs Smith and Hennessy do not have a price-fixing claim because the alleged conspiracy was designed to fix the maximum prices of independent third-party distributors and not Blue Line who was the distributor serving Smith and Hennessy. Thus, Little Caesar contends that the prices charged Smith and Hennessy were not fixed.

In response, plaintiffs Smith and Hennessy contend that they have standing to sue Little Caesar and Blue Line for the alleged price-fixing because Blue Line was able to set its prices at anti-competitive levels because the prices of competing distributors had been fixed at similarly high levels in accord with the conspiracy. In addition, plaintiffs contend that any co-conspirator is jointly and severally liable to a plaintiff even if that plaintiff did not deal directly with them. See [Ambook Enters., Inc. v. Time, Inc.](#), 612 F.2d 604, 620 (2d Cir. 1979), cert. denied, 448 U.S. 914, 65 L. Ed. 2d 1179, 101 S. Ct. 35 (1980).

Little Caesar contends, however, that no evidence has been offered to show that Blue Line's prices were set by agreement with **[**25]** the independent distributors. Since plaintiffs Smith and Hennessy purchased only from Blue Line, they have not been harmed by the higher prices allegedly fixed by the independent distributors.

The court will grant Little Caesar's motion for summary judgment against plaintiffs Smith and Hennessy as to the price-fixing claim. Plaintiffs Smith and Hennessy have not produced *any* evidence in response to the [Rule 56](#) motion to show that they have suffered any harm as a result of the alleged conspiracy. They have come forward with no evidence showing that the prices they paid for supplies were even affected by Little Caesar's conduct. In their response brief, plaintiffs merely allege that Blue Line's prices were anti-competitive, but provide no evidence of any kind to back this conclusion. During oral argument, plaintiffs conceded that the price-fixing claim was not of great import to them and was merely "background" information for their tying claim. In this context, and because plaintiffs Smith and Hennessy have failed to raise a genuine issue of material doubt in response to Little Caesar's motion, summary judgment is appropriate on Count I as against Smith and Hennessy.

2. [**26] Plaintiff Fields

Little Caesar contends that it deserves summary judgment as to plaintiff Fields because this plaintiff has not suffered any antitrust injury from the vertical maximum suggested markup policy--the alleged price fixing--and because her claims are barred by the statute of limitations.

As to antitrust injury in particular, from May 1988 until February 1989, the prices as to Fields were maximum prices only. In memos to independent distributors, Little Caesar told the distributors that the suggested prices were "maximum ranges only! Lower markup ranges would certainly be welcomed!" In fact, after the suggested prices went into effect, PYA Monarch told its customers, including Fields that the "result of this change will be savings to you." Under these circumstances, Little Caesar contends that Fields suffered no antitrust injury when her distributor was prevented from charging her higher prices.

Even if Fields suffered antitrust injury, Little Caesar contends that her claim is barred by the four year statute of limitations set in [15 U.S.C. § 15\(b\)](#), unless the price-fixing policy was fraudulently concealed.

Fields filed her claim in September 1993, more than four years [**27] after her distributor withdrew from the market. In its brief, Little Caesar details how the pricing policies complained of were fully explained and revealed to its franchisees, including Fields. In particular, Fields learned from her sister in early 1989 from PYA Monarch that it would like to charge lower prices, but was prevented from doing so by Little Caesar's pricing policies.

HN5 In order to establish fraudulent concealment in order to defeat the bar posed by a statute of limitations, plaintiff Fields must show the following:

(1) Wrongful affirmative concealment;

[*894] (2) Failure to discover within the limitations period; and

(3) Due diligence until discovery.

[Pinney Dock & Trans. Co. v. Penn Central Corp., 838 F.2d 1445, 1465 \(6th Cir. 1988\)](#), cert. denied, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988). Under the circumstances presented here, Little Caesar contends that plaintiff Fields cannot establish fraudulent concealment of the alleged price-fixing conspiracy. In response to the motion as to this claim, plaintiffs have not presented a spirited or meaningful defense, and it appears that plaintiffs are concentrating on their tying claim to the exclusion of the price-fixing [**28] claim, admitting during oral argument the price-fixing claim was not "central" to their case.

Under these circumstances, the court will grant Little Caesar's motion for summary judgment against plaintiff Fields as to Count I. It is apparent that Fields was made fully aware of the pricing policy instituted as to her distributor at least as early as the beginning of 1989. As a result, her September 1993 complaint alleging price-fixing was filed beyond the period allowed by the statute of limitations. In addition, Fields has failed to present any evidence showing that she suffered any antitrust injury as a result of the alleged conspiracy. Thus, plaintiff Fields has failed to present sufficient evidence to defeat Little Caesar's motion concerning the price-fixing claim.

B. Count II--Tying Arrangement

As discussed earlier, plaintiffs contend that Little Caesar has forced them to buy their food and other supplies from Blue Line in order to continue in their business as franchisees. Plaintiffs contend that this conduct is an illegal tying arrangement and a violation of the Sherman Act, [15 U.S.C. § 1](#). The essential elements of a tying claim under the Sherman Act are as follows: [\[**29\]](#)

- HN6**[] 1. there must be a tying arrangement between two distinct products;
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 not be insubstantial.

[Virtual Maintenance, Inc. v. Prime Corp., Inc.](#), 11 F.3d 660, 664 n.6 (6th Cir. 1993), cert. dismissed, 129 L. Ed. 2d 829 (1994); see [Times-Picayune Publishing Co. v. United States](#), 345 U.S. 594, 613-14, 97 L. Ed. 1277, 73 S. Ct. 872 (1953). In addition, "coercion is an implicit requirement for an unlawful tie-in agreement." Earl W. Kintner & Joseph P. Bauer, 2 *Federal Antitrust Law* § 10.59, at 250 (1980, Supp. 1995). In this instance, plaintiffs claim that in order to have a Little Caesar franchise (the tying product), franchisees are forced to buy their food and supplies (the tied product) from Little Caesar/Blue Line.

1. All Plaintiffs

Little Caesar is seeking summary judgment on the tying claims based upon its contention that no tying arrangement existed, and that the existence of "forcing" or actual coercion of the individual franchisees is a required element of the claim. Little Caesar admits [\[**30\]](#) that this portion of its motion does not apply to any of the claims asserted by plaintiff Smith after his request to approve Ameriserv as an independent distributor was made in April 1992. Little Caesar concedes that plaintiff Smith has a triable issue of fact as to whether the denial of the request to approve Ameriserv was reasonable and proper. In addition, Little Caesar indicates that its motion assumes it has market power and that the franchise and its supplies are distinct products. Little Caesar indicates that future motions will address these issues.

The basis of this portion of Little Caesar's motion is its contention that the plaintiffs, other than Smith, cannot show that they have been *forced* to purchase the tied product (food and other supplies) from Little Caesar/Blue Line. Little Caesar argues that in order to establish a tying claim plaintiffs must point to a particular contractual provision that binds their ability to choose independent distributors. Alternatively, Little Caesar claims that plaintiffs could establish a tying claim by showing that they objected in some way to Little Caesar/Blue Line as their [\[*895\]](#) distributor or that plaintiffs knew that a request for [\[**31\]](#) approval of an alternate distributor was futile. In essence, Little Caesar contends that plaintiffs must show some sort of forcing or coercion as an essential element of a tying arrangement.

In [Jefferson Parish Hospital District No. 2 v. Hyde](#), 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984), the Supreme Court stated that

our cases have concluded that **HN7**[] the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to *force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits for the tied item is restrained and the Sherman Act is violated.

Id. (emphasis added). Under the Supreme Court's decision and subsequent lower court interpretation, antitrust plaintiffs must demonstrate that they have been forced to purchase the tied product. As one leading commentator indicated as early as 1980 and even before *Jefferson Parish*, "[a] growing trend is to require a strict individual demonstration of coercion." Bauer & Kintner, *supra*, at 250. Such forcing can **[**32]** be demonstrated by an explicit contractual provision or provisions, individual evidence of coercion, or an admission by a defendant. The Sixth Circuit cases relied upon by plaintiffs show support, rather than opposition, to this method of proof in tying cases. See [*Virtual Maintenance Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1324 \(6th Cir. 1992\)](#) (extreme price differential meant that all rational buyers were forced to accept tied product), vacated on other grounds, 121 L. Ed. 2d 235 (1992); [*Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1131 \(6th Cir. 1981\)](#) (defendant admitted to tying arrangement based upon provisions of lease and sub-lease).

As Little Caesar points out, each of the franchise agreements at issue specifically allows the plaintiffs the ability to seek approval of independent distributors to provide them with supplies. In [*Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 712 \(11th Cir. 1984\)](#), the court stated that **HN8**↑ "an approved source requirement is not, alone, illegal. Only if a franchisee is coerced into purchasing products from a company in which the franchisor has a financial interest does an illegal tie exist." The question then is **[**33]** whether Little Caesar unreasonably refused to grant approval of an independent distributor or whether plaintiffs were aware that the approval process was futile. In this case, plaintiffs concede that they do not claim that they knew that the approval process was futile.

Plaintiff Smith claims that a tie-in has existed since 1982, and he claims damages since September 1989, four years prior to the filing of this lawsuit and within the statute of limitations. However, Smith only sought approval of an independent distributor as an alternative to Blue Line in April or May of 1992. At that time, Smith sought Little Caesar's approval of Ameriserv as a distributor. Under these circumstances, Little Caesar is seeking summary judgment against Smith as to any damages pursuant to a tying claim suffered before he sought approval of the alternate distributor. Little Caesar contends that it was only when Smith objected to Blue Line and sought Ameriserv that it became clear that he was being forced to buy the tied product.

Little Caesar's position is strengthened by the fact that in 1988 Smith was part of a large group of franchisees who considered purchasing supplies from a competitor of Blue **[**34]** Line. However, after a series of meetings, Smith's concerns were addressed and he decided to stay with Blue Line. On this basis, Little Caesar contends that Smith cannot claim that he was forced to do anything since he agreed to stay with Blue Line of his own free will. Thus, Little Caesar alleges that Smith experienced none of the forcing symptomatic of a tying arrangement until April 1992 when he sought approval of an independent distributor.

Little Caesar applies similar logic to the claims of plaintiffs Fields and Hennessy. In Hennessy's case, he has never sought an alternate distributor. Fields also has never sought approval of another distributor and **[*896]** was only aware of the single rejection of Ameriserv as an alternative distributor for Smith. Under these facts, Little Caesar argues that none of the plaintiffs, except for Smith after April 1992, has objected to the status of Blue Line as the sole distributor of supplies and can thus demonstrate that it was forced to purchase supplies from Little Caesar/Blue Line.

Little Caesar cites [*Klo-Zik Co. v. General Motors Corp.*, 677 F. Supp. 499, 506 \(E.D. Tex. 1987\)](#) and [*Dubuque Communications Corp. v. American Broadcasting Co.*, **\[**351** 432 F. Supp. 543, 546 \(N.D. Ill. 1977\)](#), aff'd, 547 F.2d 1170 (7th Cir. 1976), cert. denied, 430 U.S. 985, 52 L. Ed. 2d 379, 97 S. Ct. 1682 (1977) for the proposition that **HN9**↑ in order to prove a tying claim, plaintiffs must produce "evidence that the undesired condition was imposed over plaintiff's objection, or at the explicit refusal of the defendant to do otherwise. When a condition is accepted without objection, the element of coercion becomes totally speculative." [*Dubuque*, 432 F. Supp. at 546](#). Similarly, in *Klo-Zik*, the court stated that if two products are sold together, there must be evidence that the buyer objected to the package, that the buyer was only interested in one of the two products or that the tied product was forced upon him." [*Klo-Zik*, 677 F. Supp. at 506](#). Where the tying arrangement is admitted or where the arrangement is imposed as part of a contract, there is no further need to demonstrate the forcing element. Because of the very nature of a binding contract, coercion and forcing can be implied since the victim of the tying arrangement has no other choice but to comply with the arrangement or face litigation to enforce the contract. "All courts agree, [however], that absent contractual **[**36]** tie-in provisions, actual coercion must be demonstrated." Bauer & Kintner, *supra*, at 252.

Of the three plaintiffs currently before the court, only Smith has signed a franchise agreement that arguably contains an explicit tying arrangement. As a result, since no express contractual tie is present in this case as to plaintiffs Fields and Hennessy and because they have not sought approval or otherwise objected to Blue Line as their distributor, Little Caesar contends that summary judgment is proper.

As to plaintiff Smith, however, one of his three franchise agreements was signed after mid-1990, and thus includes a limitation on the approval of independent distributors as to the supply of logoed products. As a result, Smith may have a tying claim for the purposes of this motion based upon an express contractual tie. Thus, there is no further need to show forcing or some other coercive element in order to establish his claim. Consequently, plaintiff Smith could have a tying claim as it relates to his one franchise governed by the mid-1990 agreement.

As to plaintiffs Hennessy and Fields, however, the court will grant Little Caesar's motion for summary judgment on the tying claim as [\[**37\]](#) to these two plaintiffs. Within the applicable time period, neither one requested approval of an independent distributor or were subject to an explicit contractual tie-in as part of the franchise agreements by which they were bound. Furthermore, these plaintiffs cannot show that had they made a request for an alternate distributor, it would have been futile. As a result, there is no indication that either Fields or Hennessy was forced to continue purchasing supplies through Little Caesar/Blue Line. Any claim by plaintiff Fields based upon PYA Monarch's exit from the market is addressed in the section below.

2. Plaintiff Fields

Little Caesar contends that any tying claim relating to the independent distributor PYA Monarch, which serviced plaintiff Fields' franchises, is barred by the statute of limitations.

Prior to February 1989, plaintiff Fields' franchises purchased their supplies from an independent, third-party distributor, PYA Monarch. In February 1989, Blue Line opened a warehouse in Atlanta that serviced the region in which Fields' franchise is located. Following Blue Line's entry into the market, Fields continued to purchase from PYA Monarch until it withdrew from [\[**38\]](#) the market in July 1989 and stopped selling supplies [\[*897\]](#) to Fields' franchises. Fields then began purchasing her supplies from Blue Line.

Little Caesar contends that Fields may claim that her purchases from Blue Line, beginning when PYA Monarch withdrew from the market, were a tie-in because of actions that Little Caesar allegedly took against PYA Monarch. Little Caesar argues that assuming for the purposes of this motion that such a tie-in resulted, any such claim by Fields would be barred by the four year antitrust statute of limitations. See [15 U.S.C. § 15\(b\)](#). As indicated earlier, this case was filed in September 1993, so the unlawful conduct must have occurred after September 1989, in order for Fields' claim not to be barred.

Little Caesar argues that since PYA Monarch withdrew from the market more than four years before this lawsuit commenced, the claim is barred unless the "continuing violation" doctrine applies. According to the Sixth Circuit, a

[HN10](#) [↑] "continuing [antitrust] violation [is] one in which the plaintiff's interests are repeatedly invaded." This circuit has refined the *Zenith* standard to the point that it now can be expressed as two discrete rules. [\[**39\]](#) First, "when a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants." Second, "in the context of a continuing conspiracy, the statute of limitations runs from the commission of the act that causes the plaintiff's damage." Thus, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." For statute of limitations purposes, therefore, the focus is on the timing of the causes of injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts.

[Peck v. General Motors Corp., 894 F.2d 844, 849 \(6th Cir. 1990\)](#) (citations omitted). In *Peck*, even though the plaintiff had suffered some injury within the last four years, the court dismissed his claim under the statute of limitations because there was no new overt act. See [Fontana Aviation, Inc. v. Baldinelli, 575 F.2d 1194 \(6th Cir. 1978\)](#) (claim accrued when company pulled out of the market), cert. denied, 439 U.S. 911, 58 L. Ed. 2d 257, 99 S.

Ct. 281 (1978); *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 82 (6th Cir. 1981) (claim [**40] accrued when boycott first occurred, not while it continued to be in force). Little Caesar contends that because no overt act has been directed at plaintiff Fields in the last four years, any claim she may have based upon the pullout of PYA Monarch from the market is barred by the statute of limitations.

In response, plaintiffs allege that Little Caesar fraudulently concealed its conduct against Fields and that its conduct was not limited to the elimination of PYA Monarch from the market. As to fraudulent concealment, plaintiffs rely upon the 1989 licensing agreement which they claim was kept hidden from them, such that Fields could not have filed her claim due to this concealment.

Plaintiffs also claim that Little Caesar committed numerous overt acts, other than the elimination of PYA Monarch from the market, after September 1989 as part of its effort to control the distribution of supplies. Plaintiffs contend that Little Caesar refused to approve other distributors in other parts of the country, used the licensing agreement to foreclose competition, and sent letters to franchisees, suppliers, and distributors enforcing the tying agreement.

The court finds, however, that any tying [**41] claim by plaintiff Fields based upon the elimination of PYA Monarch from the market is barred by the statute of limitations. Conduct by Little Caesar directed towards eliminating PYA Monarch from the relevant market could serve as the basis of a tying claim, but this conduct occurred more than four years before this suit was filed. None of the new overt acts complained of by plaintiffs in the past four years appear to relate to plaintiff Fields and her franchise. Plaintiffs refer generally to many incidents cited in their various briefs, but fail to point out specific incidents applicable to Fields. In addition, there have been so few refusals to approve independent distributors, and Fields was only aware of the refusal relating to Ameriserv, that plaintiffs cannot argue that the process was made futile in the past four [*898] years. Furthermore, under Fields' franchise agreement she could ask for approval of a distributor of any products and was not limited as to logoed products. Also, Fields never asked Little Caesar to approve a new distributor in the past four years. Any refusal of such a request would have been a new overt act by Little Caesar. However, since Fields made no such request, [**42] her tying claim is barred.

C. Counts III-IV--State Antitrust Law

Little Caesar is also seeking summary judgment on the state antitrust claims for the same reasons advanced in support of its motion for summary judgment on the federal claims. Since Michigan antitrust law is identical to federal law and follows the federal precedents, the decision as to Counts I and II will govern the success of Counts III and IV. [HN11](#)[]. Pursuant to MCLA [S. 445.784\(2\)](#), in construing Michigan antitrust law, "the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes." As a result, there is no practical difference between the federal and state claims and the court reaches the same conclusions as to Counts III and IV as it did with respect to Counts I and II.

D. Count V--Breach of Contract and National Price Advertising

Each franchise agreement provides that "the final decision as to all matters of pricing . . . shall be made solely by [the] Franchise owner." Plaintiffs claim that Little Caesar breached this provision by conducting a national advertising campaign based upon "price point advertising." The campaigns consist of a series of [**43] short run promotions of particular items that are pervasively advertised nationally at a specific price in the ads. In its motion, Little Caesar contends that it has not breached the pricing provision of the franchise agreements, and that plaintiffs have always had the freedom to set their own retail prices.

Little Caesar has presented evidence showing that many franchisees do not sell the promoted products at the nationally advertised price, and that it in no way punishes franchisees who do not follow the advertised prices. In fact, each of the three plaintiffs in this case have admitted charging prices that are higher than those that are nationally advertised, or that they have deviated from the national promotions in some other manner. In addition,

each of the national ads contain the following disclaimer: "Limited time offer at participating stores. Prices may vary."

In response to this portion of Little Caesar's motion, plaintiffs contend that Little Caesar required its franchisees to abide by its pricing decisions by first creating tremendous customer expectation through pervasive price advertising, and second, by then intimidating franchisees willing to upset customer expectations [**44] and deviate from the national price.

Since 1989, Little Caesar has advertised based upon price through LCNAP. Franchisees are required to contribute up to 4% of their gross revenue to LCNAP for advertising purposes. The advertising monies amount to \$ 50-\$ 60,000,000 annually and are managed by Little Caesar employees.

Plaintiffs point to a 1988 letter sent to Little Caesar by its advertising agency stating that the "use of a specific price in the national network creative would force all markets to run a common price and could compromise LCE's competitive value and/or profit margins in particular markets." In addition, plaintiffs point to various complaints by franchisees about the use of price point advertising.

Not only do plaintiffs contend that the advertising policies took away their pricing freedom, they also claim that Little Caesar threatened franchisees who failed to follow the nationally advertised prices. In support of this contention, however, plaintiffs have only produced one letter by a Little Caesar employee to a non-plaintiff franchisee who was not following the nationally advertised prices. In the September 1991 letter, Little Caesar told the franchisee that his [**45] "practice of altering the pricing on the national promotions to accommodate what your group believes to be 'above the average costs to operate' is not acceptable. You need to understand that the continuation of this practice will affect the future of your group's [*899] relationship with Little Caesar." However, all three of the plaintiffs admit having no knowledge of this letter until it appeared during this litigation.

Finally, plaintiffs also contend that the disclaimers presented in each advertisement are not sufficient. They complain that they are not audible on TV ads, and that a Michigan regulation holds that the phrase "available at participating stores" is inadequate since it is merely a general disclaimer. See Mich. Admin. Code R 14.208(1).

In reply, Little Caesar points out that the franchisee who was threatened is not one of the plaintiffs, none of the plaintiffs have received similar letters even though they all have deviated from national prices, and plaintiffs have presented no evidence to show that they had knowledge of the September 1991 letter. As a result, Little Caesar contends that the September 1991 letter is irrelevant. In addition, plaintiffs have failed to show [**46] how the Michigan regulation applies, how it creates private rights in contract suits, or how it applies to Little Caesar's specific disclaimer which uses language which is different from that cited in the regulations.

The court finds that Little Caesar has not breached the provision of plaintiffs' franchise agreements giving them the freedom to set retail prices. As Little Caesar has demonstrated, plaintiffs are free of any contractual restrictions requiring them to follow the nationally advertised prices. Each advertisement contains a proper disclaimer that indicates that not all franchises may follow the advertised price.¹ Most importantly, plaintiffs have presented no evidence to show that they have been coerced in any way by Little Caesar to follow the national prices. In fact, all three admit to charging higher prices and to deviating from the national promotions. Plaintiffs have not submitted competent evidence showing that their freedom to set retail prices was restricted by anything other than their own business judgment. As a result, plaintiffs have not shown that Little Caesar has acted in breach of the franchise agreements.

[**47] Under the franchise agreements, although franchisees are free to set their own retail prices, they also have ceded all authority as to decisions concerning national advertisements to Little Caesar. As a result, plaintiffs cannot now complain that Little Caesar is breaching the agreement when it is simply exercising authority given to it under the franchise agreements themselves. This authority was bargained for by the parties, and it appears to be part of

¹ As part of its decision in this regard, the court notes that the regulation relied upon by plaintiffs is inapplicable. Little Caesar uses a specific disclaimer regarding price which satisfies R 14.208(1)-(2).

the overall scheme established by the franchise agreements, a scheme that in the case of these three plaintiffs has continued to allow individual franchisees the freedom to ultimately set their own price.

As plaintiffs readily admit, many franchisees eagerly support national advertisements based upon price, pointing to this program as the basis for their success. As is demonstrated by this suit, however, some franchisees are unhappy with the way in which Little Caesar has exercised its authority under the advertising provisions of the franchise agreements. To the court, there appears to be no dispute that such unhappiness merely amounts to dissatisfaction over the bargain received as part of the contract. Such unhappiness does [***48**] not amount to a breach of contract when there is no dispute that plaintiffs still retain the freedom guaranteed in the franchise agreements. As a consequence, the court will grant Little Caesar's motion for summary judgment on this portion of the breach of contract claim.

E. Count V--Breach of Contract and Supplier Rebates

Plaintiffs also claim breach of contract based upon their allegation that Little Caesar has failed to credit them with rebates, discounts, and bonuses paid by vendors to Blue Line as purportedly required by the franchise agreements and/or the implied covenant of good faith and fair dealing. Little Caesar is seeking summary judgment as to these claims on the basis that it is not required to make such credits under the franchise agreements, and that the implied [***900**] covenant is not applicable to the circumstances of this particular claim. However, Little Caesar is not seeking judgment on that portion of Count V relating to Hormel advertising allowance claims.

In support of its motion, Little Caesar cites the relevant franchise agreements which make no provision for crediting the accounts of franchisees with vendor rebates or discounts. In addition, Little Caesar [****49**] contends that the implied covenant is inapplicable in this case because "Michigan courts will recognize an action for breach of an implied covenant of good faith and fair dealing where a 'party to a contract makes the manner of its performance a matter of its own discretion.'" [*ParaData Computer Networks, Inc. v. Telebit Corp., 830 F. Supp. 1001, 1005 \(E.D. Mich. 1993\)*](#) (citing [*Burkhardt v. City Nat'l Bank, 57 Mich. App. 649, 652, 226 N.W.2d 678 \(1975\)*](#)). In this instance, Little Caesar argues that no provision of the franchise agreement is of a discretionary nature so as to implicate the implied covenant of good faith. Little Caesar specifically excludes from its motion any claim involving advertising allowance payments made by Hormel to Blue Line for including Hormel logo in ads paid for by LCNAP. Little Caesar states that it believes its franchisees received full credit and will resolve this issue by settlement or further motion.

In response to this portion of Little Caesar's motion, plaintiffs only discuss the Hormel issue and unrelated LCNAP issues that Little Caesar explicitly exempted from the scope of its motion. As a result, the court finds that Little Caesar deserves summary judgment [****50**] on the portion of Count V pertaining to the covenant of good faith and fair dealing and/or to the payment of supplier rebates other than the claim specifically excluded from this motion regarding the Hormel advertising allowance. Plaintiffs have not raised instances other than the Hormel situation that implicate a breach of contract claim in response to Little Caesar's motion as to this portion of Count V. As a result, since there is no dispute between the parties and plaintiffs have not presented any evidence to the contrary, the court will grant Little Caesar's motion for summary judgment as it relates to any breach of contract claim for failure to pay supplier rebates or discounts, except as delineated above.

V. Plaintiffs' Motion for Class Certification

In their motion for class certification, plaintiffs have requested [*Rule 23\(b\)\(2\)-\(3\)*](#) certification of a class of Little Caesar franchisees under the following claims:

1. [*Rule 23\(b\)\(3\)*](#) --Count II--illegal tying arrangement.
2. [*Rule 23\(b\)\(2\)*](#)--(for injunctive and declaratory relief)-- Count II-illegal tying arrangement.

3. Rule 23(b)(2)--(for injunctive declaratory relief)--Count V--breach of contract based upon national [**51] price advertising.
4. Rule 23(b)(2)--(for injunctive and declaratory relief)-- Counts V & VI--misappropriation of LCNAP funds in breach of the contract and conversion of LCNAP funds.

Under Rule 23(a) of the Federal Rules of Civil Procedure, the following prerequisites must be satisfied before an action can proceed as a class action:

HN12 [↑] (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

HN13 [↑] The burden is on the party seeking class certification to show that these prerequisites have been satisfied. Senter v. General Motors Corp., 532 F.2d 511, 522 (6th Cir. 1976), cert. denied, 429 U.S. 870, 50 L. Ed. 2d 150, 97 S. Ct. 182 (1976).

Once the requirements of Rule 23(a) have been satisfied, plaintiffs must demonstrate that the case falls within the guidelines set by Rule 23(b). [**52] Rule 23(b) provides as follows:

[*901] **HN14** [↑] (b) Class Actions Maintainable. An Action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

...

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[**53] *Id.* **HN15** [↑] In deciding whether to certify a class action, the court should not enquire into the merits of plaintiffs' claims. Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

A. The Magistrate Judge's Recommendations

In response to plaintiffs' motion for certification of one national class of Little Caesar franchisees as to each of their various claims, Magistrate Judge Pepe recommended that the court deny the request for a national class on the tying claim under Rule 23(b)(3), and instead certify sixteen separate regional classes, each divided into two different subclasses, for a total of thirty-two different groupings of franchisees. The sixteen regional classes recommended by the magistrate judge are based upon the sixteen warehouse/distribution regions established by Blue Line to cover the country. Neither plaintiffs nor Little Caesar asked for or briefed certification of the regional classes suggested by the magistrate judge. In fact, both sides have filed objections to this portion of the magistrate judge's report.

Similarly, the magistrate judge recommended that the court certify, pursuant to [Rule 23\(b\)\(2\)](#), sixteen regional classes, and apparently thirty-two [\[**54\]](#) subclasses, of franchisees for purposes of injunctive and declaratory relief as to the tying claim. He also recommended that plaintiffs be ordered to solicit, within ninety days, class representatives for each of the thirteen regional classes and sixteen subclasses not already represented.

With regard to plaintiffs' other claims, the magistrate judge recommended certification of a national class under [Rule 23\(b\)\(2\)](#) on plaintiffs' claims under Counts V and VI regarding national price advertisements as a breach of contract and the handling of LCNAP funds. Because it has granted Little Caesar's motion for summary judgment on the breach of contract claim relating to national price advertisements, the court will not address the magistrate judge's recommendation to certify a national class as to this claim. Instead, the court will simply deny this portion of plaintiffs' class certification motion as moot.

B. Class Certification and the Tying Claim

In his report, the magistrate judge found, and Little Caesar basically conceded, that the class requested by plaintiffs as to the tying claim satisfied the four requirements of [Rule 23\(a\)](#): numerosity, typicality, commonality, and adequate [\[**55\]](#) representation. However, the main fight as to the certification of a class for the tying claim centers around the [Rule 23\(b\)\(3\)](#) requirement that common issues of fact predominate over individual issues of fact. In this regard, the magistrate judge recognized that his recommendations could be significantly altered depending upon this court's rulings regarding the necessary components of a tying claim in response to Little Caesar's summary judgment motions.

[\[*902\]](#) Little Caesar contends that the circumstances of this case dictate that individual issues will predominate because the position of each franchisee is different, and Little Caesar's treatment of each franchisee and various independent distributors was different across the country. To Little Caesar, the key question is whether franchisees were *forced* to buy the tied product, thus satisfying the first element of a tying claim--the existence of a tying arrangement. Little Caesar contends that where, as here, there is not a uniform contract expressing the tie, the case will be decided by individual issues. In support of its contention, Little Caesar cites nineteen cases in which courts have denied a request for class certification [\[**56\]](#) because the forcing or coercive part of a tying arrangement had to be proven individually because there were no uniform ties, thus causing individual issues of fact to predominate. See, e.g., [Waldo v. North Am. Van Lines, Inc., 102 F.R.D. 807, 814 \(W.D. Pa. 1984\)](#); [Chase Parkway Garage, Inc. v. Subaru of New England, Inc., 94 F.R.D. 330, 332 \(D. Mass. 1982\)](#); [Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 118-19 \(C.D. Cal. 1978\)](#).

In their motion for certification, plaintiffs argue that common issues of fact predominate in this case because of Little Caesar's "master plan" to control the distribution of supplies to its franchisees. The centerpiece of plaintiffs' motion is the 1989 licensing agreement between Little Caesar and its subsidiary, Blue Line. Under the agreement, Blue Line received the exclusive right to distribute "logoed products" to franchisees. Previously, the parties were in dispute as to the meaning of "logo products" under the licensing agreement, and the definition of this term is the subject of Little Caesar's first motion for partial summary judgment. As the court found above, however, the effect of the licensing agreement is limited to items given [\[**57\]](#) to a retail customer that bear a registered mark, such as logo paper items and individual packages of condiments. To plaintiffs, the licensing agreement is the common document and a piece of evidence that justifies a national class action. This document, combined with plaintiffs' ancillary facts relating to the alleged master plan and Little Caesar's refusals to approve certain independent distributors serve as the main basis for this class certification motion.

Plaintiffs contend that by controlling logoed products, Little Caesar could force its franchisees to purchase all supplies through Blue Line. In support of this analysis, plaintiffs have presented the joint affidavit of two economists who contend that the licensing agreement forces franchisees to purchase all goods from Blue Line because to do otherwise would require two-stop shopping. Under the licensing agreement, franchisees would have to purchase logoed products, as defined by the licensing agreement, from Blue Line. If the franchisee chooses to purchase all other supplies from an independent distributor, two separate deliveries would become necessary. Plaintiffs'

economists contend that the two deliveries make utilizing **[**58]** an independent distributor unattractive and economically unfeasible as compared to simply purchasing all supplies through Blue Line.

In response, Little Caesar points out that each of the three named plaintiffs engages in multiple-stop shopping, receiving and purchasing various supplies from several different distributors based on different advantages provided by each. Most importantly, Little Caesar contends that the logoed products covered by the licensing agreement only include trademarked items that amount to a small percentage of the total supplies purchased by an average franchisees. As a result, because almost ninety-five percent of supplies are not even governed by the agreement, franchisees are free to purchase the vast majority of their supplies from independent distributors. Furthermore, all franchise agreements executed prior to mid-1990 specifically allow franchisees to seek approval of independent distributors of any supplied item except special dough and spice mix not covered in this lawsuit. As a result, these franchisees could still request an alternate supplier of logoed products, regardless of any internal Little Caesar directive. After mid-1990, the standard franchise **[**59]** agreement includes a clause that prevented franchisees from seeking alternate suppliers of logoed goods.

[*903] The important issue to Little Caesar for purposes of this motion, however, is that the situation of each franchisee is different depending upon the particular region in which it is located, its proximity to suppliers, the availability and willingness of independent distributors, and the actions of Little Caesar towards distributors and franchisees in the franchisee's particular area. Little Caesar contends that these issues make each franchisee different in terms of whether they were forced to purchase the tied item, thus amounting to a tying arrangement. In addition, the various issues listed above all relate to the question of the impact of the alleged tying arrangement on each different franchisee as it concerns damages.

In his report, the magistrate judge found that there is no express contract provision tying the purchase of supplies from Little Caesar/Blue Line to the obtaining of a Little Caesar franchise. In addition, the magistrate judge determined that in order to show the impact of a tie-in, *i.e.*, the fact of damages, plaintiffs will need to demonstrate that a regional **[**60]** market would support two distributors, and that there was an able alternate distributor willing to enter the market if approved by Little Caesar who could provide better prices and service. The magistrate judge concluded that such questions could only be proven on a region by region basis. Furthermore, he indicated that plaintiffs are not relying upon a claim of improper refusals to approve alternate distributors as a basis for class certification. He found that such a claim would necessarily involve a determination of individual issues. However, in their objections to the report and recommendation, plaintiffs assert that individual refusals to approve alternate distributors will play some role in their proposed class-wide proofs.

The court finds that it will accept in part and reject in part the magistrate judge's report and recommendation on plaintiffs' class certification motion. Most importantly, however, the court will deny plaintiffs' motion for class certification of the tying claim as currently proposed. It is clear that the magistrate judge recognized the complicated and individualized nature of the tying claims alleged in this case. Although he recognized the problem, he **[**61]** came up with a solution that undermines the main request of plaintiffs' motion. The court agrees to a large extent with the magistrate judge's finding that the "bulk of the proofs on impact and substantial proofs on liability will be common only to franchisees within that Blue Line distribution region." He thus recognized, to a certain degree, that plaintiffs could not prove their case based upon national or uniform methods of proof, but must instead depend upon a multitude of local, regional, and individualized factors. On this basis, the magistrate judge then correctly concluded that this fact made certification of a national class impossible. However, he did not recognize that these same factors would make sixteen regional classes and thirty-two subclasses equally inappropriate. As a result, instead of relying upon his own findings regarding the regional and individualized nature of the claims, as well as the importance of the franchisee agreements signed after mid-1990 that he so clearly recognized, the magistrate judge has made a recommendation that this court finds unworkable and contrary to the dictates of [Rule 23](#). The very nature of the recommendation for sixteen separate classes, **[**62]** not to mention the multiple subclasses, simply adds strength to the court's conclusion that the facts of this case militate against class certification, at least as it concerns the class proposed by plaintiffs.

To the court, it appears that the better choice is to follow the magistrate judge's logic and find that the factors that make a national class inappropriate also make regional classes inappropriate as well. The very fact that thirty-two

separate subclasses are proposed by the magistrate judge when there are only 500 franchisees suggests that individual issues of fact predominate over common issues of fact. In addition, the recommendation flaunts the requirement of Rule 23(b)(3) that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." In this instance, it is hard to understand how a vast multitude of separate regional class actions would be superior to individual actions filed by those franchisees who object to Little Caesar's conduct. Under these circumstances, it appears that the magistrate [*904] judge's recommendation is not superior to other methods of resolving the lawsuit.

The court's conclusion is not only [***63] based upon the factors found by the magistrate judge, but also upon the very nature of a tying claim under the antitrust laws. The main dispute between Little Caesar and plaintiffs is over whether coercion or forcing needs to be proven on an individualized basis in this case. There is no dispute that where a tying arrangement is apparent from the face of a contract, or from reasonable inferences based upon the contract and related documents, a national class would be appropriate. In this case, no such contract or set of contracts appears to fill this requirement. As a result, Little Caesar contends that proof of a tying claim will have to be done on an individual basis.

In essence, plaintiffs base their tying claim upon the master plan evidence and the 1989 licensing agreement. However, there is no evidence that any of the franchisees, except possibly the post mid-1990 franchisees, were even aware that such an internal agreement between Blue Line and Little Caesar existed. However, plaintiffs' contention appears to be that even though they might not have been aware of the tying arrangement, it was still a tying arrangement from which they can seek recovery. In response, Little Caesar [***64] cites to the nineteen cases referred to above to support its claim that proof of a tying arrangement in these circumstances is individual and not class wide. In addition, Little Caesar relies again upon the decision of the Supreme Court in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). In Jefferson Parish, the Supreme Court, in addressing a tying claim, indicated that 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." Id. at 12.

Thus, the important inquiry centers on the buyer's state of mind and whether the buyer was forced or coerced into making the purchase of the tied product by the seller's conduct. As the court discussed previously, in cases involving an express contractual tie, the coercion imposed by the seller is manifest. Where there is not an express contractual tie, the plaintiff must prove the existence of the tying arrangement by other means. These means could include an unreasonable refusal [***65] to approve an alternate distributor, as could be claimed by plaintiff Smith, or by forcing a competing distributor out of a relevant market as could have been claimed by plaintiff Fields. In each case, the evidence proving the claim would appear on an individual basis and would not be susceptible to class treatment. See Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir. 1976). In Dunkin' Donuts, the court held that where

HN16[↑] plaintiff franchisees place no reliance on express contractual tie-ins, each, individually, must prove that his purchases were coerced as an element of establishing a prima facie case of illegal tying. The district court's class certification with respect to the tying claims was expressly premised on its rejection of the individual coercion doctrine. Accordingly, the certification should not have been granted.

Id. at 1226 (citations omitted).

In response to this general position stated by Little Caesar, plaintiffs, and the magistrate judge to a certain extent, argue that certain extrinsic facts and some relevant documents can establish a tying arrangement in such a way as to justify class treatment in this case. Plaintiffs [***66] rely upon Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), which allowed class certification where an express contractual tie-in was not present. In Bogosian, a refusal to grant class certification was reversed because a tying arrangement could be discerned from a set of lease documents common to all franchisees that reflected the imposition of an unreasonable condition based upon an economic analysis.

Plaintiffs analogize *Bogosian* to this case because they claim that the 1989 licensing agreement, combined with various ancillary evidence of Little Caesar's master plan to take over distribution to its franchisees, amounts to a class-wide unreasonable condition that tied the purchase of supplies to the [*905] ownership of a franchise. By restricting the purchase of logoed products, plaintiffs contend that Little Caesar forced franchisees to buy their supplies through Blue Line in order to avoid the two-stop shopping discussed above. In addition, the licensing agreement was intended to force independent distributors out of the market by taking away the most profitable part of distribution, the sale of logoed products. In this way, plaintiffs contend that class certification [**67] is proper because proofs concerning the licensing agreement, its effect on franchisees, and proofs about the master plan are common and they predominate over individual issues.

However, as discussed earlier, the court finds that individual issues of fact relevant to each franchisee predominate over common issues of fact, thereby making it inappropriate to certify the particular class proposed by plaintiffs. It is quite apparent that "the necessity of an individual demonstration of actual coercion frustrates the ability of many suits to obtain class status." Earl W. Kintner & Joseph P. Bauer, 2 *Federal Antitrust Law* § 10.59, at 256 (1980, Supp. 1995). Any actions Little Caesar may have taken against certain independent distributors would only be relevant to those certain franchisees who could have been serviced by them. The importance of one-stop shopping would also depend upon local conditions, distance to suppliers, and the preferences of the individual franchisees. Most importantly, as found by the magistrate judge, the impact of damages depends upon the peculiar conditions faced by each franchisee.

Both parties also cite to Sixth Circuit authority on the issue of whether [**68] forcing or coercion are an element of a tying arrangement. See, e.g., *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123 (6th Cir. 1981). However, these cases appear to be inconclusive or to support the general method of proof outlined by the court. But given the nature of the tying claim alleged here and the Supreme Court's language in *Jefferson Parish*, some sort of forcing, conditioning, or actual coercion must be individually shown by plaintiffs as part of their cause of action under the scheme presented by plaintiffs in support of their class certification motion.

As it appears to the court, the only arguable basis for certification of a national class action are the franchise agreements signed after mid-1990. Franchise agreements signed after mid-1990 prevent franchisees from requesting an alternate distributor of logoed products. Only plaintiff Smith signed one of these agreements, and it only applies to one of his three stores. For some reason, possibly because plaintiffs Fields and Hennessy, as well as a large number of current franchisees have franchise agreements that were signed prior [**69] to mid-1990, plaintiffs have not sought class certification based upon these later franchise agreements. It is not clear if plaintiff Smith has even alleged his one post mid-1990 agreement as the basis of an individual claim.

It could be argued that the post mid-1990 agreements, combined with the 1989 exclusive licensing agreement, evidence an express contractual tie-in of logoed products which could receive class treatment. The magistrate judge regarded the post mid-1990 agreements as so important as to justify the creation of thirty-two subclasses because of his finding that the later franchise agreements create a better opportunity for recovery. Little Caesar argues that even if there were a tie-in of logoed products, such a tie-in would not violate the antitrust laws. See *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), cert. denied, 451 U.S. 970, 68 L. Ed. 2d 349, 101 S. Ct. 2047 (1981). However, plaintiffs cite *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1970), cert. denied, 405 U.S. 955 (1972) for the proposition that such conduct would violate the antitrust laws. In any event, because the court will not delve into the merits of a possible claim by plaintiffs regarding a [**70] tie-in of logoed products, the court must simply assume that such a claim is viable. As a result, it could be argued, although plaintiffs do not advance this claim, that there is a basis for class certification of a claim by those franchisees who signed the post mid-1990 agreement that their ability to purchase logoed products was tied to their status as a franchisee. An obvious point of [*906] dispute arises, however, as to whether such a class could be certified as to only the logoed products, or whether such a class could claim that a tie-in of the logoed products resulted in a tie-in of all supplies because of the alleged economic necessity of one-stop shopping. Furthermore, the issue remains whether a claim by all franchisees with agreements from after mid-1990 as to all supplies, rather than just logoed products, would

satisfy the requirements of [Rule 23\(b\)\(3\)](#). The court declines to certify any such class, given that plaintiffs have made the choice not to pursue certification of such a group at this time.

In conclusion, the court finds that individual issues of fact predominate over common issues of fact in the proposed claims raised by plaintiffs as the basis for certification of [\[**71\]](#) a national class as to the tying arrangement. Because of the nature of plaintiffs' proposed claim, as found by the magistrate judge and by this court, the facts necessary to prove the tying arrangement alleged by plaintiffs are not conducive to class-wide treatment since the issue of whether individual franchisees were forced to purchase supplies necessitates individual proofs. As a result, the court will deny plaintiffs' motion for class certification. The court does acknowledge, however, that a national class could arguably be certified composed of franchisees governed by agreements executed after mid-1990. Because the plaintiffs have not proposed this class and the parties have not had an opportunity to brief the many issues involved, the court will not certify such a proposed class.

C. Class Certification and LCNAP

Plaintiffs claim that defendant LCNAP has wrongly disbursed advertising funds collected from each of their franchisees. Plaintiffs assert that they will show that Little Caesar has converted some of the funds to its own use rather than for purely advertising purposes as required by the franchise agreement. They are seeking [Rule 23\(b\)\(2\)](#) certification of a class [\[**72\]](#) composed of all franchisees on the LCNAP claim.

In his report, the magistrate judge recommended [Rule 23\(b\)\(2\)](#) certification of plaintiffs' LCNAP claim. The magistrate judge found that because he had already recommended class certification of several other issues, he "saw little harm in also certifying this narrow claim."

In its objections, Little Caesar contends that resort to the device of a class action is unnecessary as to this claim. If plaintiffs prove their claim, Little Caesar admits that it would be forced to reimburse LCNAP for the full amount of the allegedly improper expenses. As a result, Little Caesar contends that in this way the entire class would benefit without the need for the cumbersome process of class certification.

The court similarly finds that class certification is inappropriate for the LCNAP claims presented in Counts V and VI. The magistrate judge's recommendation on this issue was made contingent upon the acceptance of his other recommendations in favor of the certification of regional or national classes on the tying claim and the claim relating to national price advertisements. Because the court will deny plaintiffs' motion for certification on the [\[**73\]](#) tying claim and will enter summary judgment in favor of Little Caesar on the price advertising claim, the magistrate judge's reasoning is not still be applicable to the LCNAP claim. As Little Caesar correctly points out, no benefit would be gained from certification since all the class members would benefit if the LCNAP claim is decided in their favor. As a result, the costs and burdens of class certification are not necessary in this instance.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the magistrate judge's March 31, 1995 report and recommendation is **ACCEPTED IN PART** and **REJECTED IN PART**.

IT IS FURTHER ORDERED that plaintiffs' motion for class certification is **DENIED**.

IT IS FURTHER ORDERED that plaintiffs' motion to stay defendant Little Caesar's motions for partial summary judgment is **DENIED**.

[*907] IT IS FURTHER ORDERED that defendant Little Caesar's January 30, 1995 motion for partial summary judgment as to the scope of the 1989 licensing agreement is **GRANTED**.

IT IS FURTHER ORDERED that defendant Little Caesar's February 28, 1995 motion for partial summary judgment and/or to dismiss is **GRANTED**. The [\[**74\]](#) court will enter judgment in favor of defendants as to all plaintiffs on

895 F. Supp. 884, *907 1995 U.S. Dist. LEXIS 11300, **74

Counts I and III, as to the Fields and Hennessy plaintiffs on Counts II and IV, as to the Smith plaintiffs on Counts II and IV before mid-1990, as to all plaintiffs regarding their breach of contract claim concerning supplier discounts other than Hormel, and as to all plaintiffs on the breach of contract claim in Count V relating to national price advertising.

SO ORDERED.

Dated: 8/7/95

PAUL V. GADOLA

UNITED STATES DISTRICT JUDGE

End of Document

E.W. French & Sons v. General Portland

United States Court of Appeals for the Ninth Circuit

July 14, 1995, Argued and Submitted, Pasadena, California ; August 8, 1995, Filed

No. 94-55525

Reporter

1995 U.S. App. LEXIS 23773 *; 1995-2 Trade Cas. (CCH) P71,112

E.W. FRENCH & SONS, INC., Plaintiff-Appellant, v. GENERAL PORTLAND, INC., Defendant-Appellee.

Notice: [*1] RULES OF THE NINTH 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: 62 F.3d 1424, 1995 U.S. App. LEXIS 29320.

Prior History: Appeal from the United States District Court for the Central District of California. D.C. No. CV-78-01928-RJK. Terry J. Hatter, Jr., District Judge, Presiding. Robert J. Kelleher, Senior District Judge, Presiding.

Disposition: AFFIRMED in part; REVERSED and REMANDED in part.

Core Terms

competitors, cement, concrete, conspiracy, announcements, prices, district court, price-fixing, directed verdict, summary judgment, antitrust, envelopes, mailing, customers, ready-mix, rule of reason, manufacturers, standardize, memorandum, amend

LexisNexis® Headnotes

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

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Inferences & Presumptions > Inferences

HN1 [blue icon] Inchoate Crimes, Conspiracy

Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment 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. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action. However, a plaintiff need not present evidence tending to exclude the possibility of unilateral action unless a defendant first shows that its conduct is consistent with other plausible explanations.

Judges: Before: LAY, ** BRUNETTI and RYMER, Circuit Judges.

Opinion

MEMORANDUM *

In the 17th year of this lawsuit's life, it has returned to the circuit essentially in the same shape it was before, only older. Last time, we reversed a directed verdict on the claim by E.W. French & Sons, Inc., a maker and [*2] seller of ready-mix concrete, that cement manufacturers, including General Portland, Inc., conspired to fix prices because the district court used the wrong evidentiary standard in ruling on admissibility of co-conspirator statements. [E.W. French & Sons, Inc. v. General Portland, Inc., 885 F.2d 1392 \(9th Cir. 1989\)](#) ("French I"). We also reversed judgment in favor of General Portland on French's claim that GP had conspired with French competitors (the "Conrock conspiracy") to put French out of business because the district court erred in instructing the jury that even if the Conrock conspiracy harmed competition, the elimination of a single competitor could never violate § 1. [Id. at 1401](#). The jury had found a conspiracy, but no effect on competition in the relevant market. We further held that the probative value of evidence of two mailing lists in General Portland files which French believed show that GP exchanged price information with competitors and fraudulently concealed its involvement in the alleged cement price-fixing conspiracy, if authentic, should have been left to the trier of fact. Finally we stated that if there were sufficient evidence on remand to go to [*3] the jury on the price-fixing claim, that a reasonable juror could conclude that GP denials of price-fixing coupled with use of "plain white envelopes" to mail pricing information to competitors sufficed to show that GP sought fraudulently to conceal the alleged conspiracy. [Id. at 1399-1400](#).

On remand, the district court ¹ reaffirmed its prior decision to exclude hearsay, considered evidence previously admitted only for a limited purpose, and reaffirmed the price-fixing directed verdict. Before retrial of the rule of reason case, the court granted summary judgment to GP on the footing that French had failed to prove the existence of a relevant antitrust market in ready-mix concrete in the West Los Angeles area. French appeals both decisions, as well as the district court's denial of its motion to amend, brought after final judgment was entered, to present new claims under California law.

[*4] We have jurisdiction under [28 U.S.C. § 1291](#). We affirm the summary judgment on French's rule of reason claim and the order denying French's motion to amend. We reverse the directed verdict on the cement price fixing claim and remand for further proceedings. And we would like to see what remains of this case move along expeditiously, by ADR if possible ² and an early trial if not.

I

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

* 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 Hon. Terry J. Hatter, Jr., presiding. Thereafter, the action was transferred to the calendar of Hon. Robert J. Kelleher.

² The services of the Ninth Circuit Settlement Unit are available and the parties are ordered to meet and confer, and consult with Chief Circuit Mediator David E. Lombardi, Jr., about the prospects of settlement. A status report shall be filed with the district court and this court within 45 days of the date this disposition is filed.

Because it would make French's appeal on the price-fixing claim go away, we first treat General Portland's insistence that the law of the case precludes this court from overturning the directed verdict.³ It doesn't. While *French I* obviously frames the remand, the district court considered [*5] evidence that it had not considered before: at a minimum, the "plain white envelope" mailing lists (Exhibits 992 and 996) were considered for all purposes whereas before they had been considered only for a limited purpose. Although the order is unclear, we assume from what the district court said that it also considered evidence that had previously been stricken as beyond the period of limitations. We therefore must look afresh at whether the directed verdict may stand.⁴

[*6] As French recognizes, an inference of conspiracy cannot be based solely on evidence of parallel movements in price or price protection in an oligopolistic market such as the cement market in which GP operated. But it argues that other evidence -- especially the 1970 and 1973 mailing lists in GP's files with the missing "white paper envelope" signal above competitors' names in the latter list; a GP vice president's acknowledgment that he knew about a competitor's price change before it was announced; a meeting of competitors at the Owl Ranch; efforts by a GP competitor to standardize pricing; advance price announcements; and a GP memorandum about price protection -- indicates collusive behavior rather than procompetitive conduct.

We examine the evidence through the lens of [*Matsushita v. Zenith Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)*](#), because French's case is essentially circumstantial. *Matsushita* admonishes that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," and that

HN1 [↑] conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference [*7] of antitrust conspiracy. To survive a motion for summary 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. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action. . . .

Id. at 588. However, a plaintiff need not present evidence tending to exclude the possibility of unilateral action unless a defendant first shows that its conduct is "consistent with other plausible explanations." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 440 (9th Cir. 1990)*.

Uniformity among the six cement manufacturers in the Los Angeles market in the price of cement to ready-mix dealers, parallel price moves, the refusal of the firms to underbid each other for this business, and the testimony of cement company officials (including Don Muir of General Portland) to that effect, are to be expected as normal incidents of individual self-interest in an oligopolistic market with few competitors [*8] and a fungible, undifferentiated product. [*Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 665* \(9th Cir.\), cert. denied, 375 U.S. 922, 11 L. Ed. 2d 165, 84 S. Ct. 267 \(1963\)](#); VI Phillip E. Areeda, Antitrust Law PP 1410b, 1430 (1986). As we have held, it is plausible to assert that interdependent parallel pricing behavior can occur when the number of significant rivals in a market is sufficiently small. *Coordinated*, 906 F.2d at 443 (market comprising 12 defendants). Thus, French's evidence of parallel price moves does not itself support an agreement in violation of the antitrust laws. [*Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 526 \(9th Cir. 1987\)*](#).

³General Portland relies almost entirely on the "law of the case" from *French I*, and essentially leaves it to us to ferret out its argument related to the facts from earlier briefs that are incorporated by reference. This is contrary to [*9th Cir. R. 28-3.2*](#). Moreover, it is not helpful to the court, which is what briefs are for.

⁴French does not appeal the district court's reaffirmed ruling on the inadmissibility of co-conspirator hearsay, so we do not revisit that issue.

Nor does evidence of advance price announcements by the cement manufacturers create a stronger inference of agreement than of independent action. It likewise is not sufficient to infer agreement under *Matsushita*, as the evidence clearly demonstrates a plausible legitimate reason for the practice: cement customers had to precommit to supply concrete for construction projects at set prices. Cf. *Coordinated*, 906 F.2d at 448 (publishing prices creates permissible inference [*9] of agreement under *Matsushita* where defendant's customers are captive franchisees and "not free to shop around for their oil").

Similarly, the memorandum by which French believes that Jack E. Craddock of Monolith (a GP competitor) instructed his subordinate to "standardize prices" with Monolith's competitors is insufficiently probative of an agreement involving General Portland. The memorandum tells the employee to discuss "the possibility of standardizing invoicing and pricing"; Craddock explained that this meant that prices should be standardized "in hundredweights and tonnage versus barrels." Seeking to standardize the way in which cement was quoted to customers does not tend to exclude the possibility of unilateral action in pricing.

We also do not see what the 1973 internal memorandum from GP's Puckett to J.R. Johnson concerning price protection for its customer, Conrock, adds to the mix. It evinces uncertainty at General Portland about competitors' price protection offers to Conrock, and reflects competition between Conrock's cement suppliers for its business, not collusion.

An expense report showing that Johnson of GP spent \$ 22.40 on drinks and met with a "Mr. Schooner" [*10] (presumably Paul Schoonover who was then president of Monolith) at the Owl Ranch was not admitted as substantive proof of conspiracy and, in any event, does nothing to create an inference of agreement to fix cement prices charged to ready-mix concrete dealers.

Finally, the fact that General Portland and Monolith sent out identical pricing announcements on the same day, August 14, 1972, fails to signify anticompetitive behavior since these price announcements followed on the heels of similar moves announced earlier, at different times, by Riverside Cement, California Portland, Southwestern Portland, and Kaiser. GP's announcement and the coincidence of Monolith's same-day announcement are consistent with independent behavior in a legal, but concentrated market. VI Areeda, P 1410b, at 66.

Thus, most of French's evidence is insufficient to permit an inference of conspiracy under *Matsushita*. However, General Portland did not put forward any pro-competitive business justification for mailing price information to its competitors in plain white envelopes, or for redacting that part of the mailing list bearing the "plain white envelopes" legend in the 1972 version. Similarly, General [*11] Portland failed to explain the testimony of Jim Tortrice, a former General Portland credit manager, that he heard Johnson state at an internal GP meeting sometime in 1974 or 1975 that he possessed a price announcement from a competitor that had not yet been sent out to customers. While price announcements to customers in advance of effective dates may have had a legitimate business function in this marketplace, General Portland offered no legitimate justification for sharing those announcements with competitors ahead of general distribution. Counsel's suggestion at oral argument that the practice could be explained by the fact that cement companies also purchased cement from each other is unsupported by any portion of the record cited to us. In any event, purchases among cement companies would not explain the inference raised by Tortrice's testimony that GP had its competitors' price announcements in hand before they were generally distributed.

Overall, French's case is about as thin as it can be. Its evidence, in the main, is adequately explained as legitimate business conduct raising no reasonable inference of illegal agreement. However, we cannot say the same for the "plain [*12] white envelopes" and prior exchange of competitors' price announcements. As we held in *French I* that a reasonable juror could conclude that GP denials of price-fixing together with the use of "plain white envelopes" to mail pricing information to competitors showed that General Portland sought to fraudulently conceal the alleged price-fixing conspiracy, we are hard pressed not to conclude here that it suffices to create a jury question regarding the existence of the alleged conspiracy itself.

We accordingly hold that French's evidence does not permit only one reasonable conclusion, that General Portland was not part of a cement price-fixing conspiracy. The directed verdict on that claim must, therefore, be reversed.

II

French's appeal from the summary judgment on its "rule of reason" claim (that General Portland conspired with Conrock to drive French out of business) turns on whether the district court properly struck the declaration of Wayne T. French which, French submits, affords sufficient evidence of a restraint on trade in the relevant market to go to the jury. The court excluded as hearsay French's statement that Tom Lipman (of Livingston-Graham, a French competitor) [*13] told him that concrete producers other than French had agreed to adhere to a fixed discount. French argues that Lipman's statement was admissible under *Fed. R. Evid. 804(b)(3)* or *Fed. R. Evid. 804(b)(5)*, since Lipman had died and was thus unavailable. However, *Rule 804* arguments are waived; French raised them only in its motion for reconsideration after summary judgment, and it does not appeal the denial of that motion. Regardless, excluding Wayne French's account was within the court's discretion, as his version of what Lipman had said changed as the litigation wore on. Certainly we cannot say that the statements French attributed to Lipman so "solidly" inculpate the declarant, *United States v. Nazemian*, 948 F.2d 522, 530 (9th Cir. 1991), or are so trustworthy, *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 713 (9th Cir. 1992) (*Rule 804(b)(5)* is not to be used as a new and broad hearsay exception, but rather rarely and in exceptional circumstances), that it was erroneous as a matter of law to exclude them.⁵

[*14] The court also excluded Wayne French's opinion that removing any one of the independent ready-mix concrete manufacturers in West Los Angeles "as a competitive brake on the high zone prices charged by the integrated producers in West Los Angeles, would . . . create an unreasonable restraint on the sales of ready-mix concrete in West Los Angeles." French claims the court erred because lay opinion based on years of experience is admissible. It may be, but not on subjects requiring particularized expertise. French may have considerable expertise and experience in the concrete industry, but he was never shown to have the economics expertise required to opine on what constitutes an unreasonable restraint on trade. *Pacific Coast Agriculture Export Assoc. v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), cert. denied, 425 U.S. 959, 48 L. Ed. 2d 204, 96 S. Ct. 1741 (1976), upon which French relies, is not to the contrary; it establishes only that experienced businesspeople may be qualified to project market shares for the purpose of establishing damages in an antitrust case. For these reasons, the district court did not abuse its discretion in rejecting the declaration.

[*15] We have not been directed to any other substantial evidence of a defined market within which to measure anticompetitive effect, if any. French uses "Southern California," "West Los Angeles," the "Los Angeles basin" and "Los Angeles" somewhat interchangeably. That aside, counsel's suggestion at oral argument that the existence of a relevant market was shown by testimony of the owner of Pearman & Sons, a concrete maker in Gardena, that he "couldn't make any money" hauling concrete to West Los Angeles, falls short of the mark. That a single concrete supplier could not profitably sell in West Los Angeles (however characterized) does not suffice to demonstrate that the West Los Angeles concrete market was sufficiently insulated from *all* other surrounding suppliers to make it a relevant market within which trade might be restrained. Indeed, French itself occasionally hauled concrete from Hawthorne to West Los Angeles.

French's reliance on *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024 (9th Cir. 1989), aff'd, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 114 L. Ed. 2d 366, 111 S. Ct. 1842 (1991), is misplaced. There, we were concerned with an alleged boycott, where injury [*16] to competition is generally presumed, and with the question whether injury to competition had been adequately pleaded for purposes of Rule 12(b)(6) -- not with the question whether sufficient facts have been proved (on the basis of a full trial record) to raise a genuine issue of material fact for purposes of summary judgment. Pearman's testimony does not show that French's removal injured competition by allowing other concrete manufacturers to charge higher prices, or had any other appreciable effect on the market.

⁵Because we do not reverse the exclusion of the French declaration, and because we agree with the district court that the deposition testimony of Mr. Watkins is insufficient to raise a reasonable inference of a concrete price fixing conspiracy (a conclusion with which French does not take issue on appeal), we need not address the merits of the legal theory for which this evidence is intended to provide support: that French could prove a relevant market for purposes of the GP-Conrock conspiracy claim by showing a price fixing conspiracy among West Los Angeles concrete sellers. *French I*, 885 F.2d at 1402 (Farris, J., concurring). In any event, French has failed to argue the merits of this theory in its briefs to this court.

We therefore hold that the district court correctly concluded that French failed to raise a genuine issue of material fact with respect to the existence of a relevant antitrust market among producers of concrete in West Los Angeles. Summary judgment on the "rule of reason" claim was therefore correctly entered.

III

French argues that the district court erred in refusing leave to amend to allege claims under California law that were "parallel" to its federal antitrust claims. In its motion for reconsideration, filed 16 years after bringing suit and only after final judgment was entered, French asked for leave to assert an "intentional interference" claim under [^{*17}[Herron v. State Farm Mutual Ins. Co., 56 Cal. 2d 202, 14 Cal. Rptr. 294, 363 P.2d 310 \(Cal. 1961\)](#)], and in the alternative to assert a claim for restitution under [Cal. Bus. & Prof. Code § 17203](#).

The district court did not abuse its discretion. We recognize that leave to amend "shall be freely given when justice so requires" and the policy underlying [Fed. R. Civ. P. 15](#) is to be applied with "extreme liberality." [Morongo Band of Mission Indians v. Rose, 893 F.2d 1074 \(9th Cir. 1990\)](#). But while under *Morongo* a two year delay is "not alone enough to support denial," [id. at 1079](#), nevertheless it is "relevant." French's delay here is nearly an order of magnitude longer and unexplained.

There is no reason why the *Herron* claim, based on a 1961 opinion, could not have been brought at the outset of this action. Similarly, French's argument that it needed to wait for [Bank of the West v. Superior Court, 2 Cal. 4th 1254, 10 Cal. Rptr. 2d 538, 833 P.2d 545 \(Cal. 1992\)](#), to bring its [§ 17203](#) restitution claim is without basis; French I clearly stated in 1989 that the statute authorizes restitution, [885 F.2d at 1402](#), and *Bank of the West* noted that the statute [^{*18}[had been held to authorize restitution on quite liberal grounds as early as 1983. 10 Cal. Rptr. 2d at 546.](#)

Conclusion

We affirm the district court's grant of summary judgment to General Portland on French's rule of reason claim and the denial of French's motion for leave to amend. We reverse the district court's grant of a directed verdict to General Portland on French's cement price-fixing claim and remand for further proceedings on that claim.

Each side shall bear its own costs.

AFFIRMED in part; REVERSED and REMANDED in part.

Nichols Motorcycle Supply v. Dunlop Tire Corp.

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

August 10, 1995, Decided ; August 15, 1995, DOCKETED

No. 93 C 5578

Reporter

1995 U.S. Dist. LEXIS 12153 *

NICHOLS MOTORCYCLE SUPPLY INC., an Illinois corporation, Plaintiff, v. DUNLOP TIRE CORPORATION, a Delaware corporation, ED TUCKER DISTRIBUTOR, INC. d/b/a TUCKER-ROCKY DISTRIBUTING, a Texas corporation, and LEMANS CORPORATION, a Wisconsin corporation, Defendants.

Core Terms

distributors, termination, prices, tires, discounts, competitor, dealer, Motorcycle, sales, conspiracy, warehouse, vertical, manufacturer, memo, summary judgment, conversation, market share, antitrust, customers, pricefixing, increased price, damages, Reply, parties, rule of reason, horizontal, percent, consumers, products, cases

LexisNexis® Headnotes

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

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

HN1[] Price Fixing & Restraints of Trade, Vertical Restraints

Restraints imposed by agreement between competitors have traditionally been labelled horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints; thus the nature of a restraint is determined by the type of agreement that gives rise to the restraint rather than the anticompetitive economic effects of the restraint.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3 Sherman Act, Claims

According to the Sherman Act, particularly [15 U.S.C. § 1](#), a plaintiff claiming a violation must establish a combination or some form of concerted action between at least two legally distinct economic entities. Whether an unlawful conspiracy or combination is demonstrated should be judged by what the parties actually did rather than by words they used. An explicit agreement is not a necessary part of a Sherman Act conspiracy where joint and collaborative effort is pervasive. Under well-established principles of [antitrust law](#), unilateral conduct by a single person or enterprise falls outside the scope of this provision. Once a plaintiff establishes the existence of an illegal contract, combination or conspiracy it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade under either the per se rule or the rule of reason. The nature of the restraint determines which rule must be applied.

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 > Boycotts

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

Transportation Law > Interstate Commerce > Per Se Invalidity

HN4 Practices Governed by Per Se Rule, Boycotts

Conduct considered illegal per se is limited to cases where a defendant's actions are so plainly harmful to competition that they are presumed illegal and the need for further proof of anticompetitive impact is unnecessary. Per se cases include horizontal and vertical pricefixing agreements and certain types of group boycotts. Pricefixing 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. Rather, pricefixing agreements need only have been formed for the purpose and effect of fixing or stabilizing the price of a product in interstate commerce. Tacit agreements are therefore actionable if they can be shown to exist.

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

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

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

HN5 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The per se presumption eliminates the plaintiff's burden of proving anticompetitive impact to the finder of fact through market analysis by an expert economist, as required under the rule of reason; it does not eliminate the need to find antitrust injury, nor does it relieve the plaintiff of its burden to identify and articulate the precise

anticompetitive impact caused by the per se pricefixing violation. An antitrust injury flows from pricefixing agreements that plainly reduce competition. Finding an agreement is only the first step; the agreement is not illegal under the Sherman Act, specifically [15 U.S.C.S. § 1](#), unless the nature of the pricefixing agreement reduces competition and injures dealers or consumers. The court must carefully scrutinize the competitive effect of the pricefixing agreement alleged to be illegal per se. Because the presumption of injury eliminates the need for a plaintiff to produce an economist, this theoretical hurdle is now a question of law for the court on summary judgment.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

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

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > Scope

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

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

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > General Overview

[HN6](#) [PDF] Vertical Restraints, Nonprice Restraints

An agreement to terminate a distributor without evidence of a related agreement on price is not sufficient to establish a per se violation. However, an agreement to terminate, if proven to have an anticompetitive impact, can be illegal under the rule of reason as a nonprice restraint.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

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

Evidence > Inferences & Presumptions > Inferences

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

[HN7](#) [PDF] Preservation of Relevant Evidence, Exclusion & Preservation by Prosecutors

An agreement that is illegal per se under the Sherman Act, specifically [15 U.S.C.S. § 1](#), is difficult to prove. The antitrust analysis proceeds in stages because it involves shifting burdens that lead to an ultimate burden of proof that is extremely difficult for a plaintiff to satisfy. There is a two-part test: (1) is the plaintiff's evidence of a conspiracy ambiguous, that is, is it as consistent with the defendant's permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendant was pursuing these independent interests; and a burden shifting formula: when the defendant establishes that its conduct is consistent with independent action, the plaintiff is required to come forward with evidence tending to exclude the possibility of independent action. Ultimately, the plaintiff must demonstrate, through specific evidence, that the inference of conspiracy to fix prices is reasonable in light of the competing inference of independent action.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

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

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

HN8 [] Sherman Act, Claims

The Sherman Act requires that there be a contract, combination, or conspiracy between the manufacturer and other distributors in order to establish a violation. [15 U.S.C.S. § 1](#). Independent action is not proscribed. A manufacturer generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. The manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination. The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been per se illegal since the early years of national antitrust enforcement. The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.

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 > Nonprice Restraints

HN9 [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

On a claim of concerted pricefixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. Evidence that is sufficient to show agreement is evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.

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

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

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

Contracts Law > Contract Formation > General Overview

HN10 [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The concept of a meeting of the minds or a common scheme to fix prices in a distributor termination case includes more than a showing that the nonterminated distributor conformed to the manufacturer's suggested resale price. It means that evidence must be presented by the plaintiff that shows that the distributor not only communicated its acquiescence or agreement, but that the manufacturer also sought this acquiescence.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN11[**Defenses, Ambiguities & Mistakes**

A plaintiff must produce evidence that tends to preclude independent action. The range of justifiable inferences that can be drawn from ambiguous evidence is limited. Direct evidence of a conspiracy will always meet this standard. Ambiguous circumstantial evidence, alone, will not be enough. Ambiguous evidence permits equally competing inferences without tending to point in one direction or the other. Ambiguous evidence cannot be sent to a jury because a court may not invite the factfinder to speculate that an agreement existed. To prevent such speculation, the range of permissible inferences that may be drawn from ambiguous evidence must be limited, and cannot be used, without more, to establish the existence of an agreement under [15 U.S.C.S. § 1](#) of the Sherman Act. Conversely, unambiguous evidence tends to point in a single direction. The absence of ambiguity is defined as evidence that tends to exclude the possibility that the defendants acted independently for lawful business reasons, rather than in concert for unlawful purposes.

Antitrust & Trade Law > Sherman Act > General Overview

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

Direct evidence of an agreement under [15 U.S.C.S. § 1](#) of the Sherman Act includes such things as documents, meetings, and participant testimony that defendants exchanged commitments or otherwise collaborated by some means other than making a marketplace decision.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN13[**Antitrust & Trade Law, Sherman Act**

Conscious parallelism by itself is not enough to support an antitrust conspiracy case nor does evidence of informal communications among several parties unambiguously support an inference of conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

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

Proof of parallel business behavior does not conclusively establish agreement and such behavior does not of itself constitute a Sherman Act offense. However, parallelism in an interdependent market plus conspiratorial motivation and acts against self-interest may provide the basis from which to infer an agreement.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN15**](#) [+] Antitrust & Trade Law, Sherman Act

Market interdependence exists when competitors base their pricing decisions in part on anticipated reactions to them. Interdependence exists when each competitor's pricing decision is interdependent with that of its rivals: each knows that his choice will affect the others, who are likely to respond, and that their responses will affect the profitability of its initial choice.

Antitrust & Trade Law > Sherman Act > General Overview

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

Evidence > Inferences & Presumptions > General Overview

[**HN16**](#) [+] Antitrust & Trade Law, Sherman Act

Although interdependence must be present to infer a conspiracy from parallel behavior, it cannot serve as the only basis for a claim under [15 U.S.C.S. § 1](#) of the Sherman Act. What is needed is additional proof from which the factfinder can conclude that parallel behavior would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.

Antitrust & Trade Law > Sherman Act > General Overview

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

Evidence > Inferences & Presumptions > General Overview

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

[**HN17**](#) [+] Antitrust & Trade Law, Sherman Act

Termination of a distributor following or in response to price complaints is not enough to support the inference of a conspiracy. A defendant's actions become illegal only when its concerns and plans cross the line between encouragement and agreement.

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN18**](#) [+] Antitrust & Trade Law, Sherman Act

To infer a conspiracy from parallel behavior, the parallel conduct must occur in a logically relevant manner. For instance, it cannot arise from a plausible coincidence or an expectable response to a common business problem. Although simultaneous parallel action may be convincing, the time frame is not limited to events occurring at a single moment. The definition is functional rather than literal and asks whether each alleged conspirator would normally have knowledge of another's act before deciding upon his own course of action.

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

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

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

HN19 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason, a plaintiff must still prove the existence of an agreement that restrains trade. An agreement under the rule of reason is not as difficult to prove as it is under the per se rule, because there is not a presumption of antitrust injury. In a rule of reason case, the inference of an illegal agreement may be sustained merely by producing evidence that casts doubt on inferences of independent action. However, although the agreement may not be as difficult to prove under the rule of reason, additional elements must be met. For instance, a plaintiff must show that the defendants had market power to fix prices and that the pricefixing scheme had an anticompetitive impact on the market as a whole.

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

HN20 Price Fixing & Restraints of Trade, Vertical Restraints

Most cases fall outside the categories of agreements held to be illegal per se. In the typical case, a plaintiff must prove an antitrust injury under the rule of reason. Under this test, a plaintiff bears the initial burden of showing that the challenged agreement has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market protects competition in general, rather than individual competitors. The plaintiff must also show that the defendant had market power to raise prices significantly above the competitive level without losing business. A district court must proceed to the first step in the rule of reason analysis, balancing the effects the vertical restraint has on competition, only if the evidence gives rise to the inference that defendants had sufficient market power to control dealer resale prices. Ultimately, the factfinder must weigh the harms and benefits of the challenged behavior.

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

HN21 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

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

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

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

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

Termination of a small distributor pursuant to a price agreement does not restrain trade until distribution is channeled exclusively through a few large or specifically advantaged dealers.

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

HN23 [] Horizontal Refusals to Deal, Boycotts

To prove a group boycott, a plaintiff must allege a horizontal agreement by the defendants to engage in concerted activity to deprive the plaintiff of access to sell goods.

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

HN24 [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se offenses are those set out in § 3(1) of the Illinois Antitrust Act (IAA), [740 Ill. Comp. Stat. 10/3](#). The conduct proscribed by § 3(1) is violative of the IAA without regard to, and the courts need not examine, the competitive and economic purposes and consequences of such conduct. However, a vertical pricefixing agreement is not prohibited under § 3(1). Section 3(1) does not reach vertical agreements, such as agreements between buyers and sellers fixing the price at which the buyer shall resell.

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

HN25 [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The analysis for rule of reason claims under § 3 of the Illinois Antitrust Act, [740 Ill. Comp. Stat. 10/3](#) tracks the legal analysis applied in federal cases under [15 U.S.C.S. § 1](#) of the Sherman Act.

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

[HN26](#)[] Practices Governed by Per Se Rule, Boycotts

Boycotts are not proscribed by § 3(1) of the Illinois Antitrust Act (IAA), [740 Ill. Comp. Stat. 10/3](#). Horizontal boycotts may be found unlawful under the general restraint of trade § 3(2) of the IAA, [740 Ill. Comp. Stat. 10/3](#). Vertical agreements to refuse to deal or boycotts, that is, agreements between persons at different levels of production and distribution which have as their immediate purpose the depriving of a third person of a supply of a commodity or service, may also be found violative of § 3(2).

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 > Jurisdiction

[HN27](#)[] Robinson-Patman Act, Claims

To establish a prima facie violation of § 2(a) of the Robinson-Patman Act, codified at [15 U.S.C.S. § 13\(a\)](#), a plaintiff must establish the existence of (1) price discrimination, and (2) injury to competition.

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 > ... > Private Actions > Remedies > General Overview

[HN28](#)[] Remedies, Damages

Like any damages remedy, the purpose of the Clayton Act is to place the antitrust plaintiff as far as possible in the position it would have occupied but for the violation. Thus, any calculation of damages must strive to approximate a violation-free state of affairs. The plaintiff can not merely infer damages from the fact that the defendant had engaged in discriminatory pricing irrespective of any showing that the defendant's behavior had an effect on competition.

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

[HN29](#)[] Private Actions, Remedies

Causation is established where the plaintiff presents evidence that many customers would not have purchased from the defendant had they known of the defendant's wrongdoing and that the plaintiff's position in the market would have been more advantageous absent the defendant's wrongful conduct.

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

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN30 [blue icon] Price Discrimination, Buyer Liability

Section 2(f) of the Robinson-Patman Act, codified at [15 U.S.C.S. § 13\(f\)](#), which makes it unlawful for a buyer knowingly to induce or receive a discrimination in price which is prohibited by the Robinson-Patman Act. In order to establish a *prima facie* case under § 2(f) of the Robinson-Patman Act, a plaintiff must show that the distributors knew or should have known that it was receiving greater discounts from the manufacturer than the plaintiff, and that it knew or should have known that the lower prices it induced or received from the manufacturer were discriminatory in violation of § 2(a) of the Robinson-Patman Act, codified at [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

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

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

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

HN31 [blue icon] Defenses, Cost Justification Defense

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, codified at [15 U.S.C.S. § 13\(a\)](#) makes it illegal to discriminate in price between buyers when the consequence is an injury to competition. To establish a *prima facie* violation of § 2(a), a plaintiff must establish the existence of (1) price discrimination, and (2) injury to competition. A *prima facie* violation, however, may be rebutted by one of the Robinson-Patman Act's two affirmative defenses: (1) cost justification or (2) meeting a competitive price, commonly known as the meeting competition defense. If established, an affirmative defense eliminates the need to decide the issue of injury to competition because a properly established defense renders such injury justifiable.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Contracts Law > Personal Property > Bona Fide Purchasers

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

HN32 [blue icon] **Defenses, Meeting Competition Defense**

See [15 U.S.C.S. § 13\(b\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN33 [blue icon] **Robinson-Patman Act, Claims**

Price discrimination under the Robinson-Patman Act is merely a price difference between the price for which a defendant sells to one buyer versus the price to which it sells to another. Although the burden of establishing a factual basis for the defense falls on the defendant, all reasonable inferences must be drawn in favor of the defendant when the plaintiff is the moving party.

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

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

HN34 [blue icon] **Summary Judgment, Burdens of Proof**

The moving party has the burden of showing that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN35 [blue icon] **Robinson-Patman Act, Defenses**

The defense under § 2(b) of the Robinson-Patman Act, codified at [15 U.S.C.S. § 13\(b\)](#), has two elements; both must be factually supported to send the defense to a jury. The two elements of a § 2(b) defense are as follows. First, the seller, who has knowingly discriminated in price, must show the existence of facts that would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. Second, the seller must demonstrate that its price was a good-faith response to a competitor's lower price. There are four factors that may be relevant to the determination of the seller's good faith. These include

whether the seller (1) had received reports from other customers of similar discounts; (2) was threatened with a termination of purchases if the discount were not met; (3) made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data; and (4) had past experience with the buyer.

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

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

HN36[**Summary Judgment, Burdens of Proof**

When a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN37[**Price Discrimination, Defenses**

In most situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN38[**Price Discrimination, Defenses**

The good faith defense does not require that the defendant know the identity of his competitor or have concrete proof of the amount of the competitive offer.

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

HN39[**Regulated Practices, Trade Practices & Unfair Competition**

See [815 Ill. Comp. Stat. 505/2.](#)

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

HN40[**Regulated Practices, Trade Practices & Unfair Competition**

See 815 Ill. Comp. Stat. 501(f).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN41[**Consumer Protection, Deceptive & Unfair Trade Practices**

Some Illinois courts find that the Illinois Consumer Fraud Act (Consumer Fraud Act), [815 Ill. Comp. Stat. 505/1 et seq.](#), is intended to protect and benefit Illinois residents. For practical purposes, this means that a valid Consumer Fraud Act claim must include allegations of trade or commerce directly or indirectly affecting consumers in Illinois. Conversely, some courts construe the language of the Consumer Fraud Act broadly so that it was not strictly intended to protect only Illinois consumers, but also to prohibit fraud in the conduct of any trade or commerce. The United States District Court for the Northern District of Illinois believes that the Consumer Fraud Act, although intended to protect Illinois consumers, does not contain a geographic limitation, and that the Consumer Fraud Act should be construed liberally to include all consumers whose allegations of fraud directly or indirectly affect trade or commerce in Illinois.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

[HN42](#) [] Consumer Protection, Deceptive & Unfair Trade Practices

The next question is whether a genuine issue of triable fact exists on the issues of price discrimination and termination. To establish a claim under the Illinois Consumer Fraud Act, [815 Ill. Comp. Stat. 505/1 et seq.](#), a plaintiff must allege and prove the following elements: (1) the misrepresentation or concealment of a material fact; (2) an intent by the defendant that the plaintiff rely on the misrepresentation or concealment; and (3) that the deception occurred in the course of conduct of any trade or commerce. A plaintiff must show that the challenged conduct of the defendant proximately caused the damages alleged under the Illinois Consumer Fraud Act.

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

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

[HN43](#) [] Summary Judgment, Entitlement as Matter of Law

A misrepresentation is material if the party to whom it was made would have acted differently had the party known the truth. The determination of whether a misrepresentation is material involves factual determinations generally inappropriate for resolution on a summary judgment motion. Similarly, questions of intent are inappropriate for summary judgment.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Fees

[HN44](#) [] Franchise Relationships, Elements

A franchise is defined as a contract granting the right to engage in business and requiring the payment of a franchise fee. [815 Ill. Comp. Stat. 705/3\(1\)](#). A franchise fee is any fee or charge that is required by the franchisor for the right to sell, resell, or distribute goods or services, and is paid directly or indirectly by the franchisee. [815 Ill. Comp. Stat. 705/3\(14\)](#). A franchise thus requires a contract and a required fee. Illinois law requires that, in order for a payment to be considered a franchise fee, it must precisely fit within the statutory definition.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN45 [blue icon] Consideration, Promissory Estoppel

In Illinois, the elements necessary to establish a claim of promissory estoppel are: (1) an unambiguous promise; (2) on which the promisee reasonably and justifiably relied; (3) which was foreseeable by the promisor; and (4) on which the promisee relied to his detriment.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Contracts Law > ... > Estoppel > Equitable Estoppel > Elements of Equitable Estoppel

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN46 [blue icon] Consideration, Promissory Estoppel

Unlike promissory estoppel, the doctrine of equitable estoppel is based upon an intended misrepresentation or the concealment of a material fact rather than a promise. The elements necessary to assert a claim for equitable estoppel are: (1) words or conduct consisting of misrepresentations or concealment of material facts; (2) defendant must have actual or implied knowledge at the time the representations are made that they are untrue; (3) plaintiff does not know that the representations are untrue at the time that they are made; (4) the party estopped must intend or expect that his conduct or representations will be acted on by the plaintiff; (5) plaintiff relies on the representations in such a manner that he would be prejudiced if the party making the representations is allowed to deny the truth thereof.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

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

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

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

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

Contracts Law > Remedies > Equitable Relief > General Overview

HN47 [blue icon] Standards of Performance, Discharge & Termination

The equitable recoupment doctrine applies when a contract is terminated without just cause before the terminated party has the opportunity to recoup its losses. The doctrine is designed to remedy the inequity which arises after a manufacturer requires a distributor to make a sizeable investment in furtherance of the distributorship, terminates the relationship without just cause and leaves the distributor with substantial unrecovered expenses. In some courts, the doctrine is cognizable only after it is shown that the contract in question is terminable at will.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

[**HN48**](#) [+] **Types of Contracts, Covenants**

Both Illinois and New York courts have declared that every contract implies good faith and fair dealing between its parties. However, the covenant is not an independent source of contractual duties; rather, it guides the construction of explicit terms in the agreement. When a term in the contract grants a wide range of discretion, the party must exercise that discretion reasonably, with proper motive and in a manner consistent with the reasonable expectations of the parties. On its face, this covenant appears to be at odds with the concept of at will contracts, which allow a party to exercise its discretion to terminate a contractual relationship for virtually any reason. However, since an at will contract expressly allows each party to terminate at any time, the parties have no reasonable expectation that it will be terminated only for cause. Therefore, the covenant is not breached when one party terminates an at will contract because the party's actions were in accord with the other's reasonable expectations.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN49**](#) [+] **Business Torts, Fraud & Misrepresentation**

The elements of a cause of action for common law fraudulent misrepresentation are: (1) false statement of material fact; (2) known or believed to be false by the party stating it; (3) intent to induce the other party to act; (4) justifiable reliance by the other party on the misrepresentation; and (5) damage to the other party resulting from such reliance.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN50**](#) [+] **Business Torts, Fraud & Misrepresentation**

The reasonableness of a party's reliance is determined at the time that the party acts upon the misrepresentation. A plaintiff's subsequent opportunity to become informed of the true facts contradicting a misrepresentation cannot render prior reliance unreasonable.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN51**](#) [+] **Business Torts, Fraud & Misrepresentation**

As a general rule, promises of future conduct are not actionable in fraud. However, an exception to this rule exists when the false representation is part of a scheme or device used to accomplish the fraud. Whether or not a scheme actually existed in this case is a question of fact for the jury.

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

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

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

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

HN52 [Remedies, Damages

Questions of reasonableness and intent involve factual determinations and are generally inappropriate for resolution on a motion for summary judgment.

Contracts Law > Breach > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN53 [Contracts Law, Breach

The elements that a plaintiff must allege and prove for a valid claim of tortious interference with contract include: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) that the defendant was aware of the contractual relationship; (3) an intentional and unjustified inducement of a breach of the contract which causes a subsequent breach by the third party; and (4) damages. Generally, if a contract at will is terminated, no breach has occurred. Therefore, most courts do not recognize tortious interference with contract claims that are based upon a contract at will.

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

HN54 [Intentional Interference, Defenses

Lawful competition is a justifiable reason for interfering with contractual relations. A competitor who intentionally causes a third party not to enter into a contract with another or not to continue a contract terminable at will does not interfere improperly if: (1) the relation concerns a matter involved in the competition between the actor and the other; and (2) the actor does not employ wrongful means; and (3) his action does not create or continue an unlawful restraint on trade; and (4) when a business relationship affords the parties only the hope of benefits, the parties must allow for the rights of others.

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

[**HN55**](#) [blue icon] Unfair Business Practices, Elements

The elements of a claim for tortious interference with prospective economic advantage are: (1) the plaintiff's reasonable expectation of entering into a valid business relationship; (2) the defendant's purposeful interference and destruction of this legitimate expectancy; and (3) that the defendant's actions caused harm to the plaintiff. In cases where an individual with a prospective business relationship has a mere expectancy of future economic gain; a party to a contract has a certain and enforceable expectation of receiving the benefits of the contract. When a business relationship affords the parties no enforceable expectations, but only the hope of benefits, the parties must allow for the rights of others. They therefore have no cause of action against a bona fide competitor unless the circumstances indicate unfair competition, that is, an unprivileged interference with prospective advantage.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Criminal Law & Procedure > ... > Waiver of Jury Trial > Requirements for Waiver > Knowing & Voluntary Waivers

Criminal Law & Procedure > ... > Waiver of Jury Trial > Requirements for Waiver > General Overview

Criminal Law & Procedure > Juries & Jurors > Waiver of Jury Trial > Right of Waiver

[**HN56**](#) [blue icon] Jury Trials, Right to Jury Trial

Although [U.S. Const. amend. VII](#) guarantees the right to a jury trial in civil cases; this right may be waived. However, such a waiver must be made knowingly and voluntarily. Indeed, as the right of jury trial is fundamental, courts indulge in every reasonable presumption against waiver. The factors to consider in determining whether a contractual waiver of the right to jury trial was entered into knowingly and voluntarily include: (1) the parties' negotiations concerning the waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties, and (4) whether the waiving party's counsel had an opportunity to review the agreement.

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Judges: Ruben Castillo, United States District Judge

Opinion by: Ruben Castillo

Opinion

MEMORANDUM OPINION AND ORDER

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¹ On August 1, 1995, following oral argument, the Court, in a minute order, granted summary judgment in favor of all defendants as to Counts I-VI (1-6) of the Third Amended Complaint. The Court also granted Defendant Dunlop's Motion for Summary Judgment with respect to Counts IX through XIV (9-14) and Tucker/Rocky's and Parts Unlimited's Motion for Summary Judgment with respect to Counts VII, XVI, and XVII (7, 16 and 17) of the Plaintiff's Third Amended Complaint. The Court denied Defendant Dunlop's Motion for Summary Judgment with respect to Counts VII, VIII and XV (7, 8, and 15) of the Plaintiff's Third Amended Complaint. The Court further granted Plaintiff's Motion for Partial Summary Judgment on Defendant Dunlop's Section 2(b) affirmative defense to Count VII of Plaintiff's Third Amended Complaint, and denied Dunlop's Motion to Strike Plaintiff's jury demand. The minute order was intended to give the remaining parties sufficient time to prepare for trial. This Opinion is intended to provide reasons for those judgments. The entry of final judgment will be ordered on the date this Opinion is issued.

- (a) March 15, 1993: Tucker-Rocky Article Quoting Bob Gregg (PX 382)
- (b) The March 22, 1993 Gregg Letter (PX 4C)
- (c) March 22, 1993: Parts Unlimited Revises Price List (PX 444)
- (d) March 31, 1993: Phone Call (PX 624)
- (e) Late March 1993: Mike Buckley Replaces Pat Logue as Dunlop's National Sales Manager . . .
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- (j) April 30, 1993: Logue Conversation with Motorcycle Stuff Regarding Tucker-Rocky's Low Prices
- (k) May 6, 1993: Buckley Visits Nichols, Meets Jack Jesse and Writes Call [*3] Report (PX 14)
- (l) May 6, 1993: Buckley Spends Evening with Jeff Fox of Parts Unlimited
- (m) May 7, 1993: Buckley Visits Tucker-Rocky Warehouse in Chicago
- (n) Early May 1993: "Firm Commitments" (PX 17)
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 - (a) June 1993 Tucker-Rocky Branch Manager's Report (PX 277)
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V. CONCLUSION

On June 15, 1993, after a thirty-year business relationship, Dunlop Tire Corporation ("Dunlop"), the largest manufacturer of motorcycle tires in the United States, terminated Nichols Motorcycle Supply Inc. ("Nichols"), its oldest distributor. The termination letter--commonly referred to in the vernacular as a "Dear John" letter--merely stated:

Dear Jack:

Please see enclosed copy of your "Dunlop Distributor Motorcycle Tire/Tube Agreement" signed by you on January 11, 1993.

In reference to item nine of above-mentioned agreement, Dunlop Tire Corporation exercises its option to terminate this agreement effective five days from receipt of this letter.

Regards,

DUNLOP TIRE CORPORATION

Mike Buckley

National Sales Manager

Motorcycle Tire Division

Not surprisingly, as a direct result of this letter, Nichols [*6] commenced a multi-faceted litigation campaign against Dunlop and other parties. Thus, currently pending before this court is an antitrust action brought by Nichols against Dunlop and Dunlop's two largest distributors, Tucker/Rocky Distributing ("Tucker/Rocky") and LeMans Corporation, through its Parts Unlimited division ("Parts Unlimited"), Nichols' former competitors.² The Third Amended Complaint contains seventeen counts.³ The federal antitrust conspiracy claims, brought under the Sherman Antitrust Act, [15 U.S.C. § 1 \(1995\)](#), and the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C. § 13\(a\) \(1995\)](#),⁴ are asserted in Counts I-III and VII. The Illinois antitrust claims are asserted in Counts IV-VI and the supplemental state law claims are asserted in Counts VIII-XVII. The Court has federal subject matter, supplemental and diversity jurisdiction. The fate of the state law claims depends largely upon the decisions this Court makes regarding the Sherman and Robinson-Patman Act claims. We will begin there.

[*7] I. The Facts

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[*8] The relevant market for antitrust purposes in this case is defined as the manufacture, sale, distribution and resale of replacement and premium motorcycle tires in the United States. 12(N)(3)(b) Reply P 5. The relevant manufacturers and distributors, for purposes of this case, are as follows.

A. Nichols

Nichols is an Illinois corporation with its principal place of business in Alsip, Illinois. Nichols has been in the business of distributing motorcycle parts, accessories, supplies, and clothing since around 1960. 12(M) P 1. Jack Jesse has been Nichols' president since the spring of 1993. 12(M) App. A. Terry Baisley has been Nichols' national sales manager since October 1989. *Id.* Ken Anderson is the marketing manager. *Id.* Nichols currently operates two warehouse distribution centers. Nichols' principal distribution center, which it has operated since approximately 1970, is in Alsip, Illinois (a Chicago suburb). In September 1992, Nichols acquired a second warehouse distribution center in Phoenix, Arizona. 12(M) P 33. Currently, those warehouses remain open. *Id.* See also 12(N)(3)(b) Reply P 67.

Nichols formerly distributed Dunlop tires and was Dunlop's [*9] oldest distributor, acting in this capacity for over 30 years before being terminated on June 15, 1993. 12(M) PP 146, 400. At the time Nichols was terminated, Dunlop tires constituted approximately 20 percent of Nichols' total sales. PX 608 at 29. Nichols is not and has never distributed Metzeler products. 12(N)(3)(b) Reply P 54. However, Nichols does sell about 150 lines of motorcycle-related merchandise to motorcycle retailers and approximately 15-20 different distributors. Nichols currently sells

²This lawsuit was originally assigned to Judge Conlon and transferred to this Court, by order of the Executive Committee, on May 13, 1995.

³Count XVIII, alleging a civil conspiracy, was dismissed with prejudice by this Court on December 9, 1994.

⁴The Robinson-Patman Act, [15 U.S.C. § 13 et seq.](#), is commonly referred to by its internal numbering as § 2 of the Clayton Act, and will be referred to as § 2 in this opinion.

⁵The following facts are derived from the parties' Statements of Material (undisputed) Facts filed pursuant to Local Rules 12(M)-(N)(3)(b) of the United States District Court for the Northern District of Illinois. Some facts in this case will be more easily understood in context of the asserted claims and will be discussed in those portions of the Opinion. References to the undisputed facts, identified in the parties' Rule 12(M) statements and admitted by the nonmoving party in the Rule 12(N) statement, will be designated "12(M) P --." Factual disputes, when relevant, will be designated "12(N) P --." Where additional facts supporting the denial of the summary judgment motion, as identified in the Rule 12(N)(b)(3) motion, have been admitted by the moving party, those facts will be designated "12(N)(3)(b) P --." Where certain facts are admitted and others denied, the admitted facts of the Rule 12(N)(3)(b) Statement of Additional Facts, will be designated "12(N)(3)(b) Reply P --." The undisputed facts summarized in this opinion are those facts that appear to be "without substantial controversy" pursuant to [Fed. R. Civ. P. 56\(d\)](#). These facts should not be relitigated during trial.

the following tire brands: Bridgestone, Cheng Shin, Continental, Kenda, and Kings. 12(M) P 2. In the past Nichols has also sold Dunlop, Avon, Michelin, Pirelli, and Yokohama. Nichols is also the owner of the Pro Sport line of motorcycle products and the exclusive agent for Kings motorcycle tires in continental North America. Nichols sells Pro Sport products and Kings tires through a network of distributors and publishes an annual catalog of suggested resale prices. 12(M) PP 12, 48.

Nichols' market share for Dunlop tires between 1990-1994, as indicated by the percentage of tires Dunlop sold to Nichols, was as follows:

	*6*Table
	6. Dunlop
	Motorcycl
	e Tire
	Sales to
	*6*Select
	Distributo
	rs, 1990-
	94
	6(Perce
	nt)
	1990
	1991
	1992
	1993
	1994
Nichols	13.2
	5.4
	9.3
	1.9
	0.0

[*10] 12(N)(3)(b) P 12. ⁶

B. Dunlop

Dunlop is a Delaware corporation with its principal place of business in West Amherst, New York. 12(M) P 4. Dunlop manufactures motorcycle tires and sells them to wholesale distributors, who resell them to retail dealers and subdistributors. Retail dealers in turn sell Dunlop tires primarily to the consuming public. 12(M) P 4. Robin Mitchell is Dunlop's senior vice president of marketing and sales. *Id.* Patrick Logue was Dunlop's national sales manager from approximately 1987 through March 1993. *Id.* Michael J. Buckley succeeded Mr. Logue as the national sales [*11] manager in March 1993. *Id.*

Dunlop is the largest selling motorcycle tire manufacturer in the United States. Its current market share in the relevant markets is approximately 62-70 percent. 12(M) P 6. Dunlop's success can be partially attributed to the fact that Dunlop has very high consumer name recognition, which predisposes many consumers to purchase Dunlop replacement motorcycle tires. 12(N)(3)(b) Reply P 7. Dunlop tires are also used by distributors as a lead product to generate sales of other non-Dunlop products to dealers. 12(N)(3)(b) Reply P 8.

At the time Nichols was terminated as a Dunlop distributor in June 1993, Dunlop sold tires to 18 distributors: American Honda, Bell Industries, Custom Chrome, Cycle Products, Cycle Sports (in Puerto Rico), Dixie, Harley-Davidson, Intrac, J & D Walter, KK Motorcycle, Marshall Distributing, Motorcycle Stuff, Parts Unlimited, Performance Tire, Pikes Peak, Tucker/Rocky, and Tri-State. Of these 18 distributors, Dunlop sold the most tires to the following four distributors between 1990-1993 (in decreasing order): Tucker/Rocky, Parts Unlimited, Motorcycle Stuff, and Nichols Supply. 12(M) P 10. Dunlop's top three distributors, measured [*12] by the percentage of tires sold to them from 1990-1994, are: Tucker/Rocky, followed closely by Parts Unlimited (within 2-5%), and Motorcycle

⁶ Defendants have admitted, solely for summary judgment purposes, the assertions of Nichols' expert regarding percentage of sales of various motorcycle tire brands in certain markets, because they believe that these assertions are immaterial to the Court's inquiry into whether the parties agreed to fix prices. The relevant expert data is contained in Plaintiff's Exhibit ("PX") 608 at 19.

Stuff (7-9% off the leader from 1990-92; 21% off the leader in 1993; 12.4% off the leader in 1994; and 12.2% off the leader for all four years). *Id.* (Px 608, App. Table D-3). Nichols followed in fourth and fifth⁷ place from 1990-1992, until its termination on June 15, 1993. *Id.*

C. Metzeler

Metzeler is a German tire manufacturer, owned by Pirelli. Metzeler Motorcycle Tire North America is its North American subsidiary. 12(M) PP 7-8. Gregory Blackwell has been the president of Metzeler N.A. since January 1992. 12(M) App. A.

Metzeler is the second largest selling motorcycle tire manufacturer in the relevant market. 12(N)(3)(b) Reply [*13] P 9. Metzeler tires generally sell at a higher price than Dunlop, and are not discounted as much because there is less intrabrand competition (*i.e.*, fewer distributors) for Metzeler tires. 12(N)(3)(b) Reply P 13. In the last several years, Metzeler has reduced its distributor base from approximately 12 distributors to five. 12(N)(3)(b) Reply P 14. Metzeler's five U.S. distributors are: KK Motorcycle, Motorace, Parts Unlimited, Pike's Peak and Tucker/Rocky. 12(M) P 10. Tucker/Rocky and Parts Unlimited sell the largest numbers of Metzeler tires; together they account for 90 percent of its sales (Tucker/Rocky buys 60% and Parts Unlimited buys 30%). 12(N)(3)(b) Reply P 14.

In 1990, Metzeler had a market share in the relevant markets of 24-30 percent. The president of Metzeler N.A., Gregory Blackwell, estimates that Metzeler's market share is currently 25-30 percent. However, Dunlop and other reports indicate that Metzeler's total market share for tires fell to about 12.8-13.75 percent in 1993, although its share of the premium tire market may have been 15 percent. 12(N)(3)(b) Reply P 10 (PX 608 at 16-18).

D. Tucker/Rocky

Tucker/Rocky is a Texas corporation with [*14] its principal place of business in Irving, Texas (Dallas). 12(M) P 5. Robert Nickell is the current chairman and past president (October 1989 to October 1992). Robert Gregg succeeded Mr. Nickell as president on October 1, 1992. 12(M) App. A. Tucker/Rocky owns and operates 12 warehouses in the United States and is considered a national distributor. Tucker/Rocky is in the business of distributing parts, accessories, and apparel for motorcycles and watercraft. 12(M) P 5. Tucker/Rocky is Dunlop's largest distributor, as indicated by its market share. 12(N)(3)(b) Reply P 12. This market share is based on the percentage of tires Dunlop sold to Tucker/Rocky during the periods 1990-1994, and was as follows:

*6*Table 6. Dunlop Motorcycl e Tire Sales to					
*6*Select Distributo rs, 1990- 94					
6(Perce nt)	1990	1991	1992	1993	1994
Tucker/					
Rocky	25.2	27.5	27.2	36.4	33.3

12(N)(3)(b) Reply P 12.

⁷ Nichols was beaten by Bell Industries in 1991, in terms of Dunlop distributor purchases, by .9 percent. This was the only year between 1990 and 1992 that Nichols did not finish fourth. See PX 608, App. Table D-3.

E. Parts Unlimited

LeMans Corporation is a Wisconsin corporation with its principal place of business in Janesville, Wisconsin. 12(M) P 6. Fred Fox is the current chairman and chief executive officer. Jeff Fox is Fred Fox's son, and has been the president [*15] of Parts Unlimited since approximately October 1992. 12(M) App. A. LeMans, through its Parts Unlimited division, is in the business of distributing parts and accessories for motorcycles, watercraft, and snowmobiles. 12(M) P 6. Parts Unlimited is Dunlop's second largest distributor, as indicated by its Dunlop market share. 12(N)(3)(b) Reply P 12. This market share is based on the percentage of tires Dunlop sold to Parts Unlimited during the period 1990-1994, and was as follows:

*6*Table 6. Dunlop Motorcycl e Tire Sales to	*6*Select Distributo rs, 1990- 94	*6*(Perce nt)	Parts	1990	1991	1992	1993	1994
Un-			Un-					
limited			limited					
				19.0	23.6	24.7	31.5	28.0

12(N)(3)(b) Reply P 12. Plaintiff's expert concedes that Parts Unlimited, by itself, does not possess market power. *Id.*

F. Combined Market Share

*6*Table 6. Dunlop Motorcycl e Tire Sales to	*6*Select Distributo rs 1990- 94	*6*(Perce nt)	T/R & PU	1990	1991	1992	1993	1994
			Subtotal	44.2	51.1	51.9	67.9	61.4

12(N)(3)(b) Reply P 12. This data establishes that Tucker/Rocky and Parts Unlimited's combined market share at the end of 1993 rose by 16 percent, dropping [*16] off in 1994, but remaining 9.5 percent higher than their combined 1992 market share. The combined market share of Dunlop and Metzeler is currently about 85 percent 12(n)(3)(b) Reply P 11.

G. The Economic Experts

Nichols has retained an economist, Dr. John Pisarkiewicz, as an expert to perform several tasks in this litigation. 12(M) PP 21,196. Raymond S. Sims is a Vice President at A.T. Kearney, Inc., in Chicago, Illinois. He has been retained as an expert in this case by Dunlop. 12(M) P 201. The defendants also offer Professor David T. Sheffman, who has produced a report entitled "Trends in the Motorcycle Industry 1985-1993," which indicates that the number of motorcycle dealers selling motorcycles and other related products dropped from 12,953 to 9,264 from 1985 to 1993. The number of real dollars (per million) from these sales, according to this report, also dropped from \$ 1,671 to \$ 1,247 during that time period. DX 70.

II. The Antitrust Conspiracy Claims

A. The Sherman Act § 1

In Counts I, II and III, Plaintiff broadly alleges that the Defendants unreasonably restrained trade by forming an illegal conspiracy to terminate smaller discounting [*17] distributors, like Nichols, to consolidate the market and implement an agreement to raise and stabilize resale dealer prices for Dunlop tires in violation of [Section 1](#) of the Sherman Antitrust Act. 12(N)(3)(b) P 12.⁸ In particular, Nichols claims that Dunlop, Tucker/Rocky and Parts Unlimited formed vertical and horizontal combinations.⁹

[HN2](#)[] [Section 1](#) states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States. . . is declared to be illegal." [*18] [15 U.S.C. § 1 \(1995\)](#). [HN3](#)[] According to the statute, a plaintiff claiming a [Section 1](#) violation must establish a combination or some form of concerted action between at least two legally distinct economic entities. See [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 \(1984\)](#). Whether an unlawful conspiracy or combination is demonstrated should be judged by what the parties actually did rather than by words they used. See [United States v. Parke, Davis & Co., 362 U.S. 29, 44 \(1960\)](#) (citing [Eastern States Retail Lumber Dealers' Ass'n v. United States, 239 U.S. 600, 612 \(1914\)](#); see also [United States v. General Motors Corp., 384 U.S. 127, 142 \(1966\)](#) (holding explicit agreement is not a necessary part of a Sherman Act conspiracy where joint and collaborative effort is pervasive)). Under well-established principles of [antitrust law](#), unilateral conduct (" independent action") by a single person or enterprise falls outside the scope of this provision. [Monsanto Co. v. Spray Rite Serv. Corp., 465 U.S. 752, 761 \(1984\)](#)(citing [United States v. Colgate, 250 U.S. 300, 307 \(1919\)](#)).¹⁰ Once a plaintiff establishes the existence of an illegal contract, combination or [*19] conspiracy ("an agreement"), it must then proceed to demonstrate that the agreement constituted an unreasonable (and therefore illegal) restraint of trade under either the *per se* rule or the rule of reason. The nature of the restraint (e.g., vertical price restraint, vertical nonprice restraint, horizontal price restraint etc.) determines which rule must be applied. See [Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 \(7th Cir. 1993\)](#). The *per se* claims will be addressed first.

1. Count 1: Per Se Violations

In Count I, Plaintiff broadly alleges that the defendants participated in a vertical and a horizontal conspiracy to fix prices in violation of [Section 1](#) of the Sherman Act. The Plaintiff's theory in Count I is that these agreements were illegal *per se*. In particular, Plaintiff's theory is that Dunlop, together with its two largest distributors, Tucker/Rocky

⁸ Defendants admit only that Dunlop terminated Nichols as a distributor. Defendants do not concede that the record supports Nichols' theory of concerted activity to consolidate market share and to fix prices.

⁹ [HN1](#)[] Restraints imposed by agreement between competitors have traditionally been labelled horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints; thus the nature of a restraint is determined by the type of agreement that gives rise to the restraint rather than the anticompetitive economic effects of the restraint. See [Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 \(1980\)](#).

¹⁰ Under the *Colgate* doctrine, "independent action is not proscribed. A manufacturer of course has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Id.*

and Parts Unlimited, conspired to terminate smaller discounting [*20] distributors, like Nichols, to consolidate their market share and implement an illegal agreement to raise and stabilize resale dealer prices for Dunlop motorcycle tires. There are two agreements under this theory: an agreement to terminate Nichols (because it was a discounter) and an agreement to fix prices. Plaintiff defines these agreements as both horizontal (between the two defendant distributors) and vertical (between Dunlop, Tucker/Rocky and Parts Unlimited) and admits that the proof of these conspiracies "tends to blend together." Transcript at 26. A review of the Plaintiff's proof follows a short discussion of the applicable legal principles.

a. Legal Standards

HN4[]

Conduct considered illegal *per se* is limited to cases where a defendant's actions are so plainly harmful to competition, *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988), that they are presumed illegal and the need for further proof of anticompetitive impact is unnecessary.¹¹ *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). *Per se* cases include horizontal and vertical pricefixing [*21] agreements and certain types of group boycotts. See *Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d 537, 542-43 (2d Cir. 1993) (listing the types of *per se* violations recognized by the Supreme Court). Pricefixing agreements need not include an "explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices." *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1221 (7th Cir. 1993) (citing cases). Rather, pricefixing agreements need only have been formed for the purpose and effect of fixing or stabilizing the price of a product in interstate commerce.¹² *Id.* Tacit agreements are therefore actionable if they can be shown to exist. 6 P. Areeda, *Antitrust Law* § 1410 at 66 (1986).

[*22] **HN7**[]

An agreement that is illegal *per se* under *Section 1* is difficult to prove. Much like Title VII cases, the antitrust analysis proceeds in stages because it involves shifting burdens that lead to an ultimate burden of proof which is extremely difficult for a plaintiff to satisfy.¹³ *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1171 (7th

¹¹ **HN5**[]

The *per se* presumption simply eliminates the plaintiff's burden of proving anticompetitive impact to the finder of fact through market analysis by an expert economist, as required under the rule of reason; it does not eliminate the need to find antitrust injury, nor does it relieve the plaintiff of its burden to identify and articulate the precise anticompetitive impact caused by the *per se* price-fixing violation. An antitrust injury flows from pricefixing agreements which plainly reduce competition. However, some pricefixing agreements do not "restrain trade" and are therefore reasonable. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990). It is important to note, however, that "the antitrust laws were enacted for 'the protection of competition, not competitors.'" *Id. at 338* (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Thus, a competitor "may not complain of conspiracies that set minimum [or maximum] prices at any level." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585, n.8 (1986) (minimum prices); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum prices), unless the dangers identified by *Albrecht* are present (i.e., the smaller competitor is eliminated from competition pursuant to the price agreement and distribution is then channelled "through a few large or specifically advantaged dealers."). *Atlantic Richfield*, 495 U.S. at 327. Therefore, finding an agreement is only the first step; the agreement is not illegal under *S 1* of the Sherman Act unless the nature of the pricefixing agreement reduces competition and injures dealers or consumers. *Id.* The Court must therefore carefully scrutinize the competitive effect of the pricefixing agreement alleged to be illegal *per se*. Because the presumption of injury eliminates the need for a plaintiff to produce an economist, this theoretical hurdle is now a question of law for the court on summary judgment. This Court is extremely cognizant of this important distinction, recently recognized by the Seventh Circuit in *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, Nos. 94-1451, 94-1554, 94-1815, & 94-1816, 1995 WL 425224, *5 (7th Cir. July 20, 1995) (Easterbrook, J.) ("the antitrust injury doctrine applies with full vigor to the *per se* offenses.

¹² **HN6**[]

An agreement to terminate a distributor without evidence of a related agreement on price is not sufficient to establish a *per se* violation. However, an agreement to terminate, if proven to have an anticompetitive impact, could be illegal under the rule of reason as a nonprice restraint. See *Business Electronics*, 485 U.S. at 724, 726. Nonprice restraints are not alleged in this case.

Cir. 1990). The Seventh Circuit has articulated a two-part test: (1) is the plaintiff's evidence of a conspiracy ambiguous, i.e., is it as consistent with the defendant's permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests, *id. at 1171*; and a burden shifting formula: "when [*23] the defendants establish that their conduct is consistent with independent action, the plaintiffs are required to come forward with evidence tending to exclude the possibility of independent action." *Id.* Ultimately, the plaintiff must demonstrate, through specific evidence, that the "inference of conspiracy to fix prices is reasonable in light of the competing inference of independent action." *Id.* at 1171 (quoting *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660-61 (7th Cir.), cert. denied, 484 U.S. 977 (1987)).

To survive summary judgment in this case, the plaintiff's evidence must conform to the specific standards set out by the Supreme Court in *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1983). In *Matsushita*, the Supreme Court granted certiorari to articulate the standard that district courts must apply when [*24] deciding a motion for summary judgment in an antitrust conspiracy case. In *Monsanto*, the Court granted certiorari to articulate the standard of proof required to find a vertical pricefixing conspiracy in violation of Section 1 of the Sherman Act. These two cases establish the legal parameters for this Court's decision.

In *Monsanto*, Justice Powell, writing for the Supreme Court, found that the plaintiff presented sufficient evidence of an agreement to terminate a distributor, pursuant to a vertical pricefixing conspiracy between a manufacturer and a large distributor, to create a jury issue. In reaching this conclusion, the Court articulate the proper standard to be applied to Section 1 claims like the one before us. The Court also outlined several important distinctions that are worth repeating here because they address the very heart of this case:

This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. *First, there is the basic distinction between concerted and independent action -- a distinction not always clearly drawn by the parties and the courts.* HN8[¹³] Section 1 of the Sherman Act requires that there [*25] be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. United States v. Colgate & Co., 250 U.S. 300, 307 (1919); cf. United States v. Parke, Davis & Co., 362 U.S. 29 (1960). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination. The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. See Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-409 (1911). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable [*26] restraint on competition. See Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

While these distinctions in theory are reasonably clear, often they are difficult to apply in practice. In *Sylvania* we emphasized that the legality of arguably anticompetitive conduct should be primarily judged by its "market impact." But the economic effect of all the conduct described above -- unilateral and concerted vertical price-setting, agreements on price and nonprice restrictions -- is in many, but not all cases similar or identical. [citation omitted]. And judged from a distance, the conduct of the parties in the various situations can be indistinguishable. For example, the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about prices and the reception of their products in the market. Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly

¹³ Unlike Title VII cases, however, the Plaintiff cannot prove an agreement to conspire merely by showing that the defendants' assertions of independent conduct was a pretext for pricefixing and illegal termination agreements.

nonprice [*27] restrictions that it will have the most interest in the distributors' resale prices. *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. *Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the Colgate doctrine allows*. Nevertheless, it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. [HN9](#)[] On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.

[Monsanto, 465 U.S. at 760-63](#) (emphasis added). [*28] The Supreme Court then held that evidence that is sufficient to show agreement is evidence that "tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." [465 U.S. at 764](#).¹⁴

In *Matsushita*, the Court found that the defendants lacked an economically plausible motive to conspire and thus concluded that there was no genuine issue for trial. On the issue of motive, Justice Powell, again writing [*29] for the Court, found:

the absence of plausible motive to engage in the conduct charged is highly relevant to whether a genuine issue for trial exists within the meaning of [Rule 56\(e\)](#). 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.

[475 U.S. at 596](#). To summarize, *Monsanto* requires the [HN11](#)[] plaintiff to produce evidence that tends to preclude independent action. *Matsushita* limits the range of justifiable inferences that can be drawn from ambiguous evidence offered to comply with *Monsanto*.

Direct evidence of a conspiracy will always meet this standard. "Ambiguous" circumstantial evidence, alone, will not be enough. Somewhere between those two extremes lies the kind of circumstantial evidence that will provide enough direction for the fact-finder to conclude that the defendants' minds met, and from this meeting an agreement arose and was implemented through concerted action that achieves an unlawful objective. [*30] [Monsanto, 465 U.S. at 761 n.9](#). The demarcation between circumstantial evidence which is "ambiguous" and that which is not, however, is unclear.

Ambiguous evidence permits equally competing inferences without "tending" to point in one direction or the other. [Market Force, 906 F.2d at 1171](#). For example, circumstantial evidence of a conspiracy that is "consistent with independent action" is ambiguous. [Monsanto, 465 U.S. at 763](#). Ambiguous evidence cannot be sent to a jury because a court may not invite the factfinder to speculate that an agreement existed. See 6 P. Areeda, [Antitrust Law](#) § 1405 at 21-23, for a good discussion of the judge and jury's role in determining whether an agreement exists. To prevent such speculation, the Supreme Court has held that "the range of [permissible] inferences that may be

¹⁴ In a footnote, the Court explained:

[HN10](#)[] The concept of a meeting of the minds or a common scheme [to fix prices] in a distributor termination case includes more than a showing that the [nonterminated] distributor conformed to the [manufacturer's] suggested resale price. It means . . . that evidence must be presented [by the plaintiff that shows] that the distributor [not only] communicated its acquiescence or agreement, [but] that this [acquiescence] was [also] sought by the manufacturer.

drawn from ambiguous evidence [must be] limited," *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d 537, 542 (2d Cir.), cert. denied, 114 S. Ct. 388 (1993); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660-61 (7th Cir. 1987), and cannot be [*31] used, without more, to establish the existence of a [Section 1](#) agreement.

Conversely, unambiguous evidence tends to point in a single direction--like a signpost.¹⁵ The Supreme Court has defined the absence of ambiguity as evidence which "tends to exclude the possibility" that the defendants acted independently for lawful business reasons, rather than in concert for unlawful purposes. *Monsanto*, 465 U.S. at 761. As Professor Areeda says:

Notwithstanding many difficulties in appraising the sufficiency of circumstantial evidence, we know what we are looking for: some level of commitment to a common course of action. The fact-finder may be perplexed by the evidence, but his reasoning will not be confused if he keeps clearly in mind that he is looking for a traditional agreement.

The analytical problem is that there is a "no man's land" between the traditional agreement and tacit coordination through recognized interdependence. The line between lawful interdependent behavior and unlawful commitment is not sharp. The former can often blend into the latter, because reciprocal assurances can be communicated by conduct rather than be words and remain "agreements" even though [*32] vague, incomplete, and riddled with qualifications and exceptions.

Id. § 1410 at 67. The crucial question is: "Who was in agreement with whom and about what?" *Id.* § 1409 at 59.

b. The Plaintiff's Evidence

What follows is the evidence [*33] that the Plaintiff has relied upon in an attempt to meet the requirements of *Monsanto* and *Matsushita* and to survive the Defendants' Motions for Summary Judgment.¹⁶ It is summarized in a chronological fashion to give the reader a comprehensive view of the evidence Plaintiff discovered to prove its case and which this Court evaluated in reaching its decisions.¹⁷

[*34] (i) The Year 1991

In August of 1991, Tucker/Rocky, the largest distributor for Dunlop tires in the United States, attempted to purchase Nichols' business, which then consisted of just one warehouse located in Alsip, Illinois, a suburb of Chicago. Tucker/Rocky threatened to open its own warehouse in Chicago if Nichols declined to sell. Nichols declined to pursue negotiations with Tucker/Rocky. 12(N)(3)(b) Reply P 17. Tucker/Rocky then made good on its threat, opening its own Chicago warehouse (its 12th location) in August 1992. In May 1992, Nichols began planning to open a Phoenix, Arizona warehouse.

¹⁵ As a practical matter, it may be difficult to draw a distinction between direct and unambiguous circumstantial evidence, since the characterization depends upon the facts of an individual case. Cf. 6 Areeda, *Antitrust Law* § 1410 at 64 [HN12](#) [+] ("Direct evidence [of an agreement includes] such [things] as documents, meetings, and participant testimony that defendants exchanged commitments or otherwise collaborated by some means other than making a marketplace decision."). In this case, the documents and testimony that will be reviewed do not manifest an agreement that is so obvious that the Court need not pause in reaching a decision under [Section 1](#). Quite the contrary, the evidence in this case never exceeds the outer limit of ambiguity.

¹⁶ References to the Exhibits submitted in this case are as follows: Defendants' Joint Exhibits are marked "DX---"; Plaintiff's Exhibits are marked "PX---." Deposition testimony is designated by name and page number.

¹⁷ The Court has attempted to summarize the Plaintiff's most relevant evidence. The fact that every single piece of Plaintiff's evidence is not contained in this summary does not mean that the evidence was not evaluated by this Court. The Court has fully evaluated all the evidence cited by the Plaintiff in deciding the motions addressed in this Opinion and has followed the urging of *Big Apple BMW, Inc. v. BMW of No. Am.*, 974 F.2d 1358, 1364 (3d Cir. 1992), to view the evidence as a whole.

In the meantime, a price war among distributors had developed regarding the sale of Dunlop tires.¹⁸ For instance, in September of 1991, Tucker/Rocky's monthly reports indicate that its Dunlop sales were dropping due to "deteriorating service level and competitive pressure." PX 252U. Reports in the following months bore the same complaints. An October 1991 report noted the existence of "severe price pressure on Dunlop." PX 251. A December 1991 report referred to "another 25% drop in Dunlop sales over the previous month. . . . Discounting by the competition has to be [*35] a big factor." PX 250U.

Despite its one-warehouse operation, the evidence indicates that Nichols successfully used discounting methods to undercut Tucker/Rocky and Parts Unlimited in areas of the country where these large distributors were strongest. There is also deposition testimony that Tucker/Rocky was "unwilling to sell" at Nichols' prices and that Jeff Fox of Parts Unlimited discussed the need to "clean up the market" with Pat Logue of Dunlop.

(ii) The Year 1992

In January 1992, Tucker/Rocky's [*36] monthly reports indicated that "if profits fell in 1991, [Dunlop] was probably to blame." PX 249U. In April 1992, Tucker/Rocky indicated that it was concerned about maintaining a "decent [profit] margin." PX 228. By November 1992, Bob Gregg found it necessary to send a memo to Tucker/Rocky's sales representatives to pass the word that "dealers should resent deals that are too low" and should "tell the opportunist distributor that the path to long term success is not short term deep discounts that actually hurt the dealer. Rather, if they want the business they must earn it through market stabilizing programs, service and support that helps a dealer short and long term." PX 280 (emphasis in original). Gregg also noted that dealers "should not switch orders from an industry supporter like Tucker/Rocky to an opportunistic offer." *Id.*

During the summer and fall of 1992, various meetings took place between Dunlop, Nichols, Tucker/Rocky and Parts Unlimited. For instance, in July or August 1992, Pat Logue of Dunlop met with Jack Jesse, the president of Nichols. Nichols did not mention the new warehouse at that time. On August 16, 1992, Logue attended Tucker/Rocky's open [*37] house for its new Chicago warehouse. On August 17, 1992, Logue held a business meeting with Jeff Fox of Parts Unlimited. On September 14, 1992, Nichols leased the new Phoenix warehouse. Later that month, at the IMAE trade show in Las Vegas, Nevada, Jesse told Logue that Nichols planned to open a new warehouse in Phoenix. In October 1992, Logue flew to Dallas to hold business meetings with Bob Nickell, the current chairman and past-president of Tucker/Rocky, and Bob Gregg, the president of Tucker/Rocky since October 1, 1992. In November of 1992, Nickell spoke with Jeff Fox of Parts Unlimited at a Dunlop distributor meeting in Hawaii. Fox recalled discussing only non-business matters with Nickell in Hawaii.

On November 14, 1992, Lee Walsh, a Parts Unlimited representative, wrote a letter to Jeff Fox, which stated:

Nichols Motorcycle supply has recently hired 2 Road Reps for this area. One in Washington and One in Oregon. While in Oregon this week I got my hands on the discount program that they are proposing to the dealers. (copy enclosed). I also did a price compare spread sheet so we could see where we stood (copy enclosed).

The pricing is bad enough, but they are [*38] also talking up the new Phoenix warehouse and are telling the dealers that they are looking to expand their warehouse locations and that Seattle is one of the target areas!

This is probably a big line of bull--but the dealers are sure listening.

I'm not concerned, but I thought you ought to know and should see how the pricing actually ends up.

Please show this to Jet.

Thanks,

Jeff.

PX 22.

¹⁸ This price war consisted of aggressive price discounting by Dunlop distributors to dealers nationwide. However, Dunlop discounting was particularly fierce in southern California, which was an important market for motorcycle tires. 12(N)(b)(3) P 20 (citing PX 601 a Dunlop Memorandum identifying Arizona (Phoenix, Scottsdale, Mesa, and Chandler); California (Los Angeles and San Jose); and Illinois (Chicago) as "key" markets). Southern California was a stronghold for Parts Unlimited. PX 6.

On December 28, 1992, Pat Logue, the National Sales Manager for Dunlop, issued the following Memorandum to all of Dunlop's distributors:

To: All Dunlop Motorcycle Tire Distributors

From: P.J. Logue

Date: December 28, 1992

Subject: 1993 Dunlop Distributor Motorcycle Tire/Tube Agreement

As we move into 1993, it is important that you understand Dunlop's plans for 1993. The tire replacement market is not going to grow in the predictable future.

Our distributor base is still at approximately the same level as it was when the market was 35% larger than it is today.

Because of this situation, it is our intention to reduce our account base before the September IMAE by at least two to three distributors. This is a very difficult decision [*39] but it is still one that must be made. In addition, anyone involved in sub-distribution will be cancelled. Clearly if we are concerned about the size of our existing direct distributor base, it would only make sense that "unapproved" sub-distribution base must be eliminated first.

You are encouraged to read the entire Motorcycle Tire/Tube Agreement. In particular, read point number 3. The channel of distribution that Dunlop will support and approve is detailed in this section.

Please return the signed agreement by January 8, 1993. After January 8th, all shipments will cease to distributors that have not returned agreements.

Thank you for both your understanding and cooperation.

Happy Holidays!

Patrick J. Logue

National Sales Manager

Dunlop Motorcycle Tires

PX 1.

(iii) The Year 1993

By the beginning of 1993, the ongoing price war had driven the resale price of Dunlop tires down. Decreased retail sales and "small dealer purchases from distributors" led to deep price cutting. PX 605 (Tucker/Rocky Feb. 1993 Report). On January 14, 1993, three days after Nichols signed its 1993 distributor agreement,¹⁹ Logue flew to [*40] Dallas to have dinner with Nickell, Gregg, and Andre Lacy, the owner of Tucker/Rocky's parent company. Logue testified that the four men discussed the termination of distributors and the pricing of Dunlop tires. Nickell and Gregg do not recall any such conversation.²⁰ Logue Dep. 985-88.

[*41] Tucker/Rocky and Parts Unlimited also admit that they often complained to Dunlop about Nichols' pricing during this time frame. PX 240U (refers to "Nichols' ridiculous pricing"); PX 510 states that "our most frequent thorn is Nichols M/C in Chicago" due to deep discounting). By February 1993, Tucker/Rocky's President's Report indicated that the ongoing price war had reduced the profit margins for Tucker/Rocky to an "unacceptable" level. PX 605H.

¹⁹ This agreement contained an alleged jury trial waiver which is discussed at the end of this Opinion.

²⁰ In many instances, the testimony in this case is in conflict. Plaintiff claims that this conflict creates a credibility issue for the jury. Defendants correctly point out that Plaintiff cannot establish genuine issues of material fact with credibility arguments. *Trans Aire Int'l, Inc. v. Northern Adhesive Co., Inc.*, 882 F.2d 1245, 1257 (7th Cir. 1989) (affirming entry of summary judgment and dismissing plaintiff's suggestion that deposition testimony relied on by the defendant is not credible); *Walter v. Fiorenzo*, 840 F.2d 427, 434 (7th Cir. 1988) ("A motion for summary judgment cannot be defeated merely by an opposing party's incantation of lack of credibility over a movant's supporting affidavit.").

On February 1, 1993, the two defendant distributors issued their annual published dealer price catalogs for that year. Tucker/Rocky's prices remained the same as its 1992 dealer resale prices. Parts Unlimited's prices, however, increased to reflect Dunlop's increased manufacturer's suggested dealer ("MSD") prices for 1993. The defendants argue that this disparity in pricing demonstrates the lack of a conspiracy. Nichols claims, however, that the disparity shows only that Tucker/Rocky reneged on the agreement to raise prices.

In February 1993, a new round of conversations between the defendants ensued. Pat Logue talked to Jeff Fox about Tucker/Rocky's published prices for Dunlop tires in early February 1993 at the Cincinnati dealer show. [*42] According to Logue, Fox pointed out that Parts Unlimited's published prices were significantly higher than Tucker/Rocky's published prices. 12(N)(3)(b) P 31(g). Fox admits that he recalled talking to Pat Logue about price levels, but did not recall when this conversation took place. *Id.* Mike Buckley (who did not yet work for Dunlop) and Jeff Fox also spoke together at the Cincinnati show. 12(N)(3)(b) Reply P 31(j). In addition, Pat Logue's daybook contains a notation for February 15, 1993, stating "Call J. Fox." *Id. at P 31(g)*(citing PX 153).²¹ Logue testified that he assumed he entered the notation because he received a message to call Fox, but could not recall the subject matter of any message or phone call. *Id.* Then, on February 16, 1993, Nickell, Tucker/Rocky's chairman, attended a sports banquet in Buffalo, New York, as Logue's guest. 12(N)(3)(b) P 31(h). On February 17, 1993, Tucker/Rocky's phone records indicate that someone at Tucker/Rocky (although the source of the call could not be identified) placed a telephone call to the Parts Unlimited main switchboard that lasted 17 minutes and 32 seconds. There is no evidence regarding the subject matter or the persons [*43] involved in that telephone call. 12(N)(3)(b) Reply P 31(i). Two days later, on February 19, 1993, Logue and Fox once again discussed Tucker/Rocky prices at a trade show.

Standing alone, these conversations, despite their coincidental (and perhaps suspicious) timing, are not probative of the issue before us: whether the defendants agreed to fix prices and terminate Nichols. At most, the admissions on record indicate that Jeff Fox of Parts Unlimited felt it was necessary to point out to Logue that Tucker/Rocky's published prices were lower than those published by Parts Unlimited. This evidence, taken at face value, reflects only Parts Unlimited's complaint and general expectation, which it believed Dunlop should hear about, that Tucker/Rocky should raise its prices in 1993. Logue's subsequent and contemporaneous discussions with Nickell of Tucker/Rocky, and Tucker/Rocky's mysterious phone [*44] call to Parts Unlimited, while sufficient to raise a question in the factfinder's mind, do not tend to point in the direction of an agreement to fix prices. Without evidence regarding the subject of these conversations, the suspicious timing alone does not take Plaintiff's Section 1 case past *Monsanto*.

The February conversations, however, do not stand alone; they provide the context for the two events which took place on March 22, 1993:²² [*45] (1) Parts Unlimited published its revised dealer price list for 1993, in which it dropped its prices (including its "best quantity" price) significantly below the MSD price, thereby equalling or undercutting Tucker/Rocky's published February 1, 1993, prices--in most cases by mere cents, PX 444;²³ and (2) the March 22, 1993, Gregg Letter to Pat Logue (PX 4), the first documented communication between the three defendants since the February 19, 1993, trade show meeting between Logue and Fox.

(iv) March 1993 -- June 15, 1993

The following evidence is a list of events, documents and testimony that date from March 1993 through June 15, 1994.

²¹ The daybook also contains notations regarding routine contact with Nichols' personnel. 12(N)(b)(3) Reply P 31(g).

²² Parts Unlimited claims that it issued the revised price list on March 19, 1993, rather than March 22, 1993. Because the portion of that memorandum (PX 444) dated March 19, 1993, is redacted, it is impossible for the Court to make this determination. However, the portion of the memo dated March 22, 1993, appears to confirm the revision just as well.

²³ According to Plaintiff, Parts Unlimited had never before issued revised prices prior to publication of its next annual catalog and never before had its "best quantity" prices (the subject matter of the March 22, 1993, Gregg Letter) been the same as Tucker/Rocky's prices--they were generally lower.

(a) March 15, 1993: Tucker/Rocky Article Quoting Bob Gregg (PX 382)

An in-house article by Tucker/Rocky, regarding a Tucker/Rocky meeting, reports:

Bob [Gregg] indicated that Tucker/Rocky will immediately undertake to require stable pricing and minimal discounting at the retail level of all house brands sold by Tucker/Rocky.

12(N)(3)(b) Reply P 39. Gregg apparently stated: "Tucker/Rocky will take a leadership role in bringing price stability to major house brands." *Id.*

(b) The March 22, 1993 Gregg [*46] Letter (PX 4C)

On or around March 22, 1993, Robert Gregg, the president of Tucker/Rocky, wrote a two-page letter to Patrick Logue, then the national sales manager for Dunlop, and enclosed a price analysis comparing Tucker/Rocky's and Parts Unlimited's 1992 dealer resale prices with each other and then against Dunlop's suggested dealer price. This letter is reprinted in its entirety:

March 22, 1993

Mr. Pat Logue

Dunlop Tire & Rubber Co.

P.O. Box 1109

Buffalo, NY 14240

Re: Dealer Price Analysis

Dear Pat,

Enclosed please find a detailed analysis of current Tucker/Rocky dealer prices, relative to Dunlop suggested dealer, Parts Unlimited, and Tucker/Rocky 1992. Note: Parts Unlimited and Tucker/Rocky are both published quantity prices. The following observations are of interest:

1. Tucker/Rocky 1993 prices are equal to Tucker/Rocky 1992 prices. That is, it confirms Tucker/Rocky has not passed along Dunlop's 1993 price increase.
2. Excluding ATV and Scooter, 213 tires are in the analysis. Of those the number and percentage of tires fall into the following categories:

TR Prices Greater Than PU	22	10%
TR Prices 0%-3.5% Lower Than PU	112	52%
TR Prices 3.5%-5.0% Lower Than PU	36	17%
TR Prices 5.0% + Lower Than PU	32	15%
TR Prices With Errors **	11	5%

* All K591R and K127

* Adjusted Approx. 3/12/93

[*47]

As you read this, 85% of Tucker/Rocky prices are higher or within 5% of Parts Unlimited. 15% (K591R and K127) are more than 5% lower than Parts Unlimited.

Conclusion: Tucker/Rocky would like to pass on the 1993 Dunlop price increase at this time.

(Page Two)

Problem: Tucker/Rocky pricing relative to Parts Unlimited is not relevant. Single warehouse distributors who dump tires at disruptively low and predatory prices, thousands of miles from their warehouse and service area continue to damage Dunlop's marketing objectives.

Solution: Dunlop is on record that Dunlop has too many distributors. We strongly urge Dunlop to take the action Dunlop has already identified as necessary to bring Dunlop distribution in line with market conditions. Please take into consideration the percentage of tires sold *outside* a distributor's service area (i.e., more than 500 miles from any warehouse) and the degree of disruptive and predatory pricing.

Tucker/Rocky will increase the amount of resources Tucker/Rocky spends to promote and service Dunlop tires to assure Dunlop increased sales and market share for Dunlop via the resulting distributor network. This [*48] extra Tucker/Rocky expenditure on behalf of Dunlop market share will increase interbrand competition.²⁴

Sincerely,

Robert R. Gregg

President

RRG:ms

enclosure

PX 4C (emphasis in original).

During the course of discovery, the Plaintiff found copies of this letter and the price analysis in the files of both Dunlop and Tucker/Rocky. Plaintiff also found a copy of the *first page* of the letter in the files of Parts Unlimited. PX 4A. No one knows how (or why) this page was sent to Parts Unlimited, nor who sent it (no envelope with the names of the addressee or addressor was found). The Parts Unlimited copy has a handwritten notation on the front stating:

3/26--Fred-Donna C. rec'd this in her mail today!-? (She didn't get envelope, so we don't know who it was addressed to) Janice.

[*49] (PX 4B). "Donna C." is Donna Colclasure, the person in charge of credit inquiries at Parts Unlimited. 12(M) P 87. "Janice" is the secretary to Jeff Fox, the current president of Parts Unlimited and Fred Fox's son. "Fred" is Fred Fox, chairman and former president of Parts Unlimited. In Fred Fox's handwriting, the following is written: "Lynne Forward to Jeff." There is no evidence that Parts Unlimited received a copy of either the second page of the letter or the attached price analysis, both of which Pat Logue at Dunlop did receive. *Id.* Pat Logue also gave a copy of the letter to his successor at Dunlop, Michael Buckley. 12(M) P 83. Logue testified that he never asked for the letter, 12(M) P 79, but spoke to Gregg after receiving it and was told that Gregg wanted to show that Tucker/Rocky's prices "aren't that different than those of Parts Unlimited." Logue Dep. at 301. Gregg denied any such conversation. Gregg Dep. at 328-29. Gregg also denied ever discussing the letter with Parts Unlimited. Gregg Dep. at 356.

In his deposition, however, Gregg explained his motivation for sending the letter. For instance:

Question: "Why were you comparing the prices for Logue?"

[*50] Answer: "I thought he would find it interesting."

Question: "Why?"

Answer: "Because he's in the tire business."

Gregg Dep. at 269-70; Transcript at 20.

(c) March 22, 1993: Parts Unlimited Revises Price List (PX 444)

On March 22, 1993, Parts Unlimited issued a revision of its February 1, 1993, price list to conform its prices with those issued by Tucker/Rocky on the same date. The revision went into effect on March 23, 1993. Parts Unlimited's prices were higher than Tucker/Rocky's February 1, 1993, prices with respect to the "any" price (quantity of 1), with about 2-6 cents difference. On the "best quantity" price (large orders) the differences are negligible. The parties agree that the best quantity price is the important price because most dealer discounts are applied to that number. Fox Dep. at 677; Nickell Dep. at 222.

(d) March 31, 1993: Phone Call (PX 624)

²⁴ Interbrand competition means competition between different manufacturers; intrabrand competition means competition among different distributors selling the same product.

On March 31, 1993, Bob Gregg at Tucker/Rocky made a phone call to the Parts Unlimited switchboard; the call lasted 18 minutes. 12(N)(3)(b) Reply at P 31(k). Gregg cannot remember making the call. Gregg Dep. at 455-69, 477.

(e) Late March 1993: Mike Buckley Replaces Pat [*51] Logue as Dunlop's National Sales Manager

In late March 1993, Michael Buckley was hired by Dunlop to replace Logue. Before hiring Buckley, Logue talked with Robert Gregg and Robert Nickell at Tucker/Rocky and Jeff Fox at Parts Unlimited to inquire whether their contacts with Buckley had been agreeable. Buckley received a favorable recommendation.

(f) Late March 1993: Gregg Phone Call to Buckley Regarding Termination of Distributors

Around the time of Gregg's March 22, 1993, Letter, Gregg telephoned Mike Buckley, who had just replaced Logue as Dunlop's national sales manager. According to Buckley, Gregg wanted to know if Dunlop was going to terminate any distributors. (Buckley, 91-95). Gregg, however, denied the conversation. (Gregg, 247-49; 327).

(g) April 1, 1993: Buckley Memo To Dunlop Distributors (PX 2)

On April 1, 1993, Mike Buckley sent a memo to all Dunlop distributors introducing himself as Dunlop's new national sales manager. PX 2. In this memo, Buckley indicated that he would be meeting with the distributors to become acquainted. He also stated that he would continue with Logue's plan to move Dunlop's distribution "to a more limited focus" in the [*52] coming months. Buckley also specifically requested a "current price list" in order to update his files.

(h) The April 8, 1993 Gregg Letter (PX 5)

On April 8, 1993, Mike Buckley received a letter from Bob Gregg regarding "1993 Suggested Dealer Pricing." This letter is reprinted in its entirety:

April 8, 1993
Mr. Mike Buckley
National Sales Manager
Dunlop Motorcycle Tires
P.O. Box 1109
Buffalo, N.Y. 14240-1109
Re: 1993 Suggested Dealer Pricing

Dear Mike:

Enclosed please find analysis of published "each" prices in the market. In most cases, Tucker/Rocky publishes manufacturer suggested dealer (MSD) prices. As you know, our current price list is from 1992 due to stock carryover.

It has been our opinion that Dunlop MSD is unrealistically high versus actual market conditions. Column #2 is approximately 4.5% below Dunlop 1993 MSD and seems to be a more realistic level.

Just a suggestion to discuss:

How about issuing a new 1993 MSD price list that (without changing distributor cost) lowers MSD about 4.5 %. This would be an official lowering of MSD, making Dunlop dealer pricing more competitive without [*53] reducing the amount for which Dunlop sells tires to distributors.

It would also make our imminent 1993 price increase more logical as we could just publish Dunlop MSD.

Please give it some thought and call me as we need to make a decision soon as to new prices.

Best regards,
Robert R. Gregg
President
RRG:ms
enclosure

P.S. Our Dunlop sales were up 15% and 16% in February and March.

PX 5.

The letter also includes a handwritten post-script, asking Buckley to find out if Parts Unlimited's new published prices are intended to be an "April Special" or "long term repricing." There is no evidence that Parts Unlimited received a copy of this letter.

i) April Phone Call Between Buckley & Gregg Regarding April 8, 1992 Gregg Letter

Mr. Buckley remembers, and Mr. Gregg does not, one telephone conversation in which Mr. Buckley said he would disregard the suggestions in Mr. Gregg's April 8, 1993, Letter. 12(N)(3)(b) P 31(1). Buckley recalls telling Gregg that "it didn't make sense to change a suggested dealer pricing in the middle of the year. There's no good reason to do that." Buckley Dep. at 139.

(j) April 30, 1993: Logue [*54] Conversation with Motorcycle Stuff Regarding Tucker/Rocky's Low Prices

Mr. Dodd of Motorcycle Stuff testified that he complained about Tucker/Rocky's low prices and asked Mr. Logue to take action. According to Mr. Dodd, Mr. Logue said that he would try to get Tucker/Rocky to increase its prices. 12(N)(3)(b) P 31(m).

(k) May 6, 1993: Buckley Visits Nichols, Meets Jack Jesse, and Writes Call Reports (PX 14)

On May 6, 1993, Mike Buckley made a personal visit to Nichols in Chicago. He met Jack Jesse and other Nichols personnel, discussed Dunlop's goals, the price war and Nichols' concerns about the market.

After this meeting, Mr. Buckley made two handwritten notes of the interview designated as "call reports." These call reports state:

May 6--Meeting in Chicago w/Kenny Anderson, Terry Baisley, Jack Jesse.

Nichols staff was adamant about the fact that it is D > responsibility to improve or control the inability of Dist. to make acceptable profit margins on D> Tires. Nichols felt that T/R, P/U, M.Stuff were actively discounting D> at close to Dist. cost to all dealers. Nichols was adamant that they are not involved w/mail order houses. They feel that the [*55] 3 previously mentioned dist. all sell mail order houses at cost. Nichols feels its D> responsibility to address this. Jack Jesse made specific mention that if we don't address the mailorder and discounting problems that very soon Nichols will have to stop selling D>. ²⁵ He also asked me what I felt sold our Tires. I replied--Advertising, Racing, Club + PR involvement, word of mouth. He replied Bull He feels Dealers only! Sell in this system and we need to do everything possible to make them more profitable. While at this meeting we discussed Pro Sport--aline of offroad apparel and acc. exclusively imported by Nichols. While touring their warehouse I observed a container of Alpinestar Boots which they had Gray-Marketed in from Europe to sell against P/U--the exclusive importer of Alpinestar in the U.S. Aggressive Tone Throughout meeting.

[*56] (DN00438).

Meeting--Nichols Dist.
Terry Baisley
Kenny Anderson
Jack Jesse

Topics

Gave Dist. Interview
Talked Quite a bit about Mail order Problem
Nichols doesn't sell Mail order.

²⁵ There is no other evidence in the record that any other distributor, including Tucker/Rocky and Parts Unlimited, ever threatened to stop selling Dunlop if Dunlop did not respond to their price complaints or other grievances.

Nichols has much concern about where current trends are taking D>
Nichols Does not agree That D> has a "loyal" cust base
Nichols Feels That dealers will begin switching to Profitable brands.
Nichols is now importing their own Private label tire--"Kings"
This Tire is Mail order Prohibited.
Also heavily involved in their own Private label M/C acces.
inc.--"Pro Sport"
Nichols has 30 Road Reps 10 Phone
Nichols feels they are a National Dist.
I sent Nichols 100 T.T.L. Brochures.

Nichols feels that P/U and T/R are causing All The Problem
with Discounting out there.

(DN 00439). No call reports were prepared for any other distributor. (Buckley, 272-73). There was, however, a form filled out for the interview with Motorcycle Stuff. PX 15.

(1) May 6, 1993: Buckley Spends Evening with Jeff Fox of Parts Unlimited

Late in the afternoon on May 6th, Buckley visited [*57] Parts Unlimited's Janesville, Wisconsin office and went out for supper and drinks with Jeff Fox. Mr. Buckley called ahead to set up the meeting. Mr. Fox recalled having dinner with Buckley. Mr. Fox also remembered that Mr. Buckley told him he was making a trip through the area visiting Dunlop distributors and mentioned his visit with Nichols that day, commenting that ". . . Jack Jesse was a real piece of work or something to that effect." Mr. Buckley also remembered telling Mr. Fox that he had visited Nichols on May 6 and also telling him that the visit was ". . . rather strange." Buckley denies discussing the termination of distributors with Mr. Fox. 12(N)(3)(b) P 31(n).

(m) May 7, 1993: Buckley Visits Tucker/Rocky Warehouse in Chicago

The next day, May 7, 1993, Mr. Buckley made a visit to Tucker/Rocky's Chicago warehouse and had lunch with the Bensenville, Illinois branch manager. There is no relevant testimony regarding their conversation. 12(N)(3)(b) P 31(o).

(n) Early May 1993: "Firm Commitments" (PX 17)

In early May 1993 Buckley called Jeff Fox of Parts Unlimited and Bob Gregg of Tucker/Rocky seeking commitments from these distributors to absorb the sales [*58] volume of any unnamed distributor to be terminated. Fox and Gregg gave Buckley "firm commitments" which Buckley memorialized in a document designated PX 17. Fox admits this conversation. Gregg denies it. Although defendants collectively admit that they individually discussed the absorption of sales volume of unnamed distributors to be terminated with Buckley, they do not admit a common commitment to fix prices or terminate distributors. 12(N)(3)(b) Reply P 31(p).

(o) Late May 1993: Tucker/Rocky Issues Revised Price List (PX 214; PX 645)

In late May of 1993, shortly before Nichols' termination, Tucker/Rocky published a new dealer resale price list on Dunlop tires, which significantly raised its prices above those published on February 1, 1993.

(p) May 20, 1993: Buckley's "Price War" Memo (PX 3)

On May 20, 1993, Mike Buckley sent the following memo to all Dunlop distributors entitled "Price Wars." Buckley attached a Wall Street Journal Article to the memo entitled "How to Avoid a Price War." Buckley wrote:

Enclosed please find some "food for thought" regarding the negative effects of attempting to gain market share by lowering price. I think [the article] [*59] raises some extremely valid points to the long term damage we do when we attempt these types of practices. Particularly alarming is the fact that almost never do we accomplish

what we attempt (market share gain) when we do business in this way. The only thing we do is establish a "lower perceived value" for our products.

I'm sure you'll all agree that this doesn't do anything positive for our future growth. I'm not pointing fingers here; I'm just offering some more information. We can never have enough information.

The Wall Street Journal Article goes on to suggest:

"All too often, this kind of price war has no real winner except the customer."

PX 3.

(q) Buckley's Memos to Robin Mitchell (PX 17; PX 18)

In May 1993, Mike Buckley wrote two memos to Robin Mitchell proposing to terminate Nichols as a distributor. The first memo, titled "Reasons For Change" states:

1. Overall market size shrinking. Less sales available for same number of distributors when market was bigger.
2. National distributor expansion provides excellent regional coverage (overnight service anywhere in U.S.)
3. Nichols only real weapon right now--discounting [*60] .
4. Nichols recently opened warehouse in Phoenix market. Recent meeting with Nichols officials revealed plans to expand further. Next market--Dallas.
5. Recent meeting also revealed Dunlop and Nichols are at odds on how to continue to grow Dunlop business. Dunlop--Advertising, racing, public relations.
- Nichols--None of the above, stop mail-order.
6. Nichols focus right now on off-shore produced "house brands," pro-sport off-road apparel, kings--private label tires, etc. In this scenario, Dunlop gets used as a loss leader to leverage sales for "exclusive" products.
7. Nichols claims no mail-order solicitation--invoices prove otherwise.
8. Firm commitment from T/R and P/U to absorb volume of any cancelled distributor.
9. Cycle Products--credit situation makes the decision easy.

PX 17 (DN 02279).

The second memo is dated June 15, 1993, and the subject is "Motorcycle Distributor Reduction."

As a follow-up to our discussion of the above-mentioned topic two weeks ago, I want to update you on the current situation.

As I told you, Pat Logue and I agreed that since the motorcycle market continues to shrink, it has now become [*61] necessary to cut the number of distributors we have. This is a list of the reasons for this move:

1. Less sales available for the same number of distributors has led to aggressive discounting tactics.
2. Expansion of national distributors allows us complete coverage off 11 parts of the country (overnight service).
3. Discounting has produced a low "perceived value" for premium Dunlop product.

The two distributors I am cancelling immediately are Nichols Distributing and P.J. Cycle Products.

Nichols is currently viewed as the leaders of the "sales by discounting" philosophy. By analyzing invoices from all over the country, it is clear that Nichols is using Dunlop as a "loss leader" ²⁶ to leverage sales for their own private label--high margin products. In addition, Nichols management does not agree with Dunlop's marketing ideas for future growth of the Dunlop brand.

P.J. Cycle Products has gone through recent financial problems including restructuring. A continual habit of slow pay still exists and from a credit risk standpoint, this decision is much easier than the Nichols decision.

It is my feeling that this move will send a message [*62] to our current distributor base that we are very interested in maintaining profitability for our customers, in addition to our premium image which we've worked so hard to achieve. This will create more Dunlop loyalty.

²⁶ Buckley's testimony regarding his "loss leader" theory is found in his deposition at DX 13 at 114-121.

Please contact me if you have further questions.

PX 18 (DN 00443). In deposition testimony, Buckley explained that he terminated distributors to achieve "an increased sense of loyalty to Dunlop" among the remaining distributors. Buckley Dep. at 167.

(r) June 15, 1993: Dunlop Terminates Nichols (PX 16)

In a letter dated June 15, 1993, Dunlop informed Nichols that Nichols was terminated as a Dunlop distributor, effective in five days. After 30 years of service, Dunlop's explanation, given by Robin Mitchell, was that Nichols had been terminated because of its price discounting and that Tucker/Rocky had given Dunlop the invoices showing Nichols' low prices. Dunlop terminated [*63] another distributor, P.J. Cycle (Cycle Products), which also discounted Dunlop tires. P.J. Cycle was in Chapter 11 and delinquent in payment.

(v) ***Post-Termination Evidence***

(a) June 1993: Tucker/Rocky Branch Manager's Report (PX 277)

A Tucker/Rocky branch manager, Bob Crawford, wrote to Nickell and Gregg reporting that a Tucker/Rocky salesman, Jay Crist was "glad to see Nichols problem being resolved and says thanks." PX 277 at 515. In the same report, Mr. Crawford wrote that another salesman, Kevin Christensen, was "also elated over the Nichols/Dunlop deal," and "hopes Shoei (Tucker/Rocky's other largest selling line) will follow suit or put pressure on their distributors." Crawford Dep. at 516.

(b) Joe Piazza (PX 540)

A Tucker/Rocky regional manager (Joe Piazza) indicated that Tucker/Rocky was aware of Nichols' termination before it occurred. Piazza wrote in a July 1993 report:

There are several large accounts that I am anticipating to recapture the Dunlop business away from Nichols Distributing now that their distribution restriction has become public knowledge.

(c) Tucker/Rocky's Missing Branch Manager Reports

Plaintiff [*64] claims that Piazza's reports from May and June 1993 are missing and that the July statement indicates that the earlier reports would have mentioned Nichols' termination. Piazza regularly prepared reports through the fall of 1993. Other reports from Chicago, Michigan and Portland are missing, and there are no reports from Corona, California and Maryland.

(d) September 1993: Trade Show Memo (PX 206)

A couple months after Nichols was terminated, Buckley wrote a memo to all (remaining) Dunlop distributors which says:

For 1994, our goals in marketing, as I mentioned earlier[,] take on a new focus. We will be committed to the dealer network, developing closer relationships with dealers through seminars, dealer visits, hospitality events, dealer incentive programs, so on. We're also going to do everything in our power to use our resources to drive customers into dealerships. By doing this, in conjunction with dealer education, we hope to combat the mail order issue.

PX 206. Plaintiff argues that this evidence is proof that Buckley's reasons for terminating Nichols, as reflected in his memo to Robin Mitchell in May of 1993, were a pretext for illegal termination [*65] pursuant to a pricefixing agreement.

(e) Metzeler Memo of October 5, 1993 on "Price Stability" (PX 303)

The "Metzeler Memo" was written by Guido Carissimo, a Metzeler official, recalling a meeting he had with Bob Gregg, president of Tucker/Rocky, and Greg Blackwell, president of Metzeler, on September 29, 1993. This memo states in relevant part:

Bob hopes that with Mike Buckley Dunlop (*as already discussed between them*) will look for more price stability in 1994 (Dunlop has gained market share in 1993 but made many dealer angry).

PX 303. Defendants have raised a hearsay objection to the admission of this testimony pursuant to Fed. R. Evid. 802. However, for purposes of this ruling, the Court finds this memo admissible as a business record. Fed. R. Evid. 803(6).

(f) Tucker/Rocky Memo Regarding "Market Stabilizing Programs" (PX 280)

In November 1992, Gregg issued a memo to Tucker/Rocky sales personnel suggesting ways to deal with "super low prices" of competitors and suggesting that dealers tell Tucker/Rocky competitors that "if they want the business they must earn it through market stabilizing programs."

(g) Dunlop Raises MSD **[*66]** Mid-Year

In October 1993, Dunlop raised its MSD price even though Buckley testified that there was "no good reason" to do so in the middle of the year. Buckley Dep. at 139.

(h) Rick Ward (DX 36)

Rick Ward, a Parts Unlimited Sales representative, admits that in early November 1993, shortly after the Long Beach Trade Show held at the end of October 1993, he talked with Jerry Stewart, a dealer (with inadmissible testimony) about the termination of Nichols. According to Ward, Stewart complained that Nichols had been terminated because Nichols' prices were so low. Specifically, Ward and Stewart compared specific tiring pricing--"What I was able to sell it to him at versus what he could buy it at from Nichols; us always being, you know, much more expensive than what he could buy it from the Nichols organization." Ward also admits that there was a "one-year period" in which Nichols was his most aggressive competitor for Dunlop tires. DX 36, Ward at 62.

(i) 1994 Price Increases

In January 1994, Dunlop raised its MSD prices again (by approximately 3-5%). PX 645. Similarly, on February 1, 1994, Tucker/Rocky and Parts Unlimited published annual catalogs in which both **[*67]** distributors raised their prices by significant margins. Parts Unlimited raised its catalog prices by 15 percent or more across the board. PX 645; PX 356. Tucker/Rocky increased its prices by approximately 10 percent. PX 209. Both distributors also incorporated the MSD price as part of their price lists. Parts Unlimited adopted Dunlop's suggested dealer price as its "best quantity" price. PX 356; PX 645. Tucker/Rocky adopted Dunlop's suggested dealer price as its "each" price (the price for less than a quantity of 25). PX 645; PX 209. The "best quantity" price is the important price, because discounts are usually applied to that price. Fox Dep. at 677; Nickell Dep. at 222. Once again, Fox became "very upset" once he saw Tucker/Rocky's published prices. Several weeks after the initial publication, Parts Unlimited published a revised version, which priced all popular brands of Dunlop at a level commensurate with the prices published by Tucker/Rocky with respect to the "best quantity" price. PX 645.

(j) Tom Peterich

In the fall of 1993, Tom Peterich, a dealer in Northern California, told another Parts Unlimited representative, Jim Hutzer, that there would be a price hike by **[*68]** LeMans (Parts Unlimited) of 15 percent in the coming year. Peterich Dep. at 10-14, 66-67, 71-72.

(vi) Inadmissible Testimony

The following evidence tendered by Nichols has been determined to be inadmissible and therefore was not relied upon by the Court in reaching its decision.²⁷

²⁷ Nevertheless, the Court expressly notes that even the addition of this ambiguous evidence would not have altered the conclusions it has reached herein.

(a) James Stewart

This testimony is inadmissible, because the witness statement was not signed and Stewart does not admit to the statements transcribed in the statement prepared by Plaintiff's counsel. See [Fed. R. Evid. 802](#). Nonetheless, Stewart allegedly testified as follows:

In approximately April of 1994, the sales representative for Parts Unlimited, Rick Ward, visited me at Cycle Country's store in Salem. He told me that Parts Unlimited had issued a new price list on Dunlop tires effective in April 1994, which changed the prices [*69] on Dunlop tires from their catalog prices published in February 1994. He said to me that Dunlop, Tucker/Rocky and Parts Unlimited had "agreed" that Tucker/Rocky and Parts Unlimited would increase their prices on Dunlop tires in 1994, and that Parts Unlimited's catalog prices reflected that agreement, and that after Parts Unlimited had published its catalog prices for Dunlop, Tucker/Rocky didn't raise their prices like they said they would. Mr. Ward also said that Parts Unlimited then issued the new price list for Dunlop with lowered prices on Dunlop to the level of Tucker/Rocky's prices. Just he and I were present during the conversation. Mr. Ward gave me a copy of Parts Unlimited's new price list, which reflected lower prices for Dunlop tires than in the February 1994 catalog.

PX 456.

(b) Rocky Trevino (PX 622)

This is an affidavit by a dealer who stated that a different Parts Unlimited representative, Jon Hanson, told him in January of 1994, that "there was going to be a big increase in Dunlop tires, and that both Parts Unlimited and Tucker/Rocky would be increasing their prices on Dunlop tires by approximately 15%." Parts Unlimited strongly contests [*70] the admission of this testimony under [Fed. R. Evid. 801\(d\)\(2\)](#). Parts contends that this affidavit is facially ambiguous and Hanson was not involved in pricing decisions (so his remarks were not within the scope of his agency). Parts Unlimited's evidentiary arguments are well taken. This evidence will be excluded.

(c) Terry Baisley - William Giacomelli Conversation (PX 643)

Terry Baisley, Nichols' national sales manager, testified that in June or July 1994, he had a telephone conversation with William Giacomelli, a former branch manager at Tucker/Rocky. During the course of the conversation, Giacomelli told Baisley that Robert Gregg had told him that he (Gregg) was responsible for pressuring Dunlop to terminate Nichols as a distributor. PX 643. This testimony is also inadmissible hearsay under [Fed. R. Evid. 802](#).

c. Analysis

In this case, the "combination" of *Monsanto* and *Matsushita* is deadly. The evidence in this case is largely if not completely circumstantial, and most of it is ambiguous. The justifiable inferences that can be drawn from it, even when viewed as a whole according to Plaintiff's time line and taken in the light most favorable to [*71] the Plaintiff, are equally consistent with Defendant's assertions of independent and interdependent conduct. See [Market Force, 906 F.2d at 1173 HN13](#) [↑] ("conscious parallelism by itself is not enough to support an antitrust conspiracy case. . . [nor does] evidence of informal communications among several parties . . . unambiguously support an inference of conspiracy"). Although the Court has some suspicions that the defendants may have conspired to terminate Nichols in an uncoordinated effort to affect prices, the evidence presented to the Court is not sufficient to show that the defendants implemented and enforced a pricefixing agreement by terminating Nichols, given the standards set forth in *Monsanto* and *Matsushita*. Mere suspicion does not provide the basis from which a reasonable inference of agreement can be drawn, no matter how well-intentioned these suspicions may be.

The central question in this case is whether the Defendants agreed to raise dealer resale prices and to terminate Nichols in violation of the Sherman Act. Plaintiff concedes that there is no distinction between its proof of a vertical agreement and its proof of a horizontal agreement. After careful [*72] review, the Court concludes that there is no unambiguous evidence of a horizontal agreement between Tucker/Rocky and Parts Unlimited to fix prices or to

terminate Nichols.²⁸ Plaintiff is therefore left with a vertical conspiracy claim involving the three defendants. The proof of a vertical conspiracy must also fail. First, there is simply no evidence that Parts Unlimited conspired with Dunlop (and with Tucker/Rocky through Dunlop) to terminate Nichols. Without proof of a termination agreement, Nichols cannot sustain an antitrust pricefixing action against Parts Unlimited. Second, although the vertical conspiracy case against Dunlop and Tucker/Rocky is stronger, because there is some proof of collusion on the issue of termination and pricefixing, this evidence is also ultimately ambiguous and therefore insufficient to prove an agreement under *Monsanto* and *Matsushita*, because the limited inferences, added up, do not tend to exclude the possibility of independent action.

[*73] We begin by reviewing the evidence of a horizontal agreement, then discuss the absence of proof on the issue of termination against Parts Unlimited, and conclude by addressing the central question in this case: whether the evidence is sufficient to show a vertical agreement between Tucker/Rocky and Dunlop to fix prices and to terminate Nichols pursuant to that agreement. On all questions, we find that Plaintiff's evidence has failed to prove the *per se* theories alleged under Count I.

(i) The Horizontal Agreement

Plaintiff alleges that there is a horizontal agreement between Tucker/Rocky and Parts Unlimited to raise and stabilize the dealer resale prices of Dunlop tires. During oral argument, Plaintiff argued that the horizontal agreement is supported by "evidence that there were direct communications [between Tucker/Rocky and Parts Unlimited] and [indirect] communications *through Dunlop* between Tucker and Parts, . . ." Transcript at 9. There is no horizontal agreement in this case because the direct communications between Tucker/Rocky and Parts Unlimited do not provide any evidence of illegal conduct. Cf. *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.2d 1217, 1220 (7th Cir. 1993)(holding that restraint alleged by dealer constituted *per se* horizontal pricefixing conspiracy). Similarly, the indirect communications between the two distributors *through Dunlop* do not manifest a horizontal agreement, because the presence of Dunlop reflects a vertical arrangement. See *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (1982)(noting factual difference between a horizontal and vertical conspiracy). There are only two relevant examples of direct communication between Tucker/Rocky and Parts Unlimited in which Dunlop was not present: two telephone calls and several conversations at trade show meetings in early 1993. The telephone calls, although significant with respect to the time period in which they were made and the context in which they occurred, do not provide any evidence of a horizontal conspiracy because there is no testimony indicating who called whom or what was said during those conversations.²⁹ Even if price had been discussed, at most, these telephone calls provided a *mere opportunity* to conspire. 6 P. Areeda, *Antitrust Law* § 1417 at 97. Similarly, the trade show meetings fall under [*75] the category of "informal communications" which have been held to be, at best, ambiguous evidence of a conspiracy. See *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1172 (7th Cir. 1990) (evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 662 (7th Cir. 1987) (evidence of informal communications discussing complaints about competitors prices is not sufficient evidence to raise an inference that there was an "agreement to set, control, fix, maintain, or stabilize prices"); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 805-06 (4th Cir. 1989) (evidence that dealers agreed with a ban on discounters not sufficient to support the inference of a conspiracy). The Court therefore concludes that these conversations also merely provide opportunities for collusion rather than unambiguous circumstantial evidence from which the inference of an agreement or concerted action can

²⁸ Plaintiff suggests that the Court need not find evidence of an agreement to terminate Nichols, because an agreement to terminate discounting distributors *like Nichols* is sufficient. Although we agree with this proposition, there is no significant difference in this case between the two agreements, because an agreement does not exist under either theory.

²⁹ During their depositions, both Fred Fox and Bob Gregg guessed what these conversations were about. Fox asserts that the February phone call involved a conversation between Jim and Sharon Ricci who left Parts Unlimited and were at that time talking to their prospective employer, Tucker/Rocky, in February 1993. Gregg speculates that the March phone call covered the subject of "SBS brake pads." Parts Unlimited was the exclusive distributor for these pads, and Tucker/Rocky wanted to sell them. 12(N)(3)(b) Reply at P 31(i); Transcript at 141.

be drawn. Consequently, Nichols has failed to prove a horizontal agreement between Parts Unlimited and Tucker/Rocky.

[*76] (ii) The Vertical Agreement

Because there is no evidence of a horizontal agreement in this case, Plaintiff's Sherman Act [Section 1](#) claims are limited to vertical conduct between Dunlop and one or both of the defendant distributors. In a vertical arrangement, both distributors need not have participated in the alleged conspiracy. For purposes of *per se* liability in this case, however, the evidence must show that at least one of the defendant distributors agreed with Dunlop to terminate Nichols *and fix prices*.³⁰ The evidence of a vertical agreement between Dunlop and Parts Unlimited to terminate Nichols is wholly lacking. Parts Unlimited is therefore entitled to summary judgment on Count I. Similarly, although the evidence of a vertical agreement to terminate Nichols between Dunlop and Tucker/Rocky is stronger, this evidence is also ambiguous. Finally, Nichols has no standing to assert that a pricefixing agreement caused an antitrust injury, either under the *per se* rule or the rule of reason, without a termination agreement. Under the Plaintiff's theory, the antitrust injury in this case resulted when Nichols was terminated because, without Nichols' aggressive [*77] price competition, Tucker/Rocky and Parts Unlimited were able to raise prices and use their market power to force the smaller distributors to stop discounting or face termination. We will now review the evidence that is material to these determinations.

(a) *There is no evidence of parallelism supporting the inference of an agreement to terminate Nichols or to fix prices.*

"Judicial scrutiny of alleged concerted action, undertaken to determine whether it was the result of an agreement, is an intricate endeavor." [Alvord-Polk, Inc. v. F. Schumacher & Co.](#), 37 F.3d 996, 1011 (3d Cir. 1994). The intricacy in this case involves timing: the timing of the defendants' conduct in an extremely interdependent market. If a price agreement exists in this case, it is reflected by the way the parties behaved in the market from December 28, 1992 through [*78] June 15, 1993. However, parallel behavior in an interdependent market, by itself, is not sufficient to prove the existence of an agreement to fix prices, [Reserve Supply v. Owens-Corning Fiberglas](#), 971 F.2d 37, 50 (7th Cir. 1992), and the Supreme Court has [HN14](#) [↑] "never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." *Id.* (quoting [Theatre Enter., Inc. v. Paramount Film Distrib. Corp.](#), 346 U.S. 537, 541 (1954)). However, parallelism in an interdependent market plus conspiratorial motivation and acts against self-interest may provide the basis from which to infer an agreement under *Monsanto* and *Matsushita*. 6 P. Areeda, [Antitrust Law](#) § 1434 at 213.

i) Market Theory

The traditional agreement sought by conspiracy law involves some kind of commitment to a common cause. The commitment may be weak or strong, express or implied. Because such traditional agreements are often inferred from ambiguous circumstantial evidence, the inference may be erroneously based on competitors' parallel behavior. . . in the absence of interdependence.

[*79] 6 P. Areeda, [Antitrust Law](#) § 1410 at 64

[HN15](#) [↑] Market interdependence exists when competitors "base their pricing decisions in part on anticipated reactions to them." R. Posner, [Antitrust Law: An Economic Perspective](#) 43 (1976). Interdependence exists when each competitor's "pricing decision is interdependent with that of its rivals: each knows that his choice will affect the others, who are likely to respond, and that their responses will affect the profitability of [its] initial choice." 6 P. Areeda, [Antitrust Law](#) § 1410 at 65. This process explains both price reductions and price increases. Price increases can be achieved by "oligopolistic price leadership."

³⁰ Conversely, an agreement to terminate Nichols, without a price agreement, would limit Nichols to a nonprice rule of reason claim which it has not asserted.

When one oligopolist raises his price, each of his rivals must decide whether to follow or not. Continuing the previous price would allow each of the others to increase his sales if the leader persists in charging a higher price. But each knows that the leader is likely to retract an increase that is not followed. Accordingly, each rival asks himself whether he is better off at the lower price when charged by all or at the higher price when charged by all. If the latter, as will often be the case, the [*80] leader's price increase is likely to be followed.

Id. Price leadership can result in what is known as parallel behavior by competitors, that is, conduct by one that mirrors another.

HN16 [+] Although interdependence must be present to infer a conspiracy from parallel behavior, it cannot serve as the only basis for a Section 1 claim. *Id.* § 1411. What is needed is additional proof from which the factfinder could conclude that parallel behavior "would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Id.* § 1425 at 144. Professor Areeda argues that "if the actual defendants could not or would not have acted as they did without advance communication and understanding, then their action necessarily proves a traditional conspiracy." *Id.* However, as the Professor notes, this conclusion begs the ultimate question that this Court must answer, namely, whether the defendants would not have acted without such communication and assurance. Or, to put it differently, is the parallelism in this case (if it exists) "too close" for coincidence? *Id. at 145*. Our [*81] answer to that question depends upon a close analysis of three events: Dunlop's unilateral decision to terminate distributors; Parts Unlimited's decision to raise prices in 1993; and Tucker/Rocky and Parts Unlimited's 1994 price increase.

ii) Three Examples of Non-Parallel Behavior

a) Dunlop Unilaterally Decided to Reduce Its Distribution Network

On December 28, 1993, Dunlop issued a memo to all of its distributors announcing that it planned to terminate two or three distributors in 1993 because the market for replacement tires, Dunlop's largest market, was shrinking. Along with this memo, Dunlop included the 1993 Distributor Agreements which contained a termination at will provision.

Although there is evidence of informal business and social conversations between the defendants at various trade show meetings and evidence of general price complaints by Tucker/Rocky and Parts Unlimited about Nichols, there is no evidence preceding December 28, 1993, that tends to exclude the possibility that Dunlop's decision to terminate distributors was an independent action. In fact, there are numerous economic justifications for Dunlop's decision to terminate distributors [*82] which support the inference of independence.

In 1993, the tire industry was extremely interdependent. When tire sales dropped off and the number of tire dealers began to decrease in 1991, a price war between competing distributors ensued to capture the remaining sales, driving the price of Dunlop tires down, far below Dunlop's suggested dealer resale price. Dealer sales went to the lowest bidder, or to the lowest bidder with the most nonprice services to offer. Dunlop expressed concern that lower prices on a long-term basis would only achieve a "lower perceived value" for Dunlop tires. Tucker/Rocky expressed a similar concern, remarking that price stability would support the industry, whereas excessive discounting would exploit it. Additionally, because of these concerns, both Dunlop and its two largest distributors, Tucker/Rocky and Parts Unlimited, were extremely cognizant of the prices each distributor charged dealers for various Dunlop tires.

By 1993, distributor profit margins, determined in part by the difference between the distributor's cost and the dealer resale price, were also in decline (at least on Dunlop tires), due to low dealer resale prices. The record in this case [*83] confirms that Tucker/Rocky and Parts Unlimited believed that Nichols, a small but expanding competitor, was its most aggressive competitor on price. There is also evidence that Parts Unlimited complained that Nichols was charging "ridiculous prices," which were at least partially responsible for the declining profit margins. In fact, Jeff Fox of Parts Unlimited went so far as to tell Dunlop it should "clean up [the market]." Tucker/Rocky also complained to Dunlop about Nichols' (and other distributors') low prices, indicating that it was "unwilling to sell at those prices." Tucker/Rocky and Parts Unlimited were also concerned about Nichols' expansion into Phoenix, Arizona, and its proposed expansion into Dallas, Texas and Seattle, Washington. Finally, Plaintiff

argues that Tucker/Rocky and Parts Unlimited saw an opportunity to capture an increased market share once Nichols, their most aggressive competitor on the price of Dunlop tires, was out of the picture. Plaintiff's counsel explained, "what they're trying to do is take over the Dunlop market like they control the Metzeler market, . . . They only have 68% . . . of Dunlop [in 1993]. With Nichols out, they hope to get it up probably [*84] to 90, 95 [percent] . . ." Transcript at 33.

In an elastic market, increased sales could be generated by a large number of distributors competing vigorously on price. On December 28, 1992, however, Dunlop went on record, stating that it believed the market had become inelastic:

The tire replacement market is not going to grow in the predictable future. Our distributor base is still at approximately the same level as it was when the market was 35% larger than it is today.

Because of this situation, it is our intention to reduce our account base before the September IMAE by at least two to three distributors.

PX 1. In an inelastic market, it is economically plausible that Dunlop, having attained the largest market share in the country and convinced that the demand for Dunlop tires had stabilized and matured, sought to increase profits for its distributors by reducing its distributor base. Cf. [Valley Liquors Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 \(7th Cir. 1982\)](#)(discussing restricted distribution cases under the rule of reason and the role of market power). Dunlop's concern with its largest distributors' profit margins, although facially [*85] suspicious, is a legitimate business concern under the relevant legal precedent. See [Monsanto, 465 U.S. at 762-63](#). Dunlop's interest in its "perceived" image is also legitimate cover because continued lost profits for Tucker/Rocky and Parts Unlimited might translate into lost marketing services necessary to promote Dunlop's brand name. Termination of smaller competitors³¹ would not reduce Dunlop's profit so long as the nonterminated distributors could absorb the sales being made by the terminated distributor(s).

None of these motivations or actions violate the antitrust laws, so long as Dunlop acted independently in recognition of the interdependent market. In fact, [HN17](#) termination of a distributor following or in response to price complaints, even those that expressly or impliedly [*86] referred to Nichols, is not enough to support the inference of a conspiracy. [Valley Liquors, 822 F.2d at 660](#) (citing [Monsanto, 465 U.S. at 764](#); [Lovett v. General Motors Corp., 998 F.2d 575, 578 \(8th Cir. 1993\)](#)). A defendant's actions become illegal only when its concerns and plans cross the line between encouragement and agreement.

After careful review, the Court has concluded that Dunlop's asserted reasons for terminating distributors, in general, were economically plausible and equally consistent, if not more consistent, than the conclusions the Plaintiff would have the trier of fact draw from the same evidence. Despite the evidence of strong lobbying efforts by Tucker/Rocky, there is simply not enough evidence tending to exclude the possibility that Dunlop's decision to terminate Nichols was anything other than an independent action supported by the legitimate business reasons described above.

Although there is very little evidence tending to exclude the possibility that Dunlop's decision to terminate Nichols was an independent action, there is one document, the March 22, 1993, Gregg Letter, which raises some inferences of concerted action between Dunlop and Tucker/Rocky. [*87] However, the letter raises equally reasonable (but competing) inferences on the issue of termination and pricefixing which render the letter ambiguous evidence at best. With respect to a pricefixing agreement among the three defendants, the additional evidence is equally as ambiguous.

(b) Parts Unlimited's 1993 Price Increases

On February 1, 1993, Tucker/Rocky and Parts Unlimited published their 1993 price catalogs. Parts Unlimited, despite the price war, raised its prices significantly. Given the fact that Parts Unlimited did not have the market

³¹ Plaintiff's counsel admitted during oral argument that "Dunlop would have an independent right to reduce distributors to shake out the market so long as it did not terminate Nichols pursuant to a conspiracy." Transcript at 25.

power, by itself, to lead sales to a higher price level, it is rational to conclude that Parts Unlimited's decision to raise its prices would have been perilous without an advance agreement with its primary competitor, Tucker/Rocky, and some wholesale discounting support by its manufacturer, Dunlop. It was also an unusual move because it was contrary to Parts Unlimited's economic self-interest, given the competitive forces still in play in an admittedly sensitive market. In other words, it does not make economic sense for Parts Unlimited alone to simply raise its prices on February 1, 1993.

In the Court's view, this evidence [*88] may have been sufficient to raise the inference of a vertical pricefixing agreement if there were any objective evidence of parallel behavior between Parts Unlimited and Tucker/Rocky. Although Tucker/Rocky could have backed out of any agreement reached between the three defendants, the Court's speculation about what happened cannot provide the basis upon which we allow the Section 1 claim to reach a jury. Nichols has simply failed to produce sufficient evidence that shows that Parts Unlimited's decision to raise prices resulted from an unlawful relationship with Tucker/Rocky and/or Dunlop. This is because there is no unambiguous evidence of market conduct which would tend to show that the defendants were committed to a common course of action and united by a common purpose.³² Instead, the evidence shows erratic, unpredictable conduct that is more consistent with parties trying to obtain a competitive edge than with parties allied by a common cause.

[*89] [HN18](#) [↑]

To infer a conspiracy from parallel behavior, the parallel conduct must occur in a logically relevant manner. For instance, it cannot arise from a "plausible coincidence or an expectable response to a common business problem." 6 P. Areeda, Antitrust Law § 1425 at 146. Although "simultaneous" parallel action may be convincing, the time frame "is not limited to events occurring at a single moment. The definition is functional rather than literal and asks whether each alleged conspirator would normally have knowledge of another's act before deciding upon his own course of action." Id. at 147. In this case, the prices each competitor published would not necessarily be known before they were distributed, although once distributed they became public knowledge. Thus, there is nothing suspicious about the fact that Tucker/Rocky's prices differed from those Parts Unlimited published on February 1, 1993, especially since Tucker/Rocky's prices stayed the same as its 1992 prices.

However, there is no sequential parallelism in this case either. In sequential cases, the leader's action is known before the other players must make their choices. This method works if the leader can alter [*90] or reverse its position after seeing what the other competitors do. Id. at 147. Parts Unlimited was the leader on the price increase of 1993, and it waited until March 22, 1993, to see whether Tucker/Rocky would respond. The unfortunate coincidence for Plaintiff is that on the very day that Gregg wrote the March 22, 1993, Letter to Logue confirming its desire to raise dealer resale prices to reflect Dunlop's 1993 price increase, Parts Unlimited reversed course and published prices substantially equal to those Tucker/Rocky published for 1993 on February 1. The fact that Parts Unlimited reversed course is one more indication that the minds at Tucker/Rocky never met with those at Parts Unlimited or Dunlop and vice versa.

Finally, Tucker/Rocky's price increase in May 1993 looks more like the traditional price leadership that occurs when a distributor makes the choice to risk short-term loss in the hope that its competitors will find it more profitable to sell at the higher price rather the lower one. However, Parts Unlimited did not follow Tucker/Rocky's lead. Instead, Parts Unlimited "stayed put." As counsel for Parts Unlimited phrased it during oral argument: "the best time to [*91] rock and roll on the conspiracy [was] in May '93. They didn't do it." Transcript at 139. Parts Unlimited's motivation for staying put is irrelevant since that move, combined with Tucker/Rocky's recalcitrance in February, destroys any possible theory of parallelism and any reasonable inference that can be drawn from it. In short, the relevant conduct in the market reveals that the parties were coming and going, but never once acted in a concerted way until February 1, 1994, well after Nichols had been terminated.

³² Thus, there is no need to consider whether the presence of the so called "plus factors"--conspiratorial motivation and acts against self-interest--support a conspiracy inference. See 6 P. Areeda, Antitrust Law §§ 1433-1434, at 218-221.

c) *Tucker/Rocky and Parts Unlimited's 1994 Price Increases*

The 1994 increase, although a more classic example of parallelism, is insufficient, by itself, to support the inference of an agreement, without additional evidence that the parties' decisions were the result of concerted action. The fact that Parts Unlimited once again needed to revise its price list to become more competitive with Tucker/Rocky, not only with respect to the percentage of the price increase, but with respect to the "best quantity" price, precludes the concerted action inference. Typically, in the context of secret bids (like the catalogs) which ultimately become public knowledge, the inference [*92] of collusion is stronger where there is price uniformity on specific terms which would not exist but for collusion. No such uniformity existed in this case. In short, shared interests do not constitute an agreement without evidence tending to show some symmetry and synchronicity in the parties' conduct, either simultaneous or sequential.

In this case the market is far from synchronized; it is erratic, full of unexpected shifts in movement which are not at all in synch with the actions one would expect from co-conspirators who combine to implement a common scheme. Thus, any inference of collusion that can be drawn from the 1993 and 1994 pricing movements by Tucker/Rocky and Parts Unlimited cannot be sustained given the undisputed fact that Jeff Fox had to revise his published prices downward for two consecutive years, 1993 and 1994, to meet Tucker/Rocky's more competitive (lower) levels. This conduct occurred both before *and* after Nichols' termination and therefore cannot support the inference of a conspiracy from parallel conduct because *there was no parallelism*. These pricing movements are at best ambiguous evidence because they are much more consistent with classic interdependence: [*93] each distributor resting its own decision to lead or withdraw on price based upon its belief that its competitor would do the same. Interdependent behavior without evidence of parallelism, however, does not reflect an unlawful agreement under Section 1 of the Sherman Act. The inference of a Section 1 agreement under the parallelism theory must therefore be rejected.

Although the preceding evidence does not prove that a vertical agreement - either on price or termination - existed, there is one document, as alluded to previously, upon which Count I turns. The March 22, 1993, Gregg letter. We will begin with that letter and analyze the events subsequent to it in light of the influences it raises.

(b) *The Gregg letters are ambiguous evidence and therefore do not support an inference of pricefixing or a termination agreement*

i) *The March 22, 1993 Gregg Letter*

There is only one document in this case, the March 22, 1993, Gregg Letter to Logue that can be viewed as supporting the plaintiff's proof of a vertical agreement. The question this Court has carefully considered is whether this single document, viewed in context of the record as a whole, takes the case [*94] past *Monsanto* and *Matsushita*. We believe it falls short of the mark.

There are several reasonable (but competing) inferences that can be drawn from this document. First, the concluding sentence to page one states: "Tucker/Rocky would like to pass on the 1993 Dunlop price increase at this time." This language suggests that Tucker/Rocky, in response to the pressure it received from Dunlop and Parts Unlimited after publication of the February 1, 1993, catalog, agreed to raise its prices in 1993 to reflect both Dunlop's 1993 price increase *and* the published increase in Parts Unlimited's prices.³³ The conditional language used in this sentence also implies some measure of control by Dunlop because the statement can be framed as an offer, requiring not only assent (or acceptance) but also the occurrence of an event or a condition precedent to form an agreement on price. Similarly, the second page encourages Dunlop to terminate single warehouse distributors "who dump tires at disruptively low and predatory prices, thousands of miles from their warehouse." In consideration of an agreement on these issues, Tucker/Rocky proposed that it would "increase the amount of resources [*95] Tucker/Rocky spends to promote and service Dunlop tires . . . [which] will increase *interbrand*

³³ The fact that neither Nichols, nor any other distributor, is ever mentioned in either the first page of the Gregg Letter, or the price analysis, indicates that Tucker/Rocky is responding to the complaints Dunlop received from Parts Unlimited regarding Tucker/Rocky's 1993 published prices.

competition." From this language it is not difficult to infer that Tucker/Rocky was willing to increase resale dealer prices to reflect the MSD levels suggested (and desired by) Dunlop if Dunlop terminated discounting distributors, like Nichols, who prolonged the price war that made a price increase untenable. Second, the fact that Parts Unlimited received a copy of the first page of the letter implies some sort of collusion between the three defendants regarding price: the letter appears to expressly refer to the February conversations regarding Dunlop's 1993 increase of its dealer resale prices (MSD) and Parts Unlimited's complaints that Tucker/Rocky did not pass on this increase in its published prices, as Parts Unlimited did.

[*96] The inferences break down with respect to Parts Unlimited, however, because neither a copy of the price analysis, which might have indicated plans to collude on specific tire prices, nor the second page of the letter addressing the termination of discounting distributors, like Nichols, was ever found in the possession of Parts Unlimited. Without these documents, Parts Unlimited cannot be tied to either a price-fixing or a termination agreement. The fact that Parts Unlimited admittedly only received a copy of the first page of the letter, although a somewhat strange coincidence, does not evidence a deliberate act to include Parts Unlimited in some form of traditional offer or acceptance.³⁴ See [Monsanto, 465 U.S. at 761 n.9](#). The most that can be said is that Tucker/Rocky addressed Parts Unlimited's concerns and someone, either Dunlop or Tucker/Rocky, sent the first page to Parts Unlimited to set the record straight.

[*97] With respect to Tucker/Rocky, the inferences are stronger, but equally ambiguous. Given the detailed price comparison between Tucker/Rocky's and Parts Unlimited's prices, the concluding sentence of the first page may simply mean: Tucker/Rocky would like to pass on the 1993 Dunlop price increase, but our prices are already higher than those charged by Parts Unlimited, our main competitor, and we cannot afford to raise them any higher until Parts Unlimited's dealer resale prices go up even further. The second page, although evidence of strong lobbying to terminate Nichols, may be nothing more than a complaint: identifying problems and proposing solutions. Distributors are entitled to express their opinions, and manufacturers are entitled to both listen and act on the information without being charged with illegal antitrust agreements. [Business Elecs. v. Sharp Elecs., 485 U.S. at 726](#). In this case, both Logue and Buckley testified that they did not act on the letter, which means that their decision to terminate Nichols was not based on this letter. In similar cases, courts found similar memoranda and complaints to be insufficient evidence of an agreement. [Valley Liquors, 822 \[*981 F.2d at 660-61](#) (competitors' price complaints coupled with separate meetings with manufacturer before plaintiff's termination were insufficient to go to a jury); [Winn v. Edna Hibel Corp., 858 F.2d 1517, 1520 \(8th Cir. 1988\)](#)(competitor's memo to manufacturer that it didn't discount and hoped that manufacturer would prevent plaintiff distributor from discounting, followed by termination of plaintiff, was insufficient to go to jury); [Lovett, 998 F.2d at 577, 581](#) (evidence which showed plaintiffs' competing dealers complained specifically about plaintiff's pricing program and asked manufacturer to take strong action to eliminate plaintiff's program, followed by plaintiff's termination was insufficient to jury); [Helicopter Support Sys., Inc. v. Hughes Helicopter Inc., 818 F.2d 1530, 1533-34 & n.4 \(11th Cir. 1987\)](#)("more evidence is needed of impermissible behavior than a mere response to distributor complaints to establish liability under *Colgate*); [Ben Elfman & Son, Inc. v. Criterion Mills, Inc., 774 F. Supp. 683, 685-86 n.6 \(D. Mass. 1991\)](#)(where largest distributor and a competitor of pricecutting plaintiff wrote memo to manufacturer stating that: "the problem [with [*99] plaintiff's pricing] has escalated to a point beyond which we can tolerate. You do what you must, we'll do what we must," court held that memo was ultimatum to manufacturer to make plaintiff raise prices or to terminate plaintiff as a distributor but was insufficient evidence of an agreement under [Section 1](#)). Given the competing inferences and the case law on similar issues, the Court finds that the March 22, 1993, Gregg Letter does not tend to preclude either the possibility of independent action by Dunlop to terminate Nichols, nor by Tucker/Rocky to raise its prices.

In conclusion, the Court finds that one may reasonably infer from the March 22, 1993, Gregg Letter that Tucker/Rocky strongly encouraged Dunlop to terminate Nichols, even though Nichols is never mentioned in the letter, because Gregg admits that the term "single warehouse distributors" referred to Nichols.³⁵ One may also

³⁴ The Court must draw this inference, despite Parts Unlimited's "credit inquiry" theory, see *Transcript* at 131-32, because all reasonable inferences go to the Plaintiff as the nonmoving party.

reasonably infer that Tucker/Rocky offered to raise dealer resale prices to reflect Dunlop's 1993 MSD price increase, if Dunlop promised to terminate Nichols. There is no evidence, however, that Dunlop accepted this offer, even though Tucker/Rocky's prices went up in May and Nichols was terminated [*100] in June. In addition, the fact that Parts Unlimited only received the first page of the letter, but not the price analysis or the second page of the letter, renders the probative value of the first page of the letter, for purposes of finding the relevant agreements against Parts Unlimited, marginal at best.

ii) The April 8, 1993 Gregg Letter

The inference that Tucker/Rocky held out on raising its prices until Nichols was terminated is undermined by Gregg's April 8, 1993, letter to Buckley. The April letter announced Tucker/Rocky's seemingly independent plans to raise its published [*101] 1993 dealer resale prices and proposes a pricefixing agreement: Tucker will trace Dunlop's MSD in its price increase if Dunlop lowers the MSD by 4.5 percent. Dunlop, however, does not lower its MSD mid-year, it raises it in October of 1993, for which Buckley concedes there was "no good reason." Furthermore, Tucker/Rocky raised its published dealer resale prices in May 1993, without waiting for Dunlop to lower the MSD. This market conduct by Tucker/Rocky and Dunlop does not evidence either simultaneous or sequential parallelism. Although there may have been a commitment by Dunlop to terminate Nichols prior to Tucker/Rocky's price increase, the equally competing inference is that Tucker/Rocky's price increase was independent action. The Court therefore concludes that these two letters, Plaintiff's most direct evidence of an agreement between Dunlop and Tucker/Rocky, are at best ambiguous because they raise equally competing inferences of independent action.

(c) *There is no other direct or circumstantial evidence of collusion supporting Nichols' Section 1 claim*

The only other evidence of a vertical agreement between Parts Unlimited, Tucker/Rocky and Dunlop to terminate [*102] distributors involves phone calls made in early May 1993 by Mike Buckley to both Bob Gregg of Tucker/Rocky and Jeff Fox of Parts Unlimited. Buckley admittedly made these calls for the express purpose of seeking "firm commitments" from the two distributors to absorb the sales of any terminated distributor. Buckley did not call any other distributor seeking similar commitments. Jeff Fox admits that he agreed to "pick up the slack" in case there was a termination. Bob Gregg denies giving his commitment. Buckley, however, memorialized both commitments in writing at the time he made the phone calls. Although the exchange of commitments can constitute direct evidence of collusion, in this case they do not. Admittedly, the statements allude to the prospective termination of distributors, but these calls do not raise any inferences that Parts Unlimited or Tucker/Rocky did anything more than agree to absorb sales. An agreement to absorb sales is not an agreement to fix prices, nor is it an agreement to terminate a distributor in light of Dunlop's previously stated, independently asserted, decision to terminate someone due to market stasis. Further, there is no evidence that either Parts Unlimited [*103] or Tucker/Rocky agreed with Dunlop to terminate Nichols and to absorb Nichols' sales volume. Without this evidence, there is no vertical agreement between Parts Unlimited and Dunlop or Dunlop and Tucker/Rocky.

Although *Monsanto* does not impose a higher summary judgment standard upon the Plaintiff, the inferences we may draw in favor of the Plaintiff from ambiguous evidence are limited. *Matsushita*, 475 U.S. at 596. The Court has determined that the Plaintiff's evidence is ambiguous and therefore insufficient to support the inference of a vertical agreement between the defendants, for the reasons given above. Summary judgment is therefore granted in favor of all defendants on Count I.

2. Count II: The Rule of Reason

³⁵ Even if the March Gregg Letter constituted an agreement to terminate Nichols, it is not sufficient to state a *per se* claim under Section 1 of the Sherman Act, because it would at most constitute a nonprice restraint which, if it had an anticompetitive impact, would need to be tested under the rule of reason. Plaintiff has not alleged a nonprice restraint under the rule of reason, so the Court does not reach that question.

In Count II, Plaintiff restates its pricefixing and termination conspiracy claim under the rule of reason.³⁶ [HN19](#) Under this rule, a plaintiff must still prove the existence of an agreement that restrains trade. An agreement under the rule of reason is not as difficult to prove as it is under the *per se* rule, because there is not a presumption of antitrust injury. In a rule of reason case, the inference of an illegal agreement may be sustained merely [*104] by producing evidence that "casts doubt" on inferences of independent action. [Capital Imaging, 996 F.2d at 545](#). However, although the agreement may not be as difficult to prove under the rule of reason, additional elements must be met. For instance, a plaintiff must show that the defendants had market power to fix prices and that the pricefixing scheme had an anticompetitive impact on the market as a whole. After careful review, the Court finds that Plaintiff has failed to produce sufficient evidence of anticompetitive impact for Count II to survive summary judgment.

a. Legal Standards

[HN20](#) Most cases fall outside the narrow, carefully demarcated categories of agreements held to be [*105] illegal *per se*. In the typical case, a plaintiff must prove an antitrust injury under the rule of reason. [Capital Imaging, 996 F.2d 537 \(2d Cir.\)](#), cert. denied, 114 S. Ct. 388 (1993). Under this test, plaintiff bears the initial burden of showing that the challenged agreement has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. [Tunis Bros. Co. Inc. v. Ford Motor Co., 952 F.2d 715 \(3d Cir. 1991\)](#), cert. denied, 112 S. Ct. 3034 (1992). Insisting on proof of harm to the whole market protects competition in general, rather than individual competitors. [GTE Sylvania, 433 U.S. at 52](#) (the goal of **antitrust law** is to protect interbrand rather than intrabrand competition). The Seventh Circuit has held that were the law otherwise, routine disputes between business competitors would be elevated to the status of an antitrust action, thereby trivializing the Act because of its ready availability. [Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 \(7th Cir. 1986\)](#) ("antitrust laws are not balm for rivals' wounds"). The Plaintiff must also show that [*106] the defendant had market power, that is, the "power to raise prices significantly above the competitive level without losing all of one's business." [Valley Liquor, 822 F.2d 656, 665 \(7th Cir. 1987\)](#). The Seventh Circuit has held that a district court must proceed to the first step in the rule of reason analysis, which is to balance the effects the vertical restraint has on intrabrand and interbrand competition, only if the evidence gives rise to the inference that defendants had sufficient market power to control dealer resale prices. *Id.* Ultimately, the factfinder must weigh the harms and benefits of the challenged behavior.

The classic articulation of how the rule of reason analysis should be undertaken is found in [Chicago Bd. of Trade v. United States, 246 U.S. 231 \(1918\)](#), where Justice Brandeis, speaking for the Supreme Court, said:

[HN21](#) 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 [*107] 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 the facts and to predict consequences.

Id. at 238.

b. Analysis

³⁶ The idea of applying a rule of reason analysis to a vertical pricefixing violation was discussed in *Monsanto* in a footnote, [465 U.S. at 760 n.7](#), but was not ruled on because it was not raised at the district court level. The Court has not found any case since *Monsanto* that discusses this theory for recovery.

This test is easier to state than to apply to the facts of this case. Applying this test, the Court finds that Plaintiff has failed to prove anticompetitive impact under the rule of reason and Count II must be denied. *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982) ("plaintiff must show that the refusal to deal is likely to reduce competition"). Plaintiff's theory of anticompetitive impact is that the termination of Nichols sent a message to other small distributors, whose only competitive "weapon" against the larger distributors was price. The proof of anticompetitive impact, argues Plaintiff, is [*108] that prices have gone up significantly since June 15, 1993, and smaller distributors have lost sales to Tucker/Rocky and Parts Unlimited--who absorbed not only Nichols' sales but the sales of other discounters who stopped aggressive discounting. At the outset, it is important to recognize that "the antitrust laws were enacted for 'the protection of competition, not competitors.'" *Atlantic Richfield*, 495 U.S. at 338. HN22[] Termination of a small distributor pursuant to a price agreement does not restrain trade until distribution is channeled exclusively "through a few large or specifically advantaged dealers." *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (where Court found evidence of an agreement to terminate a small distributor pursuant to an agreement with larger distributor to charge maximum prices).

Nichols only evidence of this anticompetitive impact is the testimony and opinion by its expert, Dr. Pisarkiewicz. This testimony is wholly lacking. Nichols argues that Dr. Pisarkiewicz, after extensive analysis, has concluded that the conspiracy alleged would result in an unreasonable restraint of trade and have a substantial adverse effect on competition (PX 608 at 4, [*109] 41-42). At page 4 of his report, Dr. Pisarkiewicz claims:

Report of Dr. John Pisarkiewicz, Jr.

4. In summary my conclusions are as follows:

g) But for this lawsuit, there is compelling evidence that prices of Dunlop tires to dealers and to consumers would be significantly higher. This is a substantial adverse effect on competition. In addition, the termination of Nichols indicates that the defendants have the power to exclude competitors and discipline remaining competitors. This too is a substantial adverse effect on competition.

42. . . .the impact on competition due to the termination of Nichols is very substantial. Nichols did challenge T/R. Nichols did challenge T/R and PU and was trying to grow in spite of discriminatory prices from Dunlop. Nichols size and long standing reputation in the industry made it a competitor to be reckoned with. Its termination by Dunlop was a strong signal to other Dunlop distributors not to challenge on the basis of price. Dunlop had already signaled all of its distributors that it was concerned about price wars (5/20/93 memo from Mike Buckley to all Dunlop distributors attaching a Wall Street Journal article, [*110] entitled, "How to Avoid a Price War."

Terminating Nichols strongly reinforced that signal.

43. In addition, Dunlop has already raised prices sharply in 1993 and 1994 (App. 7, Table D-1).

44. T/R and PU receive favored treatment by Dunlop and Metzeler, and T/R and PU have used these advantages to gain market share, to earn more profits and to buy other lines of products.

Nichols contends that the full anticompetitive impact has not yet been felt, because the filing of this lawsuit prevented prices from rising to the 15 percent mark allegedly agreed upon, and has resulted in the addition of new distributors and other "anticompetitive" indicia as a cover up. Nichols also claims that a question of fact exists because defendants' expert, Raymond Sims, disagrees with Dr. Pisarkiewicz's analysis.

Raymond Sims does not directly controvert Dr. Pisarkiewicz's statements, and the defendants do not use his analysis in their arguments. However, Mr. Sims would testify at trial that Nichols' prices on Dunlop tires analyzed were at or below Tucker/Rocky and Parts Unlimited between 1991-93 on the 50 best selling tires. This is disputed. Sims will also testify that Nichols' [*111] profits remained "relatively stable" while the profits of Tucker/Rocky and Parts Unlimited went up from 1991 through 1993. This is also disputed.

The defendants' position on the lack of anticompetitive impact appears to relate more to the lack of evidence offered by Dr. Pisarkiewicz, rather than to its experts own opinions. For instance, in his deposition, Dr. Pisarkiewicz admits that he has made no analysis of actual prices that dealers paid for tires, 12(M) P 174 (Pisarkiewicz Dep. at 434, 523); that he has no opinion on whether Tucker/Rocky or Parts Unlimited is pricing at, above or below competitive

levels before or after the Nichols termination, *Id.* (Pisarkiewicz Dep. at 434); that he has no information that the Nichols termination led to reduced market output, *Id.* (Pisarkiewicz Dep. at 510-11); and that he has no formation that the Nichols termination led to a deterioration in the quality of service available to dealers, *Id.* (Pisarkiewicz Dep. at 511).

These admissions are crucial because:

there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have [*112] been violated. Those laws, we have been told by the Supreme Court repeatedly in recent years, are designed to protect the consumer interest in competition. The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality.

Products Liability, 682 F.2d at 663-64 (citations omitted). There is no evidence provided by Dr. Pisarkiewicz, other than his theory that "but for this litigation" prices would not be competitive, that the termination of Nichols, due to its aggressive discounting, sent a message that reduced competition and injured consumers or their dealers. This is not sufficient evidence to withstand a motion for summary judgment, even under the rule of reason, because it is mere speculation, without a sound economic analysis to support it. Therefore, the Court must grant the Defendants' Motions for Summary Judgement because the Plaintiff failed to produce evidence of anticompetitive impact on the market as a whole.

3. Count III: Group Boycott

In Count III, Nichols vaguely alleges that the defendants' actions constitute an illegal group boycott in [*113] violation of Section 1 of the Sherman Act. Nichols claims that Tucker/Rocky and Parts Unlimited convinced both Dunlop and Metzeler not to deal with Nichols. [HN23](#) To prove a group boycott, Nichols must allege a horizontal agreement by Tucker/Rocky and Parts Unlimited to engage in concerted activity to deprive Nichols of access to sell motorcycle tires. *Business Electronics, 485 U.S. at 734*; *United States v. General Motors Corp., 384 U.S. 127 (1966)*; *Phil Tolkan Datsun, Inc. v. Greater Milwaukee, Etc., 672 F.2d 1280, 1284 (7th Cir. 1982)*. Although some group boycott claims (those involving concerted refusals to deal with a competitor) are analyzed under the *per se* rule, *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)*, Nichols has alleged its Section 1 group boycott claims under the rule of reason and therefore must show anticompetitive impact. Thus, Nichols must only submit some evidence that Tucker/Rocky and Parts Unlimited agreed to induce Metzeler not to add Nichols as a distributor, or that Tucker/Rocky and Parts Unlimited agreed to induce Dunlop to terminate Nichols as a distributor.

Although there is "some" ambiguous circumstantial evidence that [*114] the defendant distributors agreed to induce Dunlop to terminate Nichols, there is no evidence of an agreement among Tucker/Rocky and Parts Unlimited to induce Metzeler to refuse to deal with Nichols. The only evidence of any inducement is a conversation Metzeler President Greg Blackwell had with Tucker/Rocky and Parts Unlimited regarding the addition of new distributors in general and Nichols in particular. The defendant distributors independently advised Blackwell that they did not advise adding new distributors, in particular, Nichols, a known discounter. This evidence does not satisfy the concerted action/agreement requirement. Regardless, there is no evidence of anticompetitive impact, with respect to a boycott involving Dunlop or Metzeler, for the reasons expressed in Count II. Therefore, Count III also fails for lack of proof on the element of anticompetitive impact.

B. The Illinois Antitrust Act

In Counts IV, V and VI, Plaintiff alleges various vertical and horizontal agreements between the defendants to fix prices, terminate Nichols and refuse to deal with Nichols. Counts IV and V must be dismissed for failure to state a claim. Count V states a rule of reason [*115] claim under Section 3 of the Illinois Antitrust Act, [740 ILCS 10/3](#). Summary judgment must be granted for the defendants on all counts.

1. Count IV: Per Se Pricefixing

In Count IV, Plaintiff alleges that the defendants conspired to raise, fix, maintain or stabilize prices, in violation of Section 3 of the Illinois Antitrust Act ("IAA"), [740 ILCS 10/3](#). Because Nichols levies its allegation against "all defendants," that is, Dunlop (a seller), Tucker/Rocky (a buyer) and Parts Unlimited (a buyer), it alleges a *vertical* pricefixing agreement. Nichols' claim fails as a matter of law.

HN24 [↑] *Per se* offenses are those set out in Section 3(1) of the IAA. See [740 ILCS 10/3](#), Bar Committee Comments-1967 (1993). "The conduct proscribed by Section 3(1) is violative of the Act without regard to, and the courts need not examine, the competitive and economic purposes and consequences of such conduct." *Id.* The Bar Committee Comments clearly state, however, that a vertical pricefixing agreement is not prohibited under Section 3(1):

Section 3(1) does not reach vertical agreements, such as agreements between buyers and sellers fixing the price at which the buyer shall [*116] resell. Although not unlawful under Section 3(1), such vertical price fixing, if not exempt under the Illinois Fair Trade Act, may be proscribed by Section 3(2), the general restraint of trade section. Since the draftsmen carefully constructed Section 3 to require it, the Illinois courts should conclude that they must examine the competitive and economic purposes and consequences of such agreements before reaching a conclusion that Section 3(2) has been violated. While it is perhaps possible, as under Federal law, that the courts may hold such agreements violative of Section 3(2) without such an examination, they should not, since to do so would defeat the clear intention of the draftsmen.

Id. The Bar Committee Comments could not be any more explicit that a vertical agreement may not constitute a *per se* violation of Section 3 of the IAA, because *per se* claims are only those listed in Section 3(1), which does not cover vertical pricefixing agreements. While Nichols could have alleged that "all defendants" violated Section 3(2), the general restraint of trade subsection of the IAA, Section 3(2) necessarily requires a rule of reason analysis of the "economic purposes [*117] and consequences" of the agreement and therefore does not contemplate *per se* violations. Count IV fails as a matter of law.

2. Count V: Rule of Reason

In [Laughlin v. Evanston Hosp.](#), [550 N.E.2d 986, 996 \(Ill. 1990\)](#), the Illinois Supreme Court held that **HN25** [↑] the analysis for rule of reason claims under Section 3 of the Illinois Antitrust Act, [740 ILCS 10/3](#), tracks the legal analysis applied in federal cases under [Section 1](#) of the Sherman Act. Therefore, since Count V is the counterpart to Count II, which alleges a rule of reason claim under [Section 1](#) of the Sherman Act, the Court grants summary judgment for all defendants on this claim for the reasons expressed in the portion of the Opinion analyzing Count II.

3. Count VI: Group Boycott

Nichols alleges in Count VI that the actions of all the defendants constitute a *per se* illegal group boycott in violation of § 3 of IAA. Because Nichols alleges a *per se* violation of the IAA, its claim falls under Section 3(1) of the IAA, which is the only subsection of the IAA that refers to *per se* violations. See Bar Committee Comments-1967 (1993). The Bar Committee Notes are clear however, that an alleged boycott [*118] does not present a legally cognizable claim under Section 3(1). In its discussion of claims under Section 3(1), the Comments note that

HN26 [↑] boycotts are not proscribed by this "per se" subsection. Here again in view of federal precedents and of Section 11, horizontal boycotts may be found unlawful under the general restraint of trade Section 3(2). Vertical agreements to refuse to deal or boycotts, that is, agreements between persons at different levels of production and distribution which have as their immediate purpose the depriving of a third person of a supply of a commodity or service, may also be found violative of Section 3(2).

Id. Thus, although Nichols could have alleged a group boycott under Section 3(2), it has instead alleged a *per se* violation, which falls under Section 3(1) of the IAA and does not contemplate group boycotts. Count VI therefore fails as a matter of law.

C. The Robinson-Patman Act Claims

1. The Facts

Price is an important sales determinant in the industry. 12(N)(3)(b) P 57. Motorcycle tire manufacturers (*i.e.*, Bridgestone, Cheng Shin, Continental, Dunlop, Metzeler, etc.) commonly provide discounts, including [*119] volume-based discounts, in selling tires to distributors. 12(M) P 323. The defendants concede that Dunlop provided discounts to Nichols' competitors that Nichols did not receive. 12(N)(3)(b) P 44. For instance, Parts Unlimited requested and received from Dunlop a one-time special promotional discount for the opening of its facility in Southern California. 12(M) P 312 (PX 181). Tucker/Rocky and Parts Unlimited also admit that they knew of and took advantage of discounts that Dunlop did not publish but made available to them. 12(N)(3)(b) P 53. Because Tucker/Rocky and Parts Unlimited are sophisticated business entities that separately monitor information from dealers about prices at which competitor distributors sell products, 12(N)(3)(b) PP 51-52, they knew they were receiving individually negotiated prices on Dunlop tires. 12(N)(3)(b) P 53 (PX 161-187). For instance, Pat Logue of Dunlop informed them that large orders would permit Dunlop manufacturing facilities to have longer production runs on specific tires without the need to stop production, change molds, and switch over to producing other types of tires. 12(M) P 322. Large orders, in turn, would result in greater discounts during [*120] certain periods.

Other distributors, such as Bell Industries, Dixie, KK Motorcycle, and Pike's Peak, also received a variety of discounts. Bell Industries, Dixie, Parts Unlimited, and Tucker/Rocky earned Dunlop's growth bonus in 1993. 12(M) P 316. Motorcycle Stuff is a Dunlop distributor headquartered in Cape Girardeau, Missouri. Over the past four years, according to Nichols' expert report, Motorcycle Stuff has purchased fewer Dunlop tires each year than did Tucker/Rocky or Parts Unlimited. During the years 1990-93, even Nichols' expert concludes that Motorcycle Stuff received significantly higher overall discounts than Tucker/Rocky, Parts Unlimited, Nichols, or any other Dunlop distributor. 12(M) P 317.

Tucker/Rocky also received a range of discounts from Metzeler, Dunlop's largest rival in the alleged "premium tire" market. 12(M) P 323. Moreover, Nichols, the exclusive distributor of King's tires in the United States, offered a volume-based discount to its customers. 12(M) P 313. Sometimes Nichols also offered lower prices on Dunlop tires to its dealers than were offered by Tucker/Rocky, Parts Unlimited, and Motorcycle Stuff in the marketplace. 12(M) P 318. One printed report [*121] produced by Nichols indicates that Nichols gave discounts on Dunlop tires to almost 600 of its customers. These discounts were well over 20% off the best published pricing for many of Nichols' customers. For instance, Nichols discounted Dunlop tires by 20-24 percent for 88 of its customers and discounted Dunlop tires by 25 percent or more for 72 of its customers. 12(M) P 319.

The difference between the gross margins of Tucker/Rocky and Nichols on the sale of Dunlop tires during the relevant period was significantly greater than the alleged price advantage received by Tucker/Rocky. 12(M) P 324. Dunlop distributors faced and continue to face intense intrabrand competition from other Dunlop distributors during all relevant periods. 12(N)(3)(b) P 55 (PX 252U; PX 251; PX 250U; PX 249U; PX 240U; PX 510; PX 248; PX 246; PX 242U; PX 267U; PX 605F; PX 239U; PX 605H; PX 274; PX 248; PX228; PX 280; PX 22). The average price (the yearly revenues from the sale of Dunlop tires divided by the annual unit sales on an indiscriminate basis, without regard to product mix by model or type or size) on Dunlop tires sold to dealers decreased from 1991 to 1993 for Nichols, Tucker/Rocky and Parts Unlimited. [*122] 12(N)(3)(b) (PX 609 at 13).

2. The Merits

a. Dunlop: Section 2(a)

Dunlop seeks summary judgment on Count VII, Nichols' Section 2(a) Robinson-Patman Act claim. [HN27](#) To establish a *prima facie* violation of Section 2(a), a plaintiff must establish the existence of (1) price discrimination, and (2) injury to competition. See Robert M. Klein, *The Robinson-Patman Act: Jurisdictional Aspects and Elements*, 59 Antitrust L.J. 777 (1991). Dunlop does not contest that price discrimination occurred, but asserts that Nichols has failed properly to establish injury to competition. Because Nichols' assertions and its expert's analyses demonstrate, however, that Nichols has properly asserted at least two types of damages under the Act, it must prevail on Dunlop's motion for summary judgment.

Nichols claims three types of damages under the Act: (1) damages for *lost profits* on sales of Dunlop tires that it actually made (because it was not receiving the same discounts that Dunlop granted to the Defendant distributors and had to sell at lower prices than those at which it would have sold absent the price discrimination); (2) damages for *lost sales* of Dunlop products [*123] that Nichols was not able to make because of its increased costs; and (3) damages for *lost sales* of non-Dunlop products that it otherwise would have made from customers who would have been drawn to buy from Nichols had Nichols been able to offer more attractive prices on Dunlop products. Pl.'s Mem. Opp. Def.'s Mot. Summ. Judg. at 72-73. Dunlop asserts in its Motion for Summary Judgment that the first type of damages that Nichols claims amounts to "automatic damages" (i.e., damages measured by the amount of the alleged price discrimination, which are not recoverable under the Act). Def.'s Mem. Supp. Mot. Summ. Judg. at 22-23. Dunlop further asserts that the second and third type of damages represent legally deficient theories that rest on unsupported assumptions. *Id.* at 25, 28.

HN28 [↑] "Like any damages remedy, the purpose of [the Clayton Act] is to place the antitrust plaintiff as far as possible in the position it would have occupied but for the violation. Thus, any calculation of section 4 damages must strive to approximate a violation-free state of affairs." *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 394 (8th Cir. 1987).

The first type of damages [*124] claimed by Nichols, lost profits due to the fact that Nichols was forced to sell Dunlop tires at lower prices than it would have absent the price discrimination, is not "automatic damages" as defined by the Supreme Court in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981). In *J. Truett Payne*, the Court noted that the plaintiff could not merely infer damages from the fact that the defendant had engaged in discriminatory pricing irrespective of any showing that the defendant's behavior had an effect on competition. *Id. at 563-64*. The plaintiff had failed to produce any documentary evidence to show the effect of the discrimination on retail prices. *Id. at 564*.

In contrast, Nichols presents evidence prepared by its economic expert, Dr. John Pisarkiewicz, that calculates Nichols' market share prior to the period of the alleged discrimination, computes Nichols' projected market share absent any price discrimination for the period 1991-93 (the time of the alleged price discrimination), and alleges that Nichols' actual market share for that period declined and its competitors' shares increased as a result of Dunlop's alleged discriminatory behavior. App. [*125] to Pl.'s Mem. Opp. Defs.' Mots. Summ. Judg. Vol. III, Tab 608, at 44. Nichols also presents evidence of its declining market share and its competitors' simultaneously rising market share during the period of the alleged discrimination--fluctuations that Pisarkiewicz attributes to competitive injury. App. to Pl.'s Mem. Opp. Defs.' Mots. Summ. Judg., Vol. III, Tab 608, at I and VI. Although Dunlop contests that Nichols has failed to demonstrate a sufficient causal connection between Nichols' declining market share, Tucker/Rocky's and Parts Unlimited's rising market share, and the alleged discriminatory behavior, Nichols has done more than simply claim automatic damages, and thus has asserted sufficient facts to support a finding of injury due to increased costs. See *J. Truett Payne*, 451 U.S. at 565 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969)) (noting that damages may be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation); *id. at 566* (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)) (noting that damages may be awarded on the basis of comparison of plaintiff's profits with [*126] the contemporaneous profits of a competitor who was not the victim of discriminatory pricing, together with evidence of plaintiff's profits during the conspiracy as compared with his profits prior to the conspiracy).

The second type of damages claimed by Nichols, lost sales of Dunlop products that Nichols was allegedly unable to make due to the discriminatory pricing, is also a legally permissible type of damages as long as Nichols' expert's calculations properly approximate a violation-free state of affairs as opposed, for example, to one in which Nichols was able to share in the benefit of the discriminatory pricing. See *Rose Confections*, 816 F.2d at 394. Nichols has properly done so.

Using Nichols' pre-violation market share, which takes into account not just the relative market shares of Tucker/Rocky and Parts Unlimited, but the other fourteen nationwide Dunlop distributors, Dr. Pisarkiewicz estimates what Nichols' market share would have been for 1991-93 absent the alleged discriminatory pricing. Dunlop contends that Nichols' loss of market share was due to its poor customer service; if this is the case, however, it is a

factual determination that must be made by a jury. [*127] Nichols has therefore asserted at least two types of damages recognizable under the Act, therefore this Court must deny Dunlop's Motion for Summary Judgment on this issue.³⁷

[*128] b. Tucker/Rocky and Parts Unlimited: Section 2(f)

Tucker/Rocky and Parts Unlimited also seek summary judgment on Count VII, with respect to Nichols' claim that they violated [HN30](#) ↑ Section 2(f) of the Robinson-Patman Act, which makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited" by the Act. [15 U.S.C. § 13\(f\)](#). In order to establish a *prima facie* case under Section 2(f), Nichols must show that Tucker/Rocky and Parts Unlimited knew or should have known that it was receiving greater discounts from Dunlop than Nichols, and that it knew or should have known that the lower prices it induced or received from Dunlop were discriminatory in violation of Section 2(a) of the Act. [Automatic Canteen Co. v. FTC, 346 U.S. 61, 74 \(1953\)](#).

Although Nichols' evidence shows that Tucker/Rocky and Parts Unlimited received higher discounts from Dunlop than Nichols did, Nichols is unable to show that either distributor possessed the requisite knowledge (*i.e.*, knew the amount of discounts any other distributor, including Nichols, received). Both Tucker/Rocky and Parts Unlimited deny that they had any knowledge of the amount of discounts [*129] that any other distributor received. See Rule 12(N)(3)(b) Reply PP 52-54. Nichols' assertion that Tucker/Rocky and Parts Unlimited knew that they received better discounts than did Nichols, see 12(N)(3)(b) PP 52-54, is based on a single document (PX 158) that merely lists the annual volume bonus discounts available for 1992. Based on this list, Nichols claims that Tucker/Rocky and Parts Unlimited knew or should have known that the discounts greater than those listed were not generally available to the other distributors. [Id. at P 53](#). However, there is no dispute that Dunlop individually negotiated prices with its distributors. *Id.* This is indicated by the fact that Nichols received a 6 percent volume bonus discount in 1992, an amount higher than that listed in the Dunlop distributor program. Rule 12(M) P 304. Although Nichols asserts that Tucker/Rocky and Parts Unlimited not only received higher discounts than those listed but also different discounts than those listed is insufficient, without a factual showing, to support the inference that Tucker/Rocky and Parts Unlimited knew that Nichols did not receive non-listed discounts. This evidence, taken together with Tucker/Rocky's [*130] and Parts Unlimited's denials of knowledge (which has not been controverted), must be taken as true. Tucker/Rocky and Parts Unlimited therefore had no basis to determine how the discounts they were able to negotiate from Dunlop compared to those that Nichols was able to negotiate.³⁸

³⁷ The third measure of damages, lost sales on non-Dunlop products is not cognizable because Dr. Pisarkiewicz uses a statistical regression analysis to determine the percentage of Dunlop buyers who would also buy non-Dunlop products and the amount of these products that the buyers would purchase, without demonstrating evidence of a causal connection between the injury and the asserted damages. See, e.g., [BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1093 \(7th Cir. 1994\) HN29](#) ↑ (finding causation to be established where the plaintiff presented evidence that many customers would not have purchased from the defendant had they known of the defendant's wrongdoing and that the plaintiff's position in the market would have been more advantageous absent the defendant's wrongful conduct); [Alpo Petfoods, Inc. v. Ralston Purina Co., 778 F. Supp. 555, 560 \(D.D.C. 1991\)](#) (noting that statistical regression analyses, "while useful for demonstrating general trends and the broad impact of certain actions, are simply not usable with respect to the type of specific, concrete evidence needed. Without the regression analyses, however, there is nothing in the record from which this Court can deduce a lost profits figure without speculation."), *aff'd in part and rev'd in part on other grounds, 997 F.2d 949 (D.C. Cir. 1993); Nikkal Indus., Ltd. v. Salton, Inc., 735 F. Supp. 1227, 1233 (S.D.N.Y. 1990)* (finding that linear regression analysis "did not provide for the impact of other significant factors, such as the possible effect on sales of a declining trend in the popularity of [the product], the appearance of several competitors, vigorous price competition and, most importantly, [the plaintiff's] poor marketing strategy."). For example, Plaintiff would need to offer something along the lines of testimony from buyers who would have bought non-Dunlop products from Nichols who went elsewhere because of price discrimination on Dunlop products.

³⁸ Both Tucker/Rocky and Parts Unlimited note that Dunlop's pricing structure was highly individualized and flexible, and that there was no way for them to determine independently the amount of the discounts that another distributor might be receiving. See, e.g., Tucker/Rocky Mem. Supp. Mot. Summ. Judg. at 31-32.

Nichols argues, however, that Tucker/Rocky and Parts Unlimited should have known that they were receiving discriminatory prices based on their dominant positions in the marketplace (the two distributors together accounted for 60% of all Dunlop sales nationwide) and their extensive trade experience. Pl.'s Mot. Opp. Defs.' Mot. Summ. Judg. at 84; Rule 12(N)(3)(b) PP 53-54. Nichols notes that "trade experience in [*131] a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution." [Automatic Canteen, 346 U.S. at 79-80](#). In *Automatic Canteen*, however, the Supreme Court stated in dicta that "by way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner . . . as the other buyer can fairly be charged with notice that a substantial price difference cannot be justified." [Id. at 80](#). This is not the case in the instant situation. Both Tucker/Rocky and Parts Unlimited bought from Dunlop in greater quantities than Nichols and neither has been shown to be aware of what price any other distributor received, much less the existence of any "substantial price difference." Nichols' claim is further weakened by the fact that Motorcycle Stuff, another distributor, who has not been named as a defendant in this lawsuit, received greater discounts than both Tucker/Rocky and Parts Unlimited even though it bought fewer tires than either of these defendants. Even if Nichols could show that Tucker/Rocky and Parts Unlimited were aware of the amount of discounts that other distributors received, the [*132] fact that Motorcycle Stuff's discounts exceeded Nichols', Tucker/Rocky's, and Parts Unlimited's would have provided Tucker/Rocky and Parts Unlimited with reason to believe that the prices offered to them were not discriminatory. Therefore, Nichols has failed to show that the defendants had the requisite knowledge under Section 2(f) of the Act, and summary judgment is granted in favor of Tucker/Rocky and Parts Unlimited on Count VII.

3. The "Meeting Competition" Defense

[HN31](#)[] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C. § 13\(a\)](#), makes it illegal to discriminate in price between buyers when the consequence is an injury to competition. [Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 41 \(7th Cir. 1992\)](#) (citing [United States v. United States Gypsum Co., 438 U.S. 422, 450 \(1978\)](#)). To establish a *prima facie* violation of Section 2(a), a plaintiff must establish the existence of (1) price discrimination, and (2) injury to competition. See Robert M. Klein, *The Robinson-Patman Act: Jurisdictional Aspects and Elements*, 59 *Antitrust L.J.* 777 (1991). A *prima facie* violation, however, may be rebutted by one [*133] of the Robinson-Patman Act's two affirmative defenses: (1) "cost justification" or (2) "meeting a competitive price" (commonly known in this case as the "meeting competition" defense). [Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434 \(1983\)](#). If established, an affirmative defense eliminates the need to decide the issue of injury to competition, because a properly established defense renders such injury justifiable. Dunlop asserts the meeting competition defense, ³⁹ contained in Section 2(b) of the Act, which states:

[HN32](#)[] that nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

[*134] [15 U.S.C. § 13\(b\) \(1975\)](#)(emphasis added). [HN33](#)[] Price discrimination under the Robinson-Patman Act "is merely a price difference" between the price for which a defendant sells to one buyer versus the price to which it sells to another. [Falls City, 460 U.S. at 443 n.10](#) (quoting [FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 \(1960\)](#)). Although the burden of establishing a factual basis for the defense falls on Dunlop, see [Falls City, 460 U.S. at 451](#), all reasonable inferences must be drawn in favor of Dunlop because Nichols is the moving party. ⁴⁰

[HN35](#)[]

³⁹ Dunlop initially asserted, but has since withdrawn, a cost justification defense, which is therefore no longer an issue in this case.

⁴⁰ [HN34](#)[] As the moving party, Nichols has the burden of showing that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. See [Fed. R. Civ. P. 56\(c\)](#).

The Section 2(b) defense has two elements; both must be factually supported to send the defense to a jury. The two elements of a Section 2(b) defense are as follows. First, "the seller, who has knowingly discriminated in price, [must] show the existence [*135] of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945)* (emphasis added). Second, "the seller must demonstrate that its price was a good-faith response to a competitor's lower price." *Reserve Supply, 971 F.2d at 41* (citing *Falls City, 460 U.S. at 451*).

The determination of whether a seller acted in good faith does not lend itself to the application of a rigid standard. The Supreme Court has stated that the concept of good faith is

flexible and pragmatic . . . Rigid rules and inflexible absolutes are especially inappropriate in dealing with the § 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.

Gypsum, 438 U.S. at 454 (quoting *Continental Baking Co., 63 F.T.C. 2071, 2163 (1963)*). The Supreme Court has, however, identified four factors that may be relevant to the determination of the seller's good faith. These include whether the seller (1) had received reports from other [*136] customers of similar discounts; (2) was threatened with a termination of purchases if the discount were not met; (3) made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data; and (4) had past experience with the buyer. *Gypsum, 438 U.S. at 454-55*. We rely on the above standards in assessing whether Dunlop has successfully asserted an affirmative defense under Section 2(b).

a. Background

Nichols moves for partial summary judgment pursuant to *Federal Rule of Civil Procedure 56* on Dunlop's Section 2(b) defense, contending that Dunlop has not made a sufficient factual showing to demonstrate that the price discrimination was made in good faith to meet the equally low price of a competitor and that Dunlop had no procedures in place for verifying the existence of any alleged equally low price of a competitor. Pl.'s Mem. Supp. Mot. Part. Summ. Judg. at 4. [HN36](#) [↑] "When a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial." *Id. at 250*. Because the question of whether the Section 2(b) defense [*137] has been successfully asserted "demands a 'fact-specific' inquiry," *Reserve Supply, 971 F.2d at 43* (quoting *Gypsum, 438 U.S. at 454-55*), we now review the material facts presented by the parties in order to determine whether Dunlop has successfully demonstrated that there is a genuine issue for trial.

Dunlop contends that it has demonstrated "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Falls City, 460 U.S. at 438* (citations omitted). In support of its contention, Dunlop provides deposition testimony and a supplementary affidavit from Patrick Logue, Dunlop's national sales manager from approximately 1987 to March 1993. Logue states that when distributors would report to him that they were being offered better discounts from Dunlop's competitors, Logue would attempt to obtain specific details about the offer directly from the distributor, but generally would accept the distributor's word that such discounts were in fact being offered. App. to Def.'s Rule 12(N) Resp., Tab 7, at 1288. Logue would consider his prior experience with the customer [*138] and his opinion of the customer's honesty and integrity in evaluating the customer's information. Def.'s Mem. Opp. Pl.'s Mot. Part. Summ. Judg. at 7. Where possible, Logue would refer to the competitors' price lists on file with Dunlop in an attempt to verify that the alleged competing discount was in line with the competitor's published prices. App. to Def.'s Rule 12(N) Resp., Tab 7, at 1288. These price lists, however, were sometimes outdated and, in any case, did not include the unofficial discounts frequently offered by tire manufacturers. *Id. at 1289*. Logue states that he was not aware of any other method of verification used to ensure that the discount he offered was necessary to meet competition. *Id.* After following these standard practices, Logue would determine whether meeting the competitive offer was consistent with Dunlop's business objectives. Def.'s Mem. Opp. Pl.'s Mot. Part. Summ. Judg. at 7. If so, he would seek to meet the competitive offer by offering additional discounts to these customers that he believed to be equivalent to the competing offers. *Id.* at 8. Logue states that he believed that the failure to do so would result in a loss of business to Dunlop. [*139] *Id.*

Specifically, Logue states that he had conversations with Robert Nickell, president of Tucker/Rocky; Jeffrey Fox, president of Parts Unlimited; and James and Timothy Dodd, president and vice president, respectively, of Motorcycle Stuff, in which they discussed with him the prices and discounts that they were receiving from Dunlop's competitors that were more favorable than those received from Dunlop. App. to Def.'s Rule 12(N) Resp., Tab 1, PP 23-25, 29, 35-38, 48-50. In the case of Tucker/Rocky, Logue states that Nickell typically provided him with "some details about those programs and incentives," but generally refused to disclose further details when asked. *Id.* P 25.

Logue does not indicate, however, whether "some details" included specific numerical information as to prices or discounts offered by Dunlop's competitors. See *id.* In the case of Parts Unlimited, Logue states that "on several occasions when I tried to obtain specific information about specific competitive discounts from Mr. Fox, he informed me that it was not his practice to disclose such information between competitors. . . . It was not his practice to provide me with competitors' specific prices [*140] or all the other specific details about their discounts." *Id.* P 37.

Logue did, however, offer Parts Unlimited a year-long 5% discount when it opened a new warehouse in order "to compete aggressively for market share against Metzeler, Michelin and Bridgestone." Pl.'s Repl. Mem. Supp. Mot. Part. Summ. Judg. at 4 n.5. This is the sole instance in which Logue refers to specific competitors as the impetus for offering a discount on Dunlop tires. In the case of Motorcycle Stuff, Logue states that he "was not generally provided specific prices of competitors or various other details about . . . their discounts, despite my asking and re-asking about them." *Id.* P 49. In one instance, Logue granted Motorcycle Stuff a discount in July 1991, but "cannot now remember whether Mr. Dodd mentioned any specific competitors whose competition he was asking Dunlop to meet." Pl.'s Repl. Mem. Supp. Mot. Part. Summ. Judg. at 3 n.4. Logue admits that there was one instance in which he met a price of \$ 30 offered by a competitor to Motorcycle Stuff, as opposed to a discount. App. to Def.'s Rule 12(N) Resp., Tab 15, at 1297. There is no other testimony where the specific level of Dunlop's competitor's [*141] discount was revealed or discussed. Furthermore, according to Logue, at no time did any of these three distributors threaten to terminate their business with Dunlop, but all three indicated that Dunlop's failure to provide additional discounts could result in a loss of sales of Dunlop tires through those distributors. *Id.* PP 26, 39, 51.

Dunlop also provides deposition testimony by Robert Nickell and Jeffrey Fox. Robert Nickell refers to "discussions [with Logue] to do with the fact that we were getting volume incentives from other tire manufacturers . . . I would have been negotiating to try to get similar type incentives or volume programs from Dunlop." App. to Def.'s Rule 12(N) Resp., Tab 7, at 413. He does not recall any specific occasions, however, on which Logue requested or received any documentation of the competing offers. *Id.* Similarly, Jeffrey Fox states that he and Logue discussed "on a continuous basis . . . what the water level is in this industry," but is unable to recall specific conversations or details. App. to Def.'s Rule 12(N) Resp., Tab 5, at 164. He does not refer to any instances in which he provided Logue with specific information about discounts [*142] from competitors. See *id.*

b. Analysis

Under the first prong of the *Falls City* test, Dunlop does not necessarily need to know the specific price offered by the competitor, but it must produce facts sufficient to enable a jury to determine the range of discount(s) offered by Dunlop's competitors, so that they can compare the discounts Dunlop offered to Tucker/Rocky and Parts Unlimited (but not Nichols) to "meet competition." Tucker/Rocky and Parts Unlimited would then need to testify at trial that they reported such a range of discounts. None of the defendants have offered that testimony; in fact, it is conspicuously absent. Failure to satisfy this element of the section 2(a) defense requires summary judgment in Nichols' favor.

Instead of concentrating on the objective requirements of a Section 2(a) defense, both parties have focused on whether Dunlop demonstrated good faith in responding to a competitor's lower price, invoking the four *Gypsum* factors.⁴¹ Dunlop relies on a number of cases in which courts have applied *Gypsum*'s extremely flexible standard. See, e.g., [Falls City, 460 U.S. at 439 HN37](#) [↑] ("In most situations, a showing of facts giving rise to [*143] a

⁴¹ Note that the "good faith" response is only one part of the test. The other part of the test regards the objective and verifiable evidence used by the manufacturer to come up with or calculate a discount level or range that would meet competition.

reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price."); *Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979)* (holding that the defendant had successfully demonstrated good faith where the defendant had a long-standing business relationship with the customer and faced a credible threat of losing its account with the customer unless it made substantial concessions); *Reserve Supply, 971 F.2d 37* (affirming district court's grant of summary judgment to the defendant manufacturer on the issue of good faith even though the ultimate discount did not meet, but rather beat, the competition, where the manufacturer had presented evidence of its long-term relationship with the customer, whom it believed to be trustworthy, and other customers had reported precisely the same discount from the manufacturer's competitor); *Cadigan v. Texaco, Inc., 492 F.2d 383 (9th Cir. 1974)* (affirming summary judgment in favor of the defendant where the defendant relied on the buyer's uncorroborated reports that the defendant's competitors offered [*144] greater discounts and threatened to terminate business with the defendant if it failed to grant additional discounts); *Jones v. Borden Co., 430 F.2d 568 (5th Cir. 1970)* (holding that a good faith defense was properly asserted where several buyers informed the manufacturer that the manufacturer's price was uncompetitive and the manufacturer suffered substantial loss of sales prior to granting an additional discount); *Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964) HN38* [↑] (noting that good faith defense does not require that the defendant know the identity of his competitor or have concrete proof of the amount of the competitive offer), cert. denied, 380 U.S. 906 (1965); *McCaskill v. Texaco, Inc., 351 F. Supp. 1332 (S.D. Ala. 1972)* (granting summary judgment to the defendant where customers provided the defendant with uncorroborated reports of greater discounts from the defendant's competitors), aff'd, 486 F.2d 1400 (5th Cir. 1973); *Krieger v. Texaco, Inc., 373 F. Supp. 108 (W.D.N.Y. 1972)* (granting summary judgment to the defendant where a long-standing customer informed the defendant of competing offers and partially terminated business with the defendant until [*145] the defendant lowered its prices).

On the issue of good faith alone, Dunlop has relied heavily on Logue's subjective determinations, which were based on his business experience. Pat Logue testified at his deposition that Tucker/Rocky, Parts Unlimited and Motorcycle Stuff all informed him that Dunlop's discounts were uncompetitive and that Dunlop would lose sales as a result. Dunlop had long-standing business relationships with each of these distributors and believed them to be trustworthy. In addition, Logue states that it was his practice to request from the distributors documentation of these competing offers, even though such information was rarely, if ever, forthcoming. Logue also states that it was his practice to refer to the competitors' published [*146] price lists, if available to Dunlop, in order to confirm that the reported offers which no one now recalls were indeed in line with current market conditions. This evidence may have been sufficient to present a genuine issue of fact as to Dunlop's good faith under *Gypsum*'s lenient standards for good faith, as applied by the Seventh Circuit in *Reserve Supply*, if other non-subjective facts about actual price ranges from competitors had been established.

The key issue in this case is whether Dunlop has successfully shown "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor," a necessary element to asserting a Section 2(b) affirmative defense. *Staley, 324 U.S. at 759-60*. Nichols touches upon this issue tangentially in its assertion that Dunlop had no procedures in place for verifying the existence of any alleged equally low price of a competitor. See Pl.'s Mem. Supp. Mot. Part. Summ. Judg. at 12-15. Dunlop, however, is unable to point to facts that would lead a reasonable and prudent person to believe that Dunlop was meeting the equally low price [*147] of a competitor and has not provided sufficient evidence that it was ever apprised or aware of what its competitors' prices or price levels were, as compared with Dunlop's prices. Furthermore, Dunlop, through the deposition testimony of Logue, Nickell and Jeffrey Fox, is unable to show that Logue (i.e., Dunlop) ever knew, or even believed that he knew, the amount of the discounts offered by Dunlop's competitors. Absent such information, Dunlop had no way to determine that the lower price it granted to distributors who informed Logue that they were receiving discounts from competing manufacturers was "meeting" the equally low price of a competitor.

In each of the cases cited by Dunlop, the defendant had some knowledge of the nature of the offer presented by its competitor upon which to base its counter-offer. See *Great Atl. & Pac. Tea Co., 440 U.S. at 84* (noting that customer told the defendant that a \$ 50,000 improvement in its bid "would not be a drop in the bucket"); *Reserve Supply, 971 F.2d at 43* (noting that manufacturer's representative had contemporaneous notes of his conversation

with customer indicating the *exact amount* of the competitor's discount); [Cadigan \[*148\]](#), [492 F.2d at 385-86](#) (stating that buyer told defendant the *exact amount* of the discounts offered by defendant's competitors); [Jones, 430 F.2d at 573](#) (noting that buyer told defendant that defendant's *price* was "generally five percent higher" than competitor's); [Forster, 335 F.2d at 54](#) (stating that several buyers informed the defendant of the *exact nature of the competitive offer*, and the defendant conducted an independent investigation in order to confirm the offer); [McCaskill, 351 F. Supp. at 1337-38](#) (stating that buyers told defendant the *exact amount of the discounts offered* by defendant's competitors); [Krieger, 373 F. Supp. at 112](#) (noting that buyer told defendant the prices offered by defendant's competitors).

In addition, in [Glowacki v. Borden, 420 F. Supp. 348 \(N.D. Ill. 1976\)](#), a case we find analogous to the instant situation, Judge Grady denied the defendant's motion for summary judgment where the seller informed the defendant distributor that the defendant's prices were higher than those of a competitor, but the defendant failed to assert facts demonstrating that it had reason to believe that the prices it offered in response were no [\[*149\]](#) lower than those offered by its competitor. In this case, Dunlop offers no evidence that it was ever aware of even the approximate amount of the discounts offered by its competitors. Logue can recall no specific instance in which a distributor informed him of an exact amount of a competitor's discount, or even provided some sort of benchmark by which Logue could set a competitive discount on Dunlop tires. The competitors' price lists to which Logue referred were often outdated and did not include unofficial discounts, which were frequently offered by tire manufacturers such as Dunlop and its competitors.

Dunlop therefore has failed to demonstrate "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor," [Falls City, 460 U.S. at 438](#) (citations omitted). Because "the seller must show that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors," *id.* (quoting [Gypsum, 438 U.S. at 451](#)), to prevail, Dunlop has failed to produce sufficient factual [\[*150\]](#) support for the assertion of a Section 2(b) defense, and has therefore failed to carry its burden on Nichols' Motion for Partial Summary Judgment. Its motion on the Section 2(b) defense is, therefore, granted.

III. The State Law Claims

A. The Facts

The following facts relate to the state law claims alleged in Plaintiff's Third Amended Complaint. In September 1992, Pat Logue, from Dunlop, told Ken Anderson, from Nichols, that the "prices" Nichols received from Dunlop were the same as those offered to other Dunlop distributors; that "there were no other prices." 12(N)(3)(b) Reply P 63. Logue also told Terry Baisley, from Nichols, that all distributors bought from the same price sheet. *Id.* In addition, there is no dispute that sometime in 1992 Logue told Nichols that it would not be terminated as a distributor. 12(N)(3)(b) P 64. At that time, Nichols operated as a Dunlop distributor under the 1992 Distributor Agreement, which ended December 31, 1992. *Id.* On December 28, 1992, Dunlop issued a Memorandum informing all of its distributors that it intended to terminate two or three of them in 1993. PX 16. Dunlop mailed a copy of this Memo with the 1993 Distributor [\[*151\]](#) Agreements to each of its distributors. Nichols received a copy of the Memo and the Agreement, which it signed on January 11, 1993. The 1993 Distributor Agreement contained a "termination" provision which provided that Dunlop had the option to terminate the agreement with five days notice. PX 1.

In addition to Dunlop's alleged misrepresentations, Nichols bases some of its state law claims upon its decision to open a second warehouse. Nichols began exploring the possibility of opening a second warehouse in Phoenix, Arizona, in March 1992. 12(N)(3)(b) P 66. Nichols leased the warehouse in September 1992. *Id.* Nichols admits that Dunlop never asked for the Phoenix warehouse, nor did it require Nichols to obtain the warehouse as a condition of its right to distribute Dunlop tires under the relevant agreements. 12(M) P 419 The record also reflects that Nichols attempted to conceal its Phoenix plans. For instance, in September 1992, two days after Nichols leased the warehouse, Jack Jesse testified that in Las Vegas "we kind of told him [Logue] with our laughter and humor" that Nichols was opening a Phoenix warehouse. 12(N)(3)(b) P 66. Nichols began to stock Dunlop tires in its

Phoenix [*152] warehouse before it opened on January 14, 1993. *Id.* Dunlop attended the opening of the warehouse and agreed to ship Dunlop products there. *Id.* There is no evidence that Dunlop knew that Nichols had invested in the warehouse until it received Nichols' first purchase order. *Id.* The warehouse currently remains open. 12(N)(3)(b) P 67.

B. Claims Against Dunlop

1. Count VIII: Illinois Consumer Fraud Act

In Count VIII, Plaintiff alleges that Dunlop intentionally misrepresented that: (1) Nichols received the same prices and discounts offered to the other distributors; and (2) Nichols would not be terminated as a Dunlop distributor, in violation of the Illinois Consumer Fraud Act ("Consumer Fraud Act" or "the Act"). [815 ILCS 505/1 et seq.](#) Compl. P 63.

Section 2 of the Act provides:

[HN39](#)[] Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices [*153] Act,' approved August 5, 1965, in the conduct of any trade or commerce hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

[815 ILCS 505/2.](#)

Dunlop contends that Nichols is not a "consumer" under the Act and therefore lacks standing to bring this claim. In particular, Dunlop contends that the claim is defective because it does not involve Illinois trade or commerce or affect Illinois consumers. Nichols fails to specify allege an affect on trade or commerce in Illinois.

There is currently a split among both Illinois and federal district courts as to whether an effect upon Illinois consumers is required to properly bring a claim under the Act. [815 ILCS 505/2.](#)

[HN40](#)[] Section 815 ILCS 501/(f) defines trade or commerce as:

the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and [*154] shall include any trade or commerce directly or indirectly affecting the people of this State. (emphasis added).

[HN41](#)[

Some Illinois courts find that the Act is intended to "protect and benefit Illinois residents," [Lincoln Nat'l Life Ins. Co. v. Silver, 1991 U.S. Dist. LEXIS 13857 at * 34-35 \(N.D. Ill. October 1, 1991\)](#). These courts construe the language "shall include any trade or commerce" to limit the reach of the Act's protection. See [Schwartz v. Schaub, 818 F. Supp. 1214 \(1993\)](#)(Shadur, J.)(citing [Seaboard Seed Co. v. Bemis Co., Inc., 632 F. Supp. 1133 \(N.D. Ill. 1986\)](#)(Shadur, J.)). See also [Cange v. Stotler & Co., 913 F.2d 1204, 1210 \(7th Cir. 1990\)](#) (Act outlaws unfair methods of competition in the conduct of any trade or commerce which directly or indirectly affects the people of Illinois). For practical purposes, the holdings in these cases mean that a valid Consumer Fraud Act claim must include allegations of trade or commerce directly or indirectly affecting consumers in Illinois.

Conversely, some courts construe the language of the Act broadly and hold that the Act was not strictly intended to protect only Illinois consumers, but also to prohibit fraud [*155] in the conduct of any trade or commerce. See [Cirone-Shadow v. Union Nissan of Waukegan, No. 94 C 6723, 1995 WL 238680, * 3 \(N.D. Ill. April 20, 1995\)](#)(Kocoras, J.)(holding that the statute, by its terms, does not limit its scope to the protection of Illinois

residents); *Fry v. UAL Corp.*, 136 F.R.D. 626 (N.D. Ill. 1991) (Holderman, J.) (same); *CPS Corp. v. Tkalitch*, 1994 WL 724834 (N.D.Ill. Dec. 22, 1994) (Pallmeyer, J.). *Duhl*, 102 Ill. App.3d at 495 (legislature clearly mandated that Illinois courts should liberally construe and broadly apply the Consumer fraud Act in order to eradicate all forms of deceptive and unfair business practices).

In the absence of a ruling by the Illinois Supreme Court on this issue, this Court must determine which construction of the Act to apply. This Court believes that the Illinois Consumer Fraud Act, although intended to protect Illinois consumers, does not contain a geographic limitation. The Court also believes that the Illinois Supreme Court would construe the Act liberally to include all consumers whose allegations of fraud directly or indirectly affect trade or commerce in Illinois. The Seventh Circuit has held that if the Illinois [*156] Supreme Court were to face the question whether the Act requires injury to a particular consumer, or consumers generally, the Court would require a showing that a defendant's misconduct injured consumers generally." *First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033, 1040 (7th Cir. 1989) (cited by *Cange*, 913 F.2d at 1210). Thus, both the definition of a consumer and the affect upon that consumer sweeps broadly and includes Nichols' general allegations of injury. Nichols is not only an Illinois corporation, but it does business in Illinois. Therefore, any injury to Nichols is either an injury or the functional equivalent of an injury to an Illinois consumer. Nichols therefore has standing to assert Count VIII.

HN42[] The next question is whether a genuine issue of triable fact exists on the issues of price discrimination and termination. To establish a claim under the Act, a plaintiff must allege and prove the following elements: (1) the misrepresentation or concealment of a material fact; (2) an intent by the defendant that the plaintiff rely on the misrepresentation or concealment; and (3) that the deception occurred in the course of conduct of any trade or commerce. [*157] *Celex*, 877 F. Supp. at 1128; *Seigel*, 153 Ill.2d at 542. In 1994, the Illinois Supreme Court also recognized that a plaintiff must show that the challenged conduct of the defendant proximately caused the damages alleged under the Act. See *Martin v. Heinhold Commodities, Inc.*, 163 Ill.2d 33, 58-59, 643 N.E.2d 734, 746-47 (1994) (citing cases); *815 ILCS 505/2*.

Nichols claims that Dunlop made two misrepresentations: First, sometime in 1992, Dunlop promised not to terminate Nichols (termination claim). Second, in September 1992, Pat Logue told Ken Anderson that Nichols was receiving Dunlop's best distributor prices and discounts on tires.

It is undisputed that Logue's statement about price was false (price discrimination claim). Therefore, the element of misrepresentation has been established. The question on price is whether this misrepresentation was material, and whether Dunlop intended for Nichols to rely on the misrepresentation. See *Ryan v. Wersi Elec. GMBH & Co., No. 94-2783, 1995 U.S. App LEXIS 16048* (7th Cir. June 28, 1995). With respect to materiality, there are genuine issues of material fact. **HN43**[] A misrepresentation is material if the party to whom it was made [*158] would have acted differently had the party known the truth. *Id.* at * 3. The determination of whether a misrepresentation is material involves factual determinations generally inappropriate for resolution on a summary judgment motion. *Foster v. Zeeko*, 540 F.2d 692, 694 (7th Cir. 1976). Similarly, questions of intent are inappropriate for summary judgment. *Celex Group Inc. v. Executive Gallery, Inc.*, 877 F. Supp. 1114, 1128 (N.D. Ill. 1995). In this case, the Court is unable to find, as a matter of law, that Nichols would not have brought this lawsuit sooner than it did had it known that Tucker/Rocky and Parts Unlimited were receiving discounts it did not receive. Moreover, genuine issues of fact regarding injury from price discrimination exist in this case which would preclude summary judgment on Count VIII.

With respect to termination, there are similar questions. The difference between the termination claim for fraud under the Act, and the claim alleged under common law, is that under common law reliance is an element; under the Act it is not. *Celex*, 877 F. Supp. at 1128 (citing *Seigel v. Levy Organization Dev. Co.*, 153 Ill.2d 534, 542 (1992)). Whereas the Court [*159] can confidently say that Nichols could not reasonably rely, as a matter of law, on any promises not to terminate after January 11, 1993 (the date it signed the 1993 Distributor Agreement), we cannot say that Dunlop did not manifest an intent to deceive Nichols in 1992 when it made the alleged statements, nor can the Court say that these statements were not material misrepresentations, as those terms have been

defined. *Ryan, Supra* at * 3. We therefore deny summary judgment, under both the theory of price and termination, on Count VIII.

2. Counts IX & X: Illinois Franchise Act Illinois

The key issue involved in resolving Counts IX and X is whether Nichols is a franchise under the Illinois Franchise Disclosure Act. 815 ILCS 705(3)(1)(1995) ("Franchise Act"). Whether Nichols has standing to bring a suit under the Franchise Act depends upon whether it satisfies the definition of a franchise.

HN44 [+] A franchise is defined as a contract granting the right to engage in business and requiring the payment of a "franchise fee." [815 ILCS 705/3\(1\)](#). A franchise fee is any fee or charge (including payment for goods or services) that is required by the franchisor for the right to sell, resell, [*160] or distribute goods or services, and is paid directly or indirectly by the franchisee. [815 ILCS 705/3\(14\)](#).

A "franchise" thus requires a contract and a required fee. Nichols' contract with Dunlop did not characterize their relationship as a "franchise" nor did it require payment of a fee. 12(M) P 443 (the agreement did not require payment of a "franchise fee," "service fee," or "royalty fee"). Illinois law requires that, in order for a payment to be considered a "franchise fee," it must precisely fit within the statutory definition. See [Account Services Corp. v. DAKCS Software Services, Inc., 567 N.E.2d 381, 385 \(Ill. App. 1990\)](#). Nichols contends, however, that either maintaining large inventories, processing customer returns, or providing its own products liability insurance (at Dunlop's request) operates as a franchise fee. This argument is flawed, because all the payments Nichols made to Dunlop pursuant to its distributorship agreement were *voluntary*. 12(M) P 443. Nichols was not required by Dunlop to maintain large inventories, nor can Dunlop's discount system be considered a "de facto" inventory requirement since Nichols admits it was able to sell off the inventory within [*161] six months without special promotions or discounts. Costs stemming from processing customer returns are simply costs associated with doing business and are, therefore, not a franchise fee. See *Bryant Corp. v. Outboard Marine Corp.*, 1994 WL 745159 at * 3 (W.D. Wash. Sept. 29, 1994) (providing warranty administration work for the suppliers products does not constitute a franchise fee). Finally, Dunlop's request that Nichols provide products liability insurance is just that, a request, and not a requirement.

For these reasons, the Court finds that Nichols never paid a franchise fee to Dunlop and therefore has no standing to sue under the Act as "franchise." Summary judgment is therefore granted in favor of Dunlop as to Counts IX and X.

3. Count XI: Promissory Estoppel

The 1993 Distributorship Agreement signed by Nichols contained a clause which allowed Dunlop to terminate their relationship at any time, as long as Nichols was provided with five days notice. In Count XI, Nichols argues that, in spite of this provision, it reasonably and foreseeably relied upon Dunlop's promise, made in 1992, not to terminate Nichols as a Dunlop distributor. Nichols contends that this promise [*162] modified the contract and that Dunlop should be estopped from exercising the termination provision.

HN45 [+] In Illinois, the elements necessary to establish a claim of promissory estoppel are: (1) an unambiguous promise; (2) on which the promisee reasonably and justifiably relied; (3) which was foreseeable by the promisor; and (4) on which the promisee relied to his detriment. See [M. T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1408 \(7th Cir. 1991\)](#). New York law, which applies to the contract claims in this case, applies the same elements. [Gellerman v. Deet, 625 N.Y.S.2d 831, 832 \(1995\)](#)(citing *James King & son, Inc. v. De Santis Constr.*, 413 N.Y.S.2d 78, 81 (1977)).

Even if this Court were to accept Nichols' claim that Dunlop's oral promises modified the written distributor contract, Nichols' promissory estoppel claim must fail. Sometime in 1993, Logue promised Nichols that their relationship would not be terminated. At most, this promise could affect only the 1992 Distributorship Agreement. In January 1993, Nichols signed a new Distributorship Agreement. This agreement contained the termination clause with no mention of the oral promises. It also contained an integration [*163] clause. The 1993 contract supersedes the

1992 contract, whether the 1992 contract was modified or not. Further, there is no indication that the 1993 contract was similarly modified. Therefore, if Nichols' reliance on Dunlop's promises was actionable at all under the doctrine of promissory estoppel, it was actionable only under the 1992 contract. Dunlop terminated Nichols in 1993 pursuant to their 1993 agreement. Plaintiff's promissory estoppel claim must fail and summary judgment is granted for Dunlop on Count XI.

4. Count XII: Equitable Estoppel

Nichols also claims that Dunlop is equitably estopped from exercising its right to terminate Nichols under the terms of the 1993 contract because Dunlop made material misrepresentations with respect to price and termination. [HN46](#) Unlike promissory estoppel, the doctrine of equitable estoppel is based upon an intended misrepresentation or the concealment of a material fact rather than a promise. [Derby Meadows Util. v. Inter-Continental, 559 N.E.2d 986, 995 \(Ill. App. 1990\)](#). The elements necessary to assert a claim for equitable estoppel are: (1) words or conduct consisting of misrepresentations or concealment of material facts; (2) [\[*164\]](#) defendant must have actual or implied knowledge at the time the representations are made that they are untrue; (3) plaintiff does not know that the representations are untrue at the time that they are made; (4) the party estopped must intend or expect that his conduct or representations will be acted on by the plaintiff; (5) plaintiff relies on the representations in such a manner that he would be prejudiced if the party making the representations is allowed to deny the truth thereof. See [Derby Meadows Util., 559 N.E.2d at 995](#).

Nichols' equitable estoppel claim fails because Nichols cannot prove, as a matter of law, that it relied on Dunlop's 1992 statement that Nichols would not be terminated. Nichols cannot prove reasonable reliance because it read the December 28, 1992, Memorandum from Dunlop announcing the imminent termination of two or three distributors and signed the 1993 Distributorship Agreement which contained an express at will provision and an integration clause. Nichols also cannot prove reliance, as a matter of law, after it signed the 1993 contract because Dunlop made no additional assurances to Nichols regarding termination after January 11, 1993. The Court therefore [\[*165\]](#) grants summary judgment in favor of Dunlop on Count XII.

5. Count XIII: Equitable Recoupment

[HN47](#) The Equitable Recoupment doctrine applies when a contract is terminated without just cause before the terminated party has the opportunity to recoup its losses. [Cox v. Doctor's Associates, Inc., 245 Ill.App.3d 116, 200 \(Ill.App. 1993\)](#). The doctrine "is designed to remedy the inequity which arises after a manufacturer requires a distributor to make a sizeable investment in furtherance of the distributorship, terminates the relationship without just cause and leaves the distributor with substantial unrecovered expenses." [Id. at 200](#). In some courts, the doctrine is cognizable only after it is shown that the contract in question is terminable at will. [Ag-Chem Equip. Co. v. Hahn, Inc., 480 F.2d 482, \(8th Cir. 1973\)](#).

Nichols alleges that it made sizable investments, including leasing, improving and stocking the Phoenix warehouse to promote Dunlop goods in reliance on Dunlop's assurances that it would not be terminated. Compl. P 81. Nichols claims that Dunlop terminated its agreement with Nichols without just cause, leaving Nichols with substantial unrecouped investments. Compl. [\[*166\]](#) P 82.

Nichols equitable recoupment claim fails because there is no evidence that Dunlop "required" Nichols to establish a business in Phoenix. Rather, Nichols alleges that Dunlop merely "encouraged" such action. Compl. P 15. Hence, Dunlop is not responsible for Nichols investments due to its termination as a Dunlop distributor, since Dunlop did not require Nichols to make such investments. Dunlop's Motion for Summary Judgment with respect to Count XIII is, therefore, granted.

6. Count XIV: Breach of Contract/Good Faith & Fair Dealing

[HN48](#) Both Illinois and New York courts have declared that every contract implies good faith and fair dealing between its parties. [Fasolino Foods Co. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056 \(2nd Cir. 1992\)](#); [Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443 \(7th Cir. 1992\)](#). However, the covenant is not an

independent source of contractual duties; rather, it "guides the construction of explicit terms in the agreement." *Beraha, 956 F.2d at 1443*. When a term in the contract grants a wide range of discretion, the party must "exercise that discretion reasonably, with proper motive and in a manner consistent with the reasonable [*167] expectations of the parties." *Id. at 1444* (citing *Dayan v. McDonald's Corp., 466 N.E.2d 958, 972 (Ill. App. 1984)* (emphasis in original)).

On its face, this covenant appears to be at odds with the concept of at will contracts, which allow a party to exercise its discretion to terminate a contractual relationship for virtually any reason. However, since an at will contract expressly allows each party to terminate at any time, the parties have no reasonable expectation that it will be terminated only for cause. *Beraha, 956 F.2d at 1444-1445*. Therefore, the covenant is not breached when one party terminates an at will contract because the party's actions were in accord with the other's reasonable expectations. *Id.*

In this case, the 1993 contract entered into between Nichols and Dunlop stated: "In addition to the termination rights in paragraph 2, this agreement may be terminated with or without cause by either party upon five days' written notice addressed to the other party by mail or wire." 12(M) P 407. Nichols claims that Dunlop breached the implied duty of good faith and fair dealing when it terminated Nichols because it exercised the discretion provided by this clause [*168] in bad faith. However, since the contract expressly provided that Dunlop could terminate its distributorship relationship with Nichols for any reason, Nichols could not have had a reasonable expectation that Dunlop would only terminate it for cause. Nichols' claim for breach of the implied covenant of good faith and fair dealing fails because Nichols does not allege that Dunlop exercised its discretion in any manner inconsistent with the reasonable expectations of the parties. Therefore, Dunlop's Motion for Summary Judgment of Count XIV is granted.

7. Count XV: Fraud

HN49 [↑] The elements of a cause of action for common law fraudulent misrepresentation are: (1) false statement of material fact; (2) known or believed to be false by the party stating it; (3) intent to induce the other party to act; (4) justifiable reliance by the other party on the misrepresentation; and (5) damage to the other party resulting from such reliance. *Heider v. Leewards Creative Crafts, Inc., 613 N.E.2d 805, 811 (Ill. App. 2d Dist. 1993)* (citing *Soules v. General Motors Corp., 402 N.E.2d 599, 601 (Ill. 1980)*). Nichols bases its fraud claim against Dunlop upon two alleged misrepresentations. First, [*169] Nichols points to Logue's statement, made in 1992, that Nichols would not be considered for termination as a distributor. Second, Nichols alleges that Dunlop falsely represented that Nichols was getting the same discounts from Dunlap that other distributors were receiving.

With respect to Logue's 1992 statement regarding the possibility that Nichols would be terminated as a distributor, the Court has already determined that the statement was superseded by the 1993 contract. After Nichols signed this contract on January 11, 1993, Nichols reliance on Logue's statement was unjustified. See *Merex A.G. v. Fairchild Weston Systems, Inc., 810 F. Supp. 1356, 1372 (S.D.N.Y. 1993)* (no justified reliance when oral promise contradicts an admitted, subsequent written executory agreement). Therefore, Nichols can not recover for the damages it is seeking that result from events that occurred after the 1993 contract was signed, which primarily arise from the opening of the Phoenix warehouse. During that time, the 1993 contract was controlling.

There is a possibility that Nichols could have been damaged by its reliance on Logue's statement during the time between when the statement was made [*170] and when Nichols signed the 1993 contract. **HN50** [↑] The reasonableness of a party's reliance is determined at the time that the party acts upon the misrepresentation. *Duran v. Leslie Oldsmobile Inc., 594 N.E.2d 1355, 1363 (Ill. App. 1992)*. A plaintiff's subsequent opportunity to become informed of the true facts contradicting a misrepresentation cannot render prior reliance unreasonable. *Id.* However, Nichols still must prove that its reliance during this time was reasonable.

Dunlop asserts that Nichols cannot prove that its reliance upon Logue's statements was reasonable because it was a promise of future conduct. **HN51** [↑] As a general rule, promises of future conduct are not actionable in fraud. *Wilsmann v. Stearns, 664 F. Supp. 386, 391 (N.D. Ill. 1987)* (citing *Steinberg v. Chicago Medical School, 371 N.E.2d 634, 641 (1977)*). However, an exception to this rule exists when the false representation is part of a

"scheme or device" used to accomplish the fraud. [Wilsmann, 664 F. Supp. at 391](#). Nichols has alleged that the promise was part of a scheme. Whether or not a scheme actually existed in this case is a question of fact for the jury. See [Stamakis Indus., Inc. v. King, 520 \[*171\] N.E.2d 770 \(Ill. App. 1987\)](#).

In addition, Nichols must prove that its reliance upon Dunlop's statements regarding price was reasonable, and that Dunlop intended to deceive Nichols with these statements. This creates genuine issues of material fact that the jury must decide. See [Foster v. Zeeko, 540 F.2d 1310, 1319 \(7th Cir. 1976\)](#); [Fitzsimmons v. Best, 528 F.2d 692, 694 \(7th Cir. 1976\)](#); [Fisher v. Samuels, 691 F. Supp. 63, 69 \(N.D. Ill. 1988\) HN52](#)⁴² (questions of reasonableness and intent involve factual determinations and are generally inappropriate for resolution on a motion for summary judgment). There are also genuine issues of material fact with respect to the evidence of damages, as expressed in the portion of this opinion dealing with the Robinson- Patman Act claims. Therefore, this Court will deny Dunlop's Motion for Summary Judgment as to Count XV. However, Nichols' claim for fraud regarding the termination will be limited to the alleged damages which preceded the signing of the 1993 contract.

C. Claims against Tucker/Rocky and Parts Unlimited

1. Count XVI: Tortious Interference with Contract

[HN53](#)⁴³ The elements that a plaintiff must allege and prove for [*172] a valid claim of tortious interference with contract include: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) that the defendant was aware of the contractual relationship; (3) an intentional and unjustified inducement of a breach of the contract which causes a subsequent breach by the third party; and (4) damages. [A-Apart Elec. Supply Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1404 \(7th Cir.\)](#) (quoting [Mannion v. Stallings & Co., 561 N.E.2d 1134, 1139 \(Ill. App. 1st Dist. 1990\)](#)), cert. denied, 113 S. Ct. 194 (1992). Nichols claims that Tucker/Rocky and Parts Unlimited unjustifiably induced Dunlop to breach its contract with Nichols.

Generally, if a contract at will is terminated, no breach has occurred. Therefore, most courts do not recognize tortious interference with contract claims that are based upon a contract at will. See [Prudential Ins. Co. of Am. v. Sipula, 776 F.2d 157, 162 \(7th Cir. 1985\)](#); [Belden v. InterNorth, Inc., 413 N.E.2d 98, 102 \(Ill. App. 1980\)](#); [Restatement \(Second\) of Torts § 768 cmt. i](#) (1977); cf. [Prudential Ins. Co. of Am. v. Von Matre, 511 N.E.2d 740, 744 \(Ill. App. 1987\)](#) (at will nature [*173] of contract does not relieve alleged tortfeasor of liability). In this case, the Court has already determined that Dunlop's termination of Nichols was not a breach of contract because the contract was terminable at will. Since there was no breach, Nichols' claim must fail.

In addition, Tucker/Rocky's and Parts Unlimited's actions are protected by the "competitor's privilege." [HN54](#)⁴⁴ Lawful competition is a justifiable reason for interfering with contractual relations. See [Von Matre, 511 N.E.2d at 744, Getschow v. Commonwealth Edison Co., 444 N.E.2d 579, 584 \(1982\)](#). According the Restatement (Second) of Torts:

A competitor who intentionally causes a third party not to enter into a contract with another or not to continue a contract terminable at will does not interfere improperly if: (1) the relation concerns a matter involved in the competition between the actor and the other; and (2) the actor does not employ wrongful means; and (3) his action does not create or continue an unlawful restraint on trade; and (4) when a business relationship affords the parties only the hope of benefits, the parties must allow for the rights of others.

[Restatement \(Second\) \[*174\] of Torts § 768](#).⁴² We have already determined, in the section of this Opinion dealing with Count I, that Tucker/Rocky and Parts Unlimited did not participate in conduct restraining trade. Therefore, their actions are protected by the competitor's privilege. Consequently, summary judgement is granted for Tucker/Rocky and Parts Unlimited as to Count XVI.

2. Count XVII: Tortious Interference with Prospective Economic Advantage

⁴² This section of the Restatement was adopted by Illinois courts in [Galinski v. Kessler, 480 N.E.2d 1176, 1182 \(Ill. App. 1985\)](#).

HN55 [+] The elements of a claim for tortious interference with prospective economic advantage are: (1) the plaintiff's reasonable expectation of entering into a valid business relationship; (2) the defendant's purposeful interference and destruction of this legitimate expectancy⁴³; and (3) that the defendant's actions caused harm to the plaintiff. *A-Abart Elec. Supply Inc.*, 956 F.2d at 1404 (quoting *Kurtz v. Illinois Nat'l Bank*, 534 N.E.2d 1007, 1012 (Ill. App. 1989)). In cases where

an individual with a prospective business relationship has a mere expectancy of "future economic gain; a party [*175] to a contract has a certain and enforceable expectation of receiving the benefits of the contract. When a business relationship affords the parties no enforceable expectations, but only the hope of . . . benefits, the parties must allow for the rights of others. They therefore have no cause of action against a bona fide competitor unless the circumstances indicate unfair competition, that is, an unprivileged interference with prospective advantage.

A-Abart Elec. Supply, 956 F.2d at 1404-1405 (quoting *Belden Corp. v. InterNorth, Inc.*, 413 N.E.2d 98, 102 (Ill. App. 1980)).

There is no unfair competition in this case, given the Court's rulings on the antitrust claims. Nichols argues that Tucker/Rocky and Parts Unlimited interfered with its valid expectancies to continue [*176] its business dealings with Dunlop; to continue to sell Dunlop tires to its customers; to enter into a distributorship relationship with Metzeler; and, as to only Tucker/Rocky, to continue its relationship with its top salespeople, who were hired away from Tucker/Rocky after Dunlop terminated Nichols. However, Nichols' claim fails because the competitor's privilege applies not only to claims of tortious interference with contract, but also to claims of tortious interference with prospective economic advantage. *Id.* Tucker/Rocky, Parts Unlimited, and Nichols are all players in a very competitive market. The Court has determined that Tucker/Rocky and Parts Unlimited did not employ improper competitive strategies. Therefore, summary judgement is granted in favor of Tucker/Rocky and Parts Unlimited on Count XVII.

IV. Dunlop's Motion to Strike Nichols' Jury Demand

Given the rulings contained in this Opinion, this Court hereby denies defendant Dunlop's Motion to Strike Nichols' jury demand. Dunlop's motion is entirely based on form language which is contained in the distribution agreement which existed between Dunlop and Nichols. This proviso was contained in paragraph two entitled [*177] "Terms" and stated as follows:

TERMS: The due date and terms of each shipment are indicated on the invoice and on the monthly statement of account. If the Distributor fails to make payment in accordance therewith, or if there is a change in the Distributor's credit worthiness, Dunlop may modify such due dates and terms, or refuse to make further shipments except for cash and the payment in full or the balance due in the Distributor's account, and if Dunlop so decides in such case, may terminate this Agreement without ADVANCE NOTICE. Distributor agrees to pay to [sic] the collection costs of any obligation due from it to Dunlop including attorney's fees, court costs and collection agency fees. In any dispute arising between Distributor and Dunlop, Distributor hereby waives trial by jury in any action, proceeding, counterclaim, whether at law or equity against Distributor or Dunlop, or in any manner whatsoever connected with this Agreement or the performance by Distributor under this Agreement. In the event that the balance shown owing on the Distributor's Statement of Account with Dunlop remains unpaid, in whole or in part, for 30 days or more after the due date shown on [*178] said statement and Dunlop institutes a court collection action against Distributor, Distributor agrees to additionally pay interest to Dunlop from said due date. The interest shall be paid at the maximum legal rate which may be charged by commercial

⁴³ The interference must take the form of unfair competition such as fraud, intimidation, or disparagement. *A-Abart Elec. Supply Inc.*, 956 F.2d at 1404-1405. This standard is more stringent than the one used in tortious interference with contract claims because a party's interest in prospective economic advantage receives less protection than its enforceable contract rights. *Id.*

banks in Distributor's jurisdiction on payable-on-demand business loans, equal in amount to the past due sum, made by express contract to borrowers similar to the Distributor.

Based on this language Dunlop asserts that Nichols has waived its fundamental constitutional right to a trial by jury. [HN56](#) [+] Although the [*Seventh Amendment of the United States Constitution*](#) guarantees the right to a jury trial in civil cases, this right may be waived. [*Stewart v. RCA Corp., 790 F.2d 624, 630 \(7th Cir. 1986\)*](#) [*Bonfield v. AAMCO Transmissions, Inc., 717 F. Supp. 589, 594 \(N.D. Ill. 1989\)*](#). However, such a waiver must be made knowingly and voluntarily. [*In re Reggie Packing Co., 671 F. Supp. 571, 573 \(N.D. Ill. 1987\)*](#). Indeed, "as the right of jury trial is fundamental, courts indulge in every reasonable presumption against waiver." [*Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S. Ct. 809, 812, 81 L. Ed. 1177 \(1987\)*](#). The factors to consider [*179] in determining whether a contractual waiver of the right to jury trial was entered into knowingly and voluntarily include: (1) the parties' negotiations concerning the waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity to review the agreement. [*Heller Financial, Inc. v. Finch-Bayless Equip. Co., No. 90 C 1672, 1990 WL 77500 \(N.D.Ill. May 31, 1990\)*](#), reconsideration denied, [*1990 WL 103232 \(N.D. Ill. July 17, 1990\)*](#); [*Bonfield, 717 F. Supp. at 595-96*](#); [*In re Reggie, 671 F. Supp. at 573-74*](#). The Court expressly finds that interpreting this clause to be a waiver of an important constitutional right would be unjust under the circumstances of this case.

First, the Court notes that the claims that will proceed to trial in this case are limited to claims that do not directly arise or have their basis in the Distribution Agreement. Instead, this case will proceed to trial on Nichols' claims against Dunlop involving violations of the Robinson-Patman Act, the Illinois Consumer Fraud Act and common law fraud. Each of these claims are ultimately based on both [*180] statutory and common law and cannot be based on the parties' Distribution Agreement. Thus, despite the somewhat broad working of the purported jury waiver, the Court finds that this jury waiver should be strictly construed against Dunlop, the drafter of the agreement, and that it does not apply to the claims remaining this case.

Moreover, even if this Court were to find that the alleged jury waiver applies to the claims remaining in this case, this Court would still fail to enforce the waiver because there is no evidence that this alleged waiver was ever the subject of any negotiations between the parties. Given the absence of any evidence of such negotiations this Court finds that the alleged jury waiver was inconspicuous and therefore invalid. [*Whirlpool Financial Corp. v. Sevaux, 866 F. Supp. 1102, 1106 \(N.D. Ill. 1994\)*](#); [*Heller Financial, Inc. v. FinchBayless Equipment Co., No. 90 C 1672, 1990 WL 77500 \(N.D. Ill. May 31, 1990\)*](#). Finally, all of the circumstances surrounding the execution of the alleged jury waiver have led the Court to conclude that it was not undertaken in a knowing, voluntary and intelligent manner -- elements which are necessary conditions for the waiver [*181] of any important constitutional right.

V. CONCLUSION

For the reasons given above, the Court directs the Clerk of the Court to enter summary judgment in favor of Dunlop, Tucker/Rocky, and Parts Unlimited and against Nichols on Counts I-VI (1-6) of the Third Amended Complaint. The Court further directs the Clerk to enter judgment in favor of Dunlop and against Nichols on Counts IX through XIV (9-14), and in favor of Tucker/Rocky and Parts Unlimited and against Nichols on Counts VII, XVI, and XVII (7, 16, 17) of the Third Amended Complaint. Finally, the Court directs the Clerk to enter partial summary judgment in favor of Nichols and against Dunlop on Dunlop's Section 2(b) affirmative defense to Count VII of the Third Amended Complaint.

The Court denies Dunlop's Motion for Summary Judgment with respect to Counts VII, VIII and XV (7, 8, and 15) of the Third Amended Complaint. The Court also denies Dunlop's

Motion to Strike Nichols' jury demand.

ENTER:

Ruben Castillo

United States District Judge

August 10, 1995

Minute Order Form

Enter Memorandum Opinion and Order. The Clerk of the Court is directed to enter summary judgment in favor of Dunlop, Tucker/Rocky, [*182] and Parts Unlimited and against Nicholas on Counts I-VI of the Third Amended Complaint. The Court directs the Clerk to enter judgment in favor of Dunlop and against Nichols on Counts IX through XIV, and in favor of Tucker/Rocky and Parts Unlimited and against Nichols on Counts VII, enter partial summary judgment in favor of Nichols and against Dunlop on Dunlop's Section 2(b) affirmative defense to Count VII of the Third of Amended Complaint. The Court denies Dunlop's motion for summary judgment with respect to Counts VII, VIII and XV of the Third Amended Complaint. Dunlop's motion to strike Nichols' jury demand is denied.

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Bathke v. Casey's Gen. Stores

United States Court of Appeals for the Eighth Circuit

May 15, 1995, Submitted ; August 11, 1995, Filed

No. 94-3776

Reporter

64 F.3d 340 *; 1995 U.S. App. LEXIS 21612 **; 1995-2 Trade Cas. (CCH) P71,085

Gilbert Bathke; Valoris Bathke; Ronald Condon; Lanina Condon; Panora Oil Company; Martin Kress; Annette Kress; Anne Lubeck; Petroleum Marketers of Iowa, Plaintiffs - Appellants, v. Casey's General Stores, Inc., Defendant - Appellee.

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Southern District of Iowa. District No. 90-CV-80658. Honorable Charles Wolle, District Judge.

Core Terms

pricing, geographic, gasoline, district court, consumers, plaintiffs', summary judgment, relevant market, Robinson-Patman Act, competitors, costs, Sherman Act, antitrust, monopolization, customers, predatory, rivals, depositions, unfair, anti trust law, recoup, jury question, seller, sufficient evidence, class member, shoe store, small town, trade area, probability, discovery

LexisNexis® Headnotes

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

[**HN1**](#) **[]** **Summary Judgment, Entitlement as Matter of Law**

In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies.

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

[**HN2**](#) **[]** **Standards of Review, De Novo Review**

The court reviews de novo a district court's decision granting summary judgment.

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

HN3 [down arrow] Appellate Review, Standards of Review

The court must review the record in the light most favorable to the non-moving party and determine whether the movant demonstrated that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law.

Antitrust & Trade Law > Sherman Act > General Overview

HN4 [down arrow] Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 2](#).

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

Antitrust & Trade Law > Clayton Act > Penalties

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

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

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5 [down arrow] Monopolies & Monopolization, Actual Monopolization

Although the Sherman Act, [15 U.S.C.S. § 2](#), reads as a criminal statute, the antitrust laws provide a civil cause of action arising from a violation of this section, [15 U.S.C.S. § 15\(a\)](#). By its language the Sherman Act, [15 U.S.C.S. § 2](#), is directed at controlling monopolies. The Sherman Act, [15 U.S.C.S. § 2](#), prohibits predatory pricing when it poses a dangerous probability of actual monopolization. Predatory pricing means pricing a product below some objective measure of its cost.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN6 [down arrow] Robinson-Patman Act, Claims

See [15 U.S.C.S. § 13\(a\)](#).

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Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

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

HN7 **Robinson-Patman Act, Claims**

By its terms, the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#) condemns price discrimination only to the extent that it threatens to injure competition. The type of price discrimination injury under this statute which harms direct competitors of the discriminating seller, is known as primary-line injury.

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

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

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

HN8 **Price Discrimination, Competitive Injuries**

There are differences between the Sherman Act, [15 U.S.C.S. § 2](#), and the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#). For example, the interpret [§ 2](#) of the Sherman Act to condemn predatory pricing when it poses a dangerous probability of actual monopolization, whereas the Robinson-Patman Act requires only that there be a reasonable possibility of substantial injury to competition before its protections are triggered. But whatever additional flexibility the Robinson-Patman Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over the prices in the relevant market.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN9 [blue icon] Actual Monopolization, Anticompetitive & Predatory Practices

It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors. Inflicting painful losses on competitors is of no moment to the antitrust laws if competition is not injured.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN10 [blue icon] Robinson-Patman Act, Claims

In proving a pricing violation in a relevant market, under both the Sherman Act, [15 U.S.C.S. § 2](#) the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), there are two prerequisites to recovery. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. In short, the plaintiff must prove the rival was pricing below cost. The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. In short, the plaintiff must prove the defendant's eventual ability to recoup its losses from pricing below cost. Actually, the defendants must recoup more than the losses suffered.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN11 [blue icon] Robinson-Patman Act, Claims

The court holds that the essence of both a Sherman Act, [15 U.S.C.S. § 2](#) and Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#) claim is that a business engaged in unfair pricing in order to gain and exercise control over prices in the relevant market. While it has long been clear that plaintiffs asserting claims of monopolization in violation the

Sherman Act were required to prove the relevant geographical market, the court also requires plaintiffs asserting a Robinson-Patman Act predatory pricing claim to submit proof of the relevant market as well.

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

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

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

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

HN12 [blue icon] **Robinson-Patman Act, Coverage**

To determine whether the defendants have the market power required for monopolization liability, the plaintiffs have to demonstrate a well defined product and geographic market.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

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

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

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

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

HN13 [blue icon] **Relevant Market, Geographic Market Definition**

Like any other issue, market definition is subject to summary judgment if the plaintiffs fail to provide sufficient evidence from which a jury could reasonably find in their favor. Antitrust claims often rise or fall on the definition of the relevant market. An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market. The definition of the relevant market has two components -- a product market and a geographic market.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

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

HN14 [blue icon] **Relevant Market, Geographic Market Definition**

The proper definition of a geographic market is determined by a factual inquiry into the commercial realities faced by the consumer. The geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.

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

HN15[] Regulated Practices, Market Definition

The relevant geographic market is defined as the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

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

HN16[] Regulated Practices, Market Definition

Evidence of consumers' actual habits is not enough to establish relevant geographic market.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN17[] Costs & Attorney Fees, Costs

There is a presumption that the prevailing party is entitled to costs, [Fed. R. Civ. P. 54\(d\)](#). Costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs. [Fed. R. Civ. P. 54\(d\)](#) codifies the presumption that, with exceptions, costs will be awarded to prevailing parties.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN18[] Standards of Review, Abuse of Discretion

The court reviews a district court's decision to award costs for an abuse of discretion.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN19[] Costs & Attorney Fees, Costs

The district court has substantial discretion in awarding costs.

Counsel: Counsel who represented the appellant were Barry J. Nadler and James A. Brewer, Ames, Iowa.

Counsel who represented the appellee were Edward W. Remsburg and H. Richard Smith, Des Moines, Iowa.

Judges: Before McMILLIAN, BEAM, and HANSEN, Circuit Judges.

Opinion by: HANSEN

Opinion

[*341] HANSEN, Circuit Judge.

The plaintiffs, gasoline retailers located in small towns, appeal the district court's ¹ order granting summary judgment to the defendant, Casey's General Stores, Inc., a multi-state retailer of gasoline and other goods, on the plaintiffs' complaint alleging that Casey's had sold gasoline at below-cost prices to destroy or control competition in violation of federal and state antitrust laws. The district court held that the plaintiffs failed to produce sufficient evidence to create a jury question on three required elements of their unfair pricing claims: the relevant geographic market, that Casey's was selling gas below cost, and that Casey's had either a reasonable prospect or a dangerous probability of recouping its investment in the alleged below-cost prices. We affirm.

[**2] I.

There are no significant factual disputes on the questions presented for our review. The only dispute concerns the legal sufficiency of the plaintiffs' evidence to raise a jury question.

The named plaintiffs and the nearly 175 class members they represent (hereinafter "plaintiffs") owned or operated gasoline stations in small Iowa towns in 1988. The plaintiffs' stores were located in 67 Iowa towns where Casey's had convenience stores that sold gasoline. Each of the 67 towns has a population of fewer than 5500 persons.

Casey's is a multi-state retailer of gasoline and other merchandise, and operates over 800 convenience stores in Iowa, Missouri, Illinois, Minnesota, Nebraska, Kansas, Wisconsin, and South Dakota. Casey's owns approximately 600 of the stores and the remainder are owned by franchisees. It owns all of the stores in the 67 Iowa towns involved in this case.

During the 1980's some of Casey's competitors for gasoline business began converting their gasoline stations to convenience stores and generally upgrading their facilities. These competitors began to gain a larger [*342] percentage of the gasoline market at Casey's expense. From 1984 through early 1988, Casey's gasoline [**3] sales for its company stores dropped from 450,000 gallons per year to nearly 365,000 gallons per year per store.

Casey's internal company documents indicate that sometime during 1987, Casey's decided to take action to restore the lost volume of gasoline sales in certain towns. Casey's directed company-owned stores where volume had fallen below thirty thousand gallons per month to reduce the price of gas until the store restored the thirty thousand gallon volume. Casey's directed stores losing sales to competition to reduce gas prices to regain the volume. Casey's instructed stores selling at least thirty thousand gallons monthly simply to price competitively. These pricing directives did not target towns or markets of any particular population or geographic size. Casey's gave a different set of instructions to stores that faced new competitors or unusual competitive situations. Casey's goal was to achieve gasoline sales of thirty thousand gallons per month in each store.

On December 4, 1990, the plaintiffs filed this three-count anti-competition lawsuit against Casey's. Count I alleged that Casey's engaged in discriminatory pricing practices in violation of section 2(a) of the [**4] Robinson-Patman Act, 15 U.S.C. § 13(a). Count II alleged that Casey's engaged in predatory pricing in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. Count III alleged violation of the Iowa unfair discrimination statute, Iowa Code ch. 551 (1989). The district court certified this case as a class action in 1993.

The plaintiffs' theory underlying all three of its claims in this case is that Casey's developed and implemented a plan to target and destroy, or to tame, rival gasoline sellers in small Iowa towns by pricing its gasoline below cost for a period of time. The plaintiffs contend that in towns where rivals were destroyed, Casey's then would recoup its losses on the below cost gasoline sales by charging monopoly prices far above normal competitive market prices. The plaintiffs contend that in towns where the rivals were tamed, oligopolistic pricing of gasoline resulted because the rivals realized their peril and tacitly accepted charging their customers excessive gasoline prices.

Casey's first moved for summary judgment before the parties had completed discovery. The district court denied Casey's motion. After the parties completed extensive discovery, Casey's again [**5] moved for summary

¹ The Honorable Charles J. Wolle, Chief Judge, United States District Court for the Southern District of Iowa.

judgment. Casey's also filed a motion to dismiss some class members who had not complied with discovery orders or, alternatively, to decertify the class.

On August 23, 1994, the district court held an all day hearing on the motions. The district court eventually denied Casey's motion to decertify the class, but dismissed with prejudice the claims of class members who had not complied with discovery requests. The district court held two additional hearings on the motion for summary judgment, on September 8, 1994, and October 11, 1994, each hearing lasting about two hours. On October 14, 1994, the district court granted Casey's motion for summary judgment.

In entering summary judgment, the district court held that the plaintiffs failed to present sufficient evidence to create a jury question on three essential requirements of their unfair pricing scheme claims under both the Sherman Act and the Robinson-Patman Act. The district court ruled that the plaintiffs produced insufficient facts: (1) to establish the relevant geographic market, (2) to establish that Casey's sold the gasoline below its cost, or (3) to establish that Casey's would be able to recoup its losses [**6] and actually profit from this alleged illegal pricing scheme. Accordingly, the district court entered judgment in favor of Casey's on the plaintiffs' two federal claims, and dismissed without prejudice the Iowa state law unfair discrimination claim. The district court also assessed against the plaintiffs Casey's costs of taking certain depositions. The plaintiffs appeal both the decision granting summary judgment and the decision assessing costs. II.

HN1 [↑] "In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies." *Flegel v. Christian* [*343] *Hosp., Northeast-Northwest*, 4 F.3d 682, 685 (8th Cir. 1993) (quoting *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1489-90 (8th Cir. 1992)), cert. denied, 122 L. Ed. 2d 356, 113 S. Ct. 1048 (1993). **HN2** [↑] We review de novo the district court's decision granting summary judgment. *Willman v. Heartland Hosp. East*, 34 F.3d 605, 609 (8th Cir. 1994), cert. denied, 131 L. Ed. 2d 218, 115 S. Ct. 1361 (1995). **HN3** [↑] We must review the record in the light most favorable to the non-moving party and determine whether the movant demonstrated that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of [**7] law. See *id. at 609-610*.

We note at the outset that the Supreme Court has urged great caution and a skeptical eye when dealing with unfair pricing claims. "'Predatory pricing schemes are rarely tried, and even more rarely successful,' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), and the costs of an erroneous finding of liability are high." *Brooke Group v. Brown & Williamson Tobacco*, 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2589 (1993).

"The mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because 'cutting prices is the very essence of competition . . . ;' mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122 n.17, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) (quoting *Matsushita*, 475 U.S. at 594). It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.

113 S. Ct. at 2589-90. With these guidelines in mind, we turn to the merits of the issues presented for [**8] our review. The plaintiffs allege that Casey's engaged in a pricing scheme that violated both section 2 of the Sherman Act, 15 U.S.C. § 2, and section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Section 2 of the Sherman Antitrust Act provides:

HN4 [↑] 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. **HN5** [↑] Although this section reads as a criminal statute, the antitrust laws provide a civil cause of action arising from a violation of this section. See 15 U.S.C. § 15(a). By its language, section two of the Sherman Act is directed at controlling monopolies. Section two of the Sherman Act prohibits predatory pricing "when it poses 'a dangerous probability of actual monopolization.'" *Brook Group*, 113 S. Ct. at 2587 (quoting *Spectrum Sports, Inc.*

v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890 (1993)). Predatory pricing means pricing a product below some objective measure of its cost. *Matsushita, 475 U.S. at 585 n.8.*

HN6 [↑] Section 2(a) of the Robinson-Patman [**9] Act, a more detailed statute specifically addressing certain forms of price discrimination, 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.

15 U.S.C. § 13(a). **HNT** [↑] "By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." *Brook Group, 113 S. Ct. at 2586.* The type of price discrimination injury under this statute "which harms direct competitors of the discriminating seller, is known as primary-line injury." *Id.* The plaintiffs' Robinson-Patman claim against Casey's alleges harm to [*344] direct competitors and thus is a primary-line injury claim.

"It has become evident that primary-line competitive injury under the [**10] Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act." *Id. at 2587.*

HN8 [↑] There are, to be sure, differences between the two statutes. For example, we interpret § 2 of the Sherman Act to condemn predatory pricing when it poses a dangerous probability of actual monopolization, . . . whereas the Robinson-Patman Act requires only that there be a reasonable possibility of substantial injury to competition before its protections are triggered But whatever additional flexibility the Robinson-Patman Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over the prices *in the relevant market.*

Id. (internal citations and quotations omitted) (emphasis added).

The focus of these cases is the effect in the relevant market of reduced competition on consumers, not the competitors. **HN9** [↑] "It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" [**11] *Id. at 2588* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*). Inflicting painful losses on competitors "is of no moment to the antitrust laws if competition is not injured." *Id.*

HN10 [↑] In proving a pricing violation in a relevant market, under both § 2 of the Sherman Act and section 2(a) of the Robinson-Patman Act, there are two prerequisites to recovery. *113 S. Ct. at 2587.* "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* In short, the plaintiff must prove the rival was pricing below cost. "The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id. at 2588.* In short, the plaintiff must prove the defendant's eventual ability to recoup its losses from pricing below cost. Actually, the defendants must recoup "more than the losses suffered." *Id.* (quoting *Matsushita, 475 U.S. at 588-89*). [**12]

As noted above, the district court found that the plaintiffs failed to present sufficient evidence to create a jury question on three required elements of the pricing claims under *Brook Group*: relevant market, pricing below cost, and recoupment. Because we find the plaintiffs' failure to produce evidence of the relevant market dispositive, we will not address the other issues.

The district court held that the plaintiffs' antitrust claims failed because they did not produce sufficient evidence to create a jury question on the relevant geographic market of competition. In particular, the district court found that the plaintiffs failed to create a jury issue on their contention that the relevant geographic markets were the 67 separate small towns (and their immediate surrounding areas) involved in this case.

The plaintiffs do not dispute that they were required to establish the relevant geographic market to recover under their unfair pricing theory. [HN11](#) [↑] As we noted above, the essence of both a Sherman Act and Robinson-Patman Act claim is that a business engaged in unfair pricing in order to "gain and exercise control over prices *in the relevant market*." [Brook Group, 113 F.2d at 2587](#). (emphasis added). While it has long been clear that plaintiffs asserting claims of monopolization in violation of [section 2](#) of the Sherman Act were required to prove the relevant geographical market, see [Spectrum Sports, 113 S. Ct. at 892](#) ("demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendants' economic power in that market"); [*345] [Morgenstern v. Wilson, 29 F.3d 1291, 1295-96 \(8th Cir. 1994\)](#) ([HN12](#) [↑]) to determine whether the defendants have the market power required for monopolization liability, the plaintiffs had to demonstrate a well defined product and geographic market), we also have required plaintiffs asserting a Robinson-Patman Act predatory pricing claim to submit proof of the relevant market as well, [Henry v. Chloride, Inc., 809 F.2d 1334, 1347 \(8th Cir. 1987\)](#); see also Herbert Hovenkamp, *Federal Antitrust Policy*, § 3.1, at 79 n.6 (1994) ("When predatory pricing is challenged as a so-called 'primary line' violation of the Robinson-Patman Act, [15 U.S.C. § 13](#), most courts require that a relevant market be defined as well") (citing [Henry](#) [*14], [809 F.2d at 1347](#)).

[HN13](#) [↑] "Like any other issue, market definition is subject to summary judgment if the plaintiffs fail to provide sufficient evidence from which a jury could reasonably find in their favor." [Flegel, 4 F.3d at 689](#). Antitrust claims often rise or fall on the definition of the relevant market. See [Morgenstern, 29 F.3d at 1296](#) ("An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market."). The definition of the relevant market has two components -- a product market and a geographic market. [Flegel, 4 F.3d at 689](#); see also [Spectrum Sports, 113 S. Ct. at 892](#). The definition of the geographic market is the only one at issue here because the parties agree that the relevant product market is gasoline.

[HN14](#) [↑] The proper definition of a geographic market is determined by a "factual inquiry into the "commercial realities" faced by consumers." [Flegel, 4 F.3d at 690](#) (quoting [Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 112 S. Ct. 2072, 2076, 119 L. Ed. 2d 265 \(1992\)](#) (quoting [United States v. Grinnell Corp., 384 U.S. 563, 572, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#))). "The geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." [Morgenstern, 29 F.3d at 1296](#) (citing [Baxley-DeLamar Monuments, Inc., v. American Cemetery Ass'n, 938 F.2d 846, 850 \(8th Cir. 1991\)](#); see also [Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 \(1961\)](#) ([HN15](#) [↑] defining relevant geographic market as "the market area in which the seller operates, and to which the purchaser can practically turn for supplies."). The plaintiffs bear the "burden of establishing that a specified area constitutes a relevant geographic market." [Morgenstern, 29 F.3d at 1296](#).

In *Morgenstern*, we concluded that the plaintiffs' expert testimony and evidence was insufficient to establish a relevant geographic market because the plaintiffs' evidence "failed to address a critical legal question: where could consumers of the product . . . *practically turn for alternative sources of the product*." *Id.* Here, there is an identical failure of proof.

The plaintiffs' expert in this case relied on price differences between Casey's stores in different towns as an indication that those towns (and their surrounding areas) were separate markets. The plaintiffs' [*16] expert also relied on testimony from class members that most of their business came from in-town customers and that they priced their gas to compete with other in-town prices. The record is virtually silent, however, on the issue of where the consumer could "practically turn for alternative sources" of gas. *Id.* This silence is fatal to the plaintiffs' case under *Morgenstern*.

The plaintiffs' evidence, viewed in a light most favorable to them, suggests that gasoline retailers considered other in-town stores as their competitors and that consumers preferred to buy their gasoline in the small towns where they lived. Evidence of the *competitor's perspective* is not sufficient, however, because a geographic market is determined by inquiring into the "commercial realities" faced by *consumers.*" [Flegel, 4 F.3d at 689](#) (quoting [Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 112 S. Ct. 2072, 2076, 119 L. Ed. 2d 265 \(1992\)](#)) (emphasis added) (other citation omitted). [HN16](#) [↑] Likewise, evidence of consumers' actual habits is not enough to establish relevant geographic market under our cases. In *Morgenstern*, we rejected as insufficient both evidence [*346] detailing where consumers *actually* went [*17] for services as well as evidence indicating that consumers tended to go close to home for services because the evidence did not address where they *could practicably* go for the products and services. [29 F.3d at 1296-97](#). Thus, even if we fully credit the testimony from a number of the plaintiffs that consumers in the class towns prefer to buy gasoline close to home, there is still an absence of evidence on a critical question: where those gasoline consumers could practicably turn for alternatives.

A leading antitrust treatise further demonstrates the logic and necessity of applying such a requirement in this case: . . . a court would often be mistaken to conclude that a seller's "trade area," or the area from which it currently draws its customers, constitutes a relevant geographic market. In fact, the "trade area" and the "relevant market" are precisely reverse concepts.

Consider the following illustration. Fifteen miles outside of City A is a small town, Town B, which contains a single shoe store, Smith's Clothing. The only people who ever shop in Smith's Clothing are residents of Town B. When Smith's is accused of monopolization, the plaintiffs argue that Town [*18] B defines the relevant geographic market, since all of the store's customers come from there. In that case, Smith's market share is 100%.

But further inquiry shows the following. Last year 800 residents of Town B purchased shoes. 400 of them purchased from Smith's Clothing, and the other 400 purchased from the numerous shoe stores in City A. Note that this conclusion is absolutely consistent with the proposition that Smith's "trade area" is Town B. The *only* customers Smith's had were from Town B, assuming no one drove from City A to buy shoes at Smith's. In fact, Smith's is probably in close competition with the City A shoe stores. To the extent Town B residents go into City A to work or to shop, they regard the City shoe stores as interchangeable, and would respond to any local price increase by purchasing even more of their shoes in City A.

In sum, "trade area" considers the extent to which customers will travel in order to do business at Smith's. "Relevant market" considers the extent to which customers will travel in order to *avoid* doing business at Smith's. Unfortunately, this means that using discovery to obtain the addresses of a seller's customers [*19] seldom provides us with useful information about geographic market. What we really need to know is the extent to which people from the immediate area can readily turn to *alternative* sellers, and the defendant is far less likely to have such information.

H. Hovenkamp, *Federal Antitrust Policy*, § 3.6d, at 113-114 (footnotes omitted). Here, the plaintiffs' evidence, at best, demonstrates only the "trade area" of a Casey's store, i.e., the particular small town and immediate surrounding area. However, the plaintiffs have failed to present any evidence of "the extent to which customers will travel in order to *avoid* doing business" at a particular Casey's store. *Id.*

Requiring the plaintiffs to examine consumers' practicable alternatives in this case makes particularly good sense. Casey's has pointed to the unrefuted evidence that 42% of the people living in the relevant towns work elsewhere. Given these facts, it is entirely possible, if not likely, that those consumers have alternatives to purchase gas beyond their town of residence. See H. Hovenkamp, *Federal Antitrust Policy*, § 3.6d at 113 ("To the extent that Town B residents go into City A to work or [*20] to shop, they regard the City shoe stores as interchangeable, and would respond to any local price increase by purchasing even more of their shoes in City A"). On these facts alone, it is a distinct possibility that Casey's could never gain the control of the competition in those towns because there would be too many people who could easily avoid monopolistic or oligopolistic prices by looking to alternative sources for gasoline that are beyond Casey's control. Thus, the alternatives available to the consumers in this case must be accounted for in determining the relevant geographic market.

In sum, the problem with the evidence the plaintiffs submitted to establish the relevant geographic market is that it looks at the [*347] issue only from the perspective of Casey's rivals, not from the perspective of the consumer. This is not the correct approach in antitrust cases. See *Spectrum Sports, 113 S. Ct. at 891-92* (the purpose of the antitrust laws "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market"). Accordingly, we must affirm the district court's conclusion that summary judgment is appropriate because the plaintiffs [**21] failed to create a jury question on the issue of the relevant geographic market.

III.

The plaintiffs also argue that the district court erred in assessing \$ 30,831.78 against them for costs Casey's incurred in taking depositions of class members. [HN17](#)[] There is a presumption that the prevailing party is entitled to costs. *Fed. R. Civ. P. 54(d)* ("costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs"); *Police Retirement Sys. v. Midwest Inv. Advisory Serv., 940 F.2d 351, 358-59 (8th Cir. 1991)* ("[Federal Rule of Civil Procedure 54\(d\)](#) codifies the presumption that, with exceptions not relevant here, costs will be awarded to prevailing parties"). [HN18](#)[] We review the district court's decision to award costs for an abuse of discretion. *Milton v. Des Moines, Iowa, 47 F.3d 944, 947 (8th Cir. 1995)*, petition for cert. filed, [64 USLW 3017](#) (June 26, 1995).

The plaintiffs argue that the district court abused its discretion in awarding Casey's all of its deposition costs because: (1) many of the depositions were unnecessary or too broad in scope; and (2) the district court did not rely on all of the depositions in deciding the [**22] case.² The district court rejected both of these arguments, finding that the depositions were necessary and specifically indicating that it relied on the depositions in ruling on the motion for summary judgment. The district court is in the best position to make these determinations. As such, we cannot conclude in this case that the district court abused its substantial discretion in assessing the deposition costs against the plaintiffs. See *Richmond v. Southwire Co., 980 F.2d 518, 520 (8th Cir. 1992)* ("[HN19](#)[] The district court has substantial discretion in awarding costs").

IV.

For the reasons stated above, we affirm the judgment of the district court.

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² To the extent that the plaintiffs are arguing about the amount of costs the district court awarded, we have no jurisdiction over that issue. [Poe v. John Deere, Co., 695 F.2d 1103, 1108-09 \(8th Cir. 1982\)](#).



MCM Partners v. Andrews-Bartlett & Assocs.

United States Court of Appeals for the Seventh Circuit

January 5, 1995, Argued ; August 11, 1995, Decided

No. 94-3019

Reporter

62 F.3d 967 *; 1995 U.S. App. LEXIS 21695 **; 1995-2 Trade Cas. (CCH) P71,088

MCM PARTNERS, INCORPORATED, Plaintiff-Appellant, v. ANDREWS-BARTLETT & ASSOCIATES, INCORPORATED, doing business as ANDREWS-BARTLETT EXPOSITION SERVICES, et al., Defendants-Appellees.

Prior History: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 92 C 5641. Paul E. Plunkett, Judge.

Disposition: VACATED AND REMANDED.

Core Terms

conspiracy, coerced, allegations, enterprise, district court, forklifts, Sherman Act, conspirators, exhibition, antitrust, threats, contractors, rented, relevant market, personnel, coercion, material handling, moving equipment, racketeering, upper management, acquiescence, participated, lower-rung, rental, rental equipment, co-conspirator, cooperative's, defendants', convention, violations

LexisNexis® Headnotes

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

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

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

The court reviews the dismissal of plaintiff's complaint de novo, accepting as true the complaint's well-pleaded factual allegations and drawing all reasonable inferences from those allegations in plaintiff's favor.

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

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

HN2 [down arrow] **Standards of Review, De Novo Review**

The court will affirm the dismissal of plaintiff's complaint only if it appears beyond doubt that plaintiff can prove no set of facts in support of its claim which would entitle it to relief.

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 > General Overview

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

HN4 [] **Antitrust & Trade Law, Sherman Act**

In order to state a claim under [15 U.S.C.S. § 1](#) a plaintiff must allege: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.

Antitrust & Trade Law > Sherman Act > General Overview

HN5 [] **Antitrust & Trade Law, Sherman Act**

A party may independently decide with whom it will deal, and it may, without running afoul of [15 U.S.C.S. § 1](#), decide to direct all of its business to a single supplier.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

A conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN7 [] **Antitrust & Trade Law, Sherman Act**

The involuntary nature of one's participation in a conspiracy to monopolize is no defense. An antitrust conspirator can be liable for damages even though he participates only under coercion.

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

Civil Procedure > Preliminary Considerations > Venue > General Overview

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

HN8 Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

So long as defendants knew that they were acquiescing in conduct that was in all likelihood unlawful, there is no difficulty concluding that they thereby joined a combination or conspiracy for which they can be held accountable under [15 U.S.C.S. § 1](#).

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

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN9 Sherman Act, Remedies

To state a claim for relief under [15 U.S.C.S. § 1](#), a plaintiff must allege either that the contract, combination, or conspiracy resulted in a per se violation of the Sherman Act or that it unreasonably restrained competition in a relevant market.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Governments > Local Governments > Police Power

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Governments > Local Governments > Claims By & Against

HN10 Complaints, Requirements for Complaint

It is sufficient for the plaintiff to include in its complaint only a short and plain statement of the claim showing entitlement to relief, [Fed. R. Civ. P. 8\(a\)\(2\)](#).

Business & Corporate Law > Cooperatives > General Overview

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

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

[HN11](#) Business & Corporate Law, Cooperatives

[18 U.S.C.S. § 1962\(c\)](#) makes it unlawful for any person employed by or associated with enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

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

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

[HN12](#) Racketeer Influenced & Corrupt Organizations Act, Elements

To be liable under [18 U.S.C.S. § 1962\(c\)](#), it must be shown that the defendant participated in the operation or management of the enterprise itself and that requires that the defendant play some part in directing the enterprise's affairs.

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

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

[HN13](#) Racketeer Influenced & Corrupt Organizations Act, Elements

The reach of [18 U.S.C.S. § 1962\(c\)](#)'s is not limited to upper-level management, explaining that an enterprise also may be operated by lower-rung participants who are under the direction of upper management. Therefore, a RICO enterprise may be operated at least by upper management, lower-rung participants in the enterprise who are under the direction of upper management, or others associated with the enterprise who exert control over it, as for example, by bribery.

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

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

[HN14](#) Racketeer Influenced & Corrupt Organizations Act, Elements

18 U.S.C.S. § 1962(d)'s target is the agreement to violate RICO's substantive provisions, not the actual violations themselves, and liability under 18 U.S.C.S. § 1962(d) is therefore not coterminous with liability under 18 U.S.C.S. § 1962(c).

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

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

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

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

HN15 [blue icon] Racketeer Influenced & Corrupt Organizations Act, Elements

A defendant may conspire to violate 18 U.S.C.S. § 1962(c) if it agrees to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity, and it is only necessary that the defendant agree to the commission of at least two predicate acts on behalf of the conspiracy. The defendant need not agree to actually commit the predicate acts itself or even to participate in the commission of those acts so long as it agrees that the acts will be committed on behalf of the conspiracy.

Criminal Law & Procedure > Defenses > Coercion & Duress

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

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

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

HN16 [blue icon] Defenses, Coercion & Duress

Economic coercion or duress is generally an affirmative defense to a conspiracy charge and that defense takes into consideration the types of pressure or coercion applied to the defendant and any alternatives to acquiescence that may have been available.

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Judges: Before RIPPLE and ROVNER, Circuit Judges, and MILLER, District Judge. *

Opinion by: ROVNER

Opinion

[*969] ROVNER, *Circuit Judge*. MCM Partners, Incorporated ("MCM") alleged that two exhibition contractors who staged conventions and trade shows at Chicago's McCormick Place violated the Sherman Antitrust Act, [15 U.S.C. § 1](#), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. §§ 1962\(c\) & \(d\)](#), when they refused to rent forklifts and other material handling and personnel moving equipment from MCM. The district court dismissed MCM's antitrust claim with prejudice, and after permitting MCM to replead its RICO claims, found that MCM also had failed to state a claim under that statute. The district court found from the allegations in MCM's complaint that the exhibition contractors had been coerced by O.G. Service Corporation ("OG"), a competing rental equipment company, and individuals acting on its behalf [**2] into refusing to deal with MCM. The court concluded that, as coerced parties, neither of the contractors could be considered conspirators under [section 1](#) of the Sherman Act or [section 1962\(d\)](#) of RICO. The court also dismissed MCM's claim under [section 1962\(c\)](#) because neither defendant met the test for liability set out in [Reves v. Ernst & Young, 122 L. Ed. 2d 525, 113 S. Ct. 1163 \(1993\)](#). In this appeal, MCM challenges the dismissal of all three claims.¹ It argues that even if coerced by a third party, the exhibition contractors are not immune from liability for a conspiracy under the Sherman Act or RICO. It also contends that the dismissal of its [section 1962\(c\)](#) claim under *Reves* was erroneous. For the reasons that follow, we vacate the dismissal of all three claims and remand for further proceedings.

I. BACKGROUND

[**3] Because we are reviewing a dismissal at the pleading stage, we take MCM's allegations at face value. See [Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union \(Independent\) Health and Welfare Fund, 25 F.3d 509, 511 \(7th Cir. 1994\)](#). We accordingly describe the facts as they are alleged in MCM's initial complaint and its second amended complaint.²

[*970] MCM brought its initial complaint against not only the exhibition contractors--Andrews-Bartlett & Associates, Incorporated ("A-B") and Freeman Decorating Company ("FDC")--and their principals, but also against OG and its principal, Nick Boscarino. The two complaints are a bit convoluted, but the essence of both the antitrust and RICO claims is simple enough--that OG conspired with A-B and FDC to monopolize the market for the rental of forklifts and material handling and personnel moving equipment [**4] at McCormick Place, thereby excluding MCM as a competitor in that market. MCM alleges in that regard that the conspiracy enabled OG to procure 100 percent of the McCormick Place rental market. The facts leading to the creation of this monopoly are alleged to be the following.

Prior to April 1991, only OG and AIM Industrial Lift Truck ("AIM") were in the business of providing forklifts and other material handling and personnel moving equipment to exhibition contractors at McCormick Place. In April 1991, however, MCM began to compete with OG and AIM for this exhibition business.³ MCM alleged that at that point it procured an order from A-B for the rental of forklifts and other heavy machinery for one of A-B's upcoming McCormick Place shows. Boscarino learned of this order in May 1991, and he contacted National Lift Truck ("NLT"), whom he knew would be leasing certain equipment to MCM to be used at the A-B show. Boscarino told an NLT

* The Honorable Robert L. Miller, Jr., of the Northern District of Indiana, sitting by designation.

¹ The district court also dismissed MCM's claims under [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), and [section 3](#) of the Clayton Act, [15 U.S.C. § 14](#). MCM has not challenged the dismissal of those claims in this appeal.

² The second amended complaint addressed only MCM's RICO claims, as the district court had dismissed the Sherman Act claim in MCM's initial complaint with prejudice.

³ In the fall of 1991, OG purchased the assets of AIM, leaving MCM as OG's sole competitor at McCormick Place.

principal that unless NLT terminated any relationship with MCM in relation to the buildings and facilities at McCormick Place, NLT's property would be in jeopardy. MCM also alleged that another OG employee, Cliff Larson, made a call to NLT the following [**5] day, threatening that the NLT forklifts rented by MCM would be damaged unless the business relationship was terminated. Indeed, on the day following Larson's threat, one of the rented forklifts was damaged when it was rammed in the side by another forklift.

By letter dated January 17, 1992, A-B committed to utilize MCM equipment for a number of its shows throughout the year. For instance, A-B agreed that MCM would serve as its primary supplier of gas scooters at McCormick Place for the entire calendar year, and that MCM would provide either 50 or 100 percent of A-B's forklift requirements for designated trade shows. The letter noted that A-B "looked forward to this working relationship and the possibility of maintaining and expanding our relationship throughout the year." (R. 1, Ex. A.) In accordance with this letter, A-B's equipment manager delivered two purchase orders for forklifts and gas scooters [**6] to MCM on April 14, 1992. Less than one week later, however, A-B sent to MCM the following notice canceling those purchase orders:

We regret to inform you that due to an advance agreement between O.G. Service and Andrews-Bartlett Exposition Services Corporate office, we must cancel [the April 14, 1992] purchase orders. . . . I have been informed by my corporate office that any and all equipment required by our Chicago operation will be provided by O.G. Services.

(R. 1, Ex. D.) MCM alleged that prior to A-B's cancellation of the two purchase orders, Boscarino met with two A-B managers, who informed him of A-B's ongoing relationship with MCM. Boscarino told the managers that Bill Hogan, who was president of the local branch of the International Brotherhood of Teamsters (the "Teamsters"), was "not going to like" the fact that A-B was doing business with MCM. Upon learning of the A-B/MCM agreement, Hogan met with A-B's president, Harold Bartlett, on April 17, 1992, and agreed to grant A-B certain work rule concessions. It was after this meeting that Bartlett directed his Chicago managers to cancel the MCM purchase orders and to terminate any business relationship with MCM [**7] at McCormick Place.

Consistent with these specific allegations, MCM generally alleged that both A-B and FDC proceeded, at the direction of Hogan, to [**971] lease forklifts and other material and personnel handling equipment at McCormick Place only from OG, whose principal (Boscarino) was a steward of the Teamsters' local branch. According to MCM, whenever either exhibition contractor took any steps that were inconsistent with Hogan's directive in this regard, the contractor was subject to discipline by the Teamsters, including threats of labor strikes and damage to property. As a result, since August 1992, A-B and FDC have exclusively used OG for their rental equipment needs at McCormick Place. Because the effect of defendants' actions was to provide OG with a virtual monopoly at the convention center, defendants paid rates for OG's rental equipment that were higher than the prevailing market rates.⁴

[**8] From these factual allegations, MCM advanced claims under two federal statutes. First, MCM maintained that defendants had violated [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), by conspiring to monopolize the market for the rental of forklifts and other material handling and personnel moving equipment at McCormick Place. The conspiracy's purpose, the complaint alleged, was to raise or stabilize the price of rental equipment either by excluding MCM from the market or by substantially limiting its ability to compete with OG. MCM was successfully excluded because Boscarino procured agreements from both A-B and FDC not to deal with MCM and to instead use OG for all of their rental equipment needs. MCM therefore alleged that actual and potential competition in the relevant market was restrained or eliminated altogether. MCM asked that the Sherman Act violation be enjoined and that it recover treble the damages it incurred.

MCM alleged, in addition, that defendants' conduct also violated RICO [sections 1962\(c\)](#) & [\(d\)](#). The predicate acts allegedly constituting a pattern of racketeering activity were defendants' payments to OG for the rental of equipment

⁴ MCM alleged that A-B and FDC controlled 75 percent of the convention and trade show business at McCormick Place in 1992 and that the remaining 25 percent was divided between United Exposition Services and several smaller exposition contractors. These contractors also refused to rent from MCM at McCormick Place, as they allegedly had been told that problems would develop with the Teamsters if they used a rental equipment company other than OG.

at McCormick Place at higher than market [**9] rates. MCM alleged that these payments violated [section 186](#) of the Taft-Hartley Act, [29 U.S.C. § 186](#), as they were payments by an employer to a union representative of its employees.⁵ In its RICO count, MCM also prayed for treble damages and injunctive relief.

After filing its original complaint, MCM voluntarily dismissed OG and Boscarino,⁶ and the remaining defendants then moved to dismiss for failure to state a claim. The district court permitted MCM to replead [**10] its RICO claims but dismissed the antitrust claim with prejudice. See [MCM Partners, Inc. v. Boscarino, 1994-1 Trade Cas. \(CCH\) P 70,547](#) (N.D. Ill. Feb. 17, 1994). The district court subsequently dismissed the RICO claims that MCM realleged in a second amended complaint. (See R. 107.) The court determined that neither the antitrust nor the RICO claims could survive MCM's voluntary dismissal of OG and Boscarino. In the court's words, the dismissal of these defendants "left a racketeering count with no racketeer and an antitrust suit with no monopoly." [1994-1 Trade Cas. \(CCH\) P 70,547, at 71,958](#). Finding from the allegations in MCM's complaint that A-B and FDC had been coerced into dealing exclusively with OG at McCormick Place, the court held that a coerced party could not be liable as a co-conspirator [*972] under RICO or the Sherman Act. The court also found that a coerced party could not operate or manage a racketeering enterprise under RICO [section 1962\(c\)](#).

[**11] II. DISCUSSION

[HN1](#) We review the dismissal of MCM's complaint de novo, accepting as true the complaint's well-pled factual allegations and drawing all reasonable inferences from those allegations in MCM's favor. [Leatherman v. Tarrant County Narcotics Unit, 122 L. Ed. 2d 517, 113 S. Ct. 1160, 1161 \(1993\)](#); [Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 644 \(7th Cir. 1995\)](#). [HN2](#) We will affirm the dismissal of MCM's complaint "only if it 'appears beyond doubt that [MCM] can prove no set of facts in support of [its] claim which would entitle [it] to relief.'" [Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 421 \(7th Cir. 1994\)](#) (quoting [Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#)). We apply that liberal standard first to MCM's antitrust claim and then to its RICO claims.

A. Sherman Act Claim

1. Contract, Combination, or Conspiracy

The district court viewed MCM's claim under [section 1](#) of the Sherman Act⁷ as somewhat unique:

⁵ [Section 186](#) provides, *inter alia*, that:

- (a) It shall be unlawful for any employer or association of employers . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--
- (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
- (2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce.

⁶ The record does not reveal MCM's reason for dismissing these defendants, although it apparently relates to the fact that MCM previously had sued OG and Boscarino but had settled its claims in that case.

⁷ [Section 1](#) provides in pertinent part that:

- [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.](#) [HN4](#) In order to state a claim under that section, a plaintiff must allege: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." [Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 \(7th Cir. 1993\)](#).

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 disruption by a union official in cahoots with the would-be monopolist. **[**12]** As a consequence, [MCM] 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 [MCM] is not suing the would-be monopolist but the victims forced to deal with it.

[1994-1 Trade Cas. \(CCH\) P 70,547, at 71,953](#) (district court's emphasis). The court concluded, however, that MCM had failed to state a claim for relief under [section 1](#) because it had not adequately alleged a contract, combination, or conspiracy in restraint of trade. The district court believed that "the only reasonable inference to be drawn from the facts alleged in the Complaint [was] that A-B and FDC's agreement to deal exclusively with OG was motivated by their desire to avoid labor trouble and damage to the rented equipment." *Id.* at 71,954. In the court's view, this "hardly suggests a meeting of the minds with OG or Boscarino," as "the person who 'agrees' to give a gunman his wallet is not a co-conspirator." *Id.* MCM contends in this appeal that, contrary to the import of the district court's opinion, coercion is not an absolute defense to conduct that otherwise violates [section 1](#). According to **[**13]** MCM, a coerced party that acquiesces in the unlawful conduct of another is considered a co-conspirator of its coercer and may thus be held accountable under the antitrust laws.

If A-B or FDC had independently exercised its business judgment to refuse to rent equipment from MCM at McCormick Place, that decision would not be actionable under [section 1](#) of the Sherman Act. See [Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#); [United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#). [HN5](#) A party may independently decide with whom it will deal, and it may, without running afoul of [section 1](#), decide to direct all of its business to a single supplier. Yet MCM's allegations suggest that A-B and FDC did not make independent business decisions here. Instead, MCM alleged that A-B and FDC decided to deal exclusively with OG at McCormick Place only in response to threats of labor disruption and damage to property made by Hogan, Boscarino, or others **[*973]** on behalf of OG. Indeed, MCM alleged that in both 1991 and 1992, it had procured contracts with A-B to supply equipment for certain of A-B's McCormick Place exhibitions. A-B canceled those agreements, according to the complaint, only in response to pressure and threats from Boscarino and Hogan.⁸ The allegations therefore support the inference that both A-B and FDC acquiesced to the demands of Boscarino and Hogan that they deal only with OG in renting forklifts and other material handling and personnel moving equipment at McCormick Place.

[15]** A-B and FDC argue, however, and the district court found, that their acquiescence did not establish a combination or conspiracy for purposes of [section 1](#) because the complaint itself indicated that A-B and FDC acted only at the direction of and in response to pressure applied by OG and its principals--that is, that they were coerced victims of OG's scheme. But the district court's holding in that regard is without support in the case law interpreting [section 1](#). In [United States v. Paramount Pictures, Inc., 334 U.S. 131, 161, 92 L. Ed. 1260, 68 S. Ct. 915 \(1948\)](#), for example, the Supreme Court dispatched a similar argument in short order:

There is some suggestion . . . that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.

⁸ In its second amended complaint filed after the dismissal with prejudice of its [section 1](#) claim, MCM also alleged that Hogan, on April 17, 1992, agreed to grant A-B certain work rule concessions if it terminated its business relationship with MCM and rented equipment at McCormick Place only from OG. Although the district court had no opportunity to consider this allegation in connection with MCM's antitrust claim, it suggests that AB's actions may not have been entirely coerced, as A-B was able to negotiate concessions from the Teamsters in return for conduct in conformance with Hogan's wishes. Because the allegation was not before the district court, however, and because MCM does not allege that FDC received similar concessions, we will disregard that additional allegation when considering MCM's antitrust claim and will treat A-B and FDC both as coerced parties. On remand, however, MCM should be afforded the opportunity to include this potentially significant allegation in an amended complaint.

Later courts have applied this principle in a variety of settings, concluding that the "combination or conspiracy" element of a section 1 violation is not negated by the fact that one or more of the co-conspirators [**16] acted unwillingly, reluctantly, or only in response to coercion. See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968) (plaintiff could allege a conspiracy between a manufacturer and the franchise dealers who acquiesced in the manufacturer's demands); Albrecht v. Herald Co., 390 U.S. 145, 150 & n.6, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968); United States v. Parke, Davis and Co., 362 U.S. 29, 45, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960); City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1371 (9th Cir.) HN6[¹⁵] ("a conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion."), cert. denied, 121 L. Ed. 2d 228, 113 S. Ct. 305 (1992); Duplan Corp. v. Deering Milliken, Inc., 594 F.2d 979, 982 (4th Cir. 1979) (coercion no defense in horizontal conspiracy involving patent), cert. denied, 444 U.S. 1015 (1980); Calnetics Corp. v. Volkswagen of Am., Inc., 532 F.2d 674, 682 (9th Cir.) HN7[¹⁶] (¹⁵) ("The involuntary nature of one's participation in a conspiracy to monopolize is no defense. An antitrust conspirator can be liable for damages even though he participates only under coercion."), cert. denied, 429 U.S. 940, 50 L. Ed. 2d 309, 97 S. Ct. 355 (1976); Flintkote Co. v. Lysfjord, 246 F.2d 368, 375 (9th Cir.) ("Because one is [**17] coerced by economic threats to participate in or aid and abet an illegal scheme does not excuse the actor."), cert. denied, 355 U.S. 835, 2 L. Ed. 2d 46, 78 S. Ct. 54 (1957); C & W Constr. Co. v. Brotherhood of Carpenters and Joiners of Am., Local 745, 687 F. Supp. 1453, 1462-63 (D. Haw. 1988) (suppliers coerced by labor union to refuse to deal with the plaintiff were co-conspirators under section 1); Oltz v. St. Peter's Community Hosp., 656 F. Supp. 760, 763 (D. Mont. 1987) (hospital board of trustees [*974] that bowed to pressure from anesthesiologists in refusing to continue to deal with the plaintiff held to have conspired with the anesthesiologists), aff'd, 861 F.2d 1440, 1451 (9th Cir. 1988); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1321-22 (D. Conn. 1977) ("Courts have uniformly rejected any defense that an antitrust violation was 'forced' onto the defendant."); Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 261 F. Supp. 381, 385 (W.D. Pa. 1966) ("even if one is coerced by economic threats or pressure to participate in an illegal scheme, that does not make him any less a co-conspirator."), aff'd, 388 F.2d 789, 797 (3d Cir. 1967); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 245 F. Supp. 889, [***18] 892-93 (N.D. Ill. 1965) (striking economic coercion defense in horizontal price fixing case as inconsistent with *Paramount Pictures*). Our cases, too, have adhered to this general principle. See Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1163 (7th Cir. 1987) ("The fact that Isaksen may have been coerced into agreeing is of no moment; an agreement procured by threats is still an agreement for purposes of section 1."), cert. denied, 486 U.S. 1005, 100 L. Ed. 2d 193, 108 S. Ct. 1728 (1988).

A-B and FDC acknowledge that courts traditionally have found concerted action even where at least one of the alleged conspirators may have been coerced, but they argue that the purpose of finding a conspiracy in that instance is to provide the coerced party or an injured third party with a remedy *against the coercer*. Defendants maintain that a combination or conspiracy should not be found when a third party seeks recovery *from the coerced party itself*. Under defendants' theory, then, treatment of the identical conduct would vary under section 1 based upon the identity of the defendant. Yet nothing in the text of the Sherman Act or in the Supreme Court's interpretation of that statute suggests to us that the defendant's identity [**19] is at all relevant to whether or not there was an actionable contract, combination, or conspiracy. Moreover, it would be logically inconsistent to find a conspiracy only when the coercing party is sued, as the conduct relevant to the conspiracy determination is the same if only the coerced party is targeted.

Defendants, however, find some support for their theory in Professor Areeda's treatise. See VI P.E. Areeda, Antitrust Law P 1408 (1978 & 1994). There, the author explains that a judicial desire to protect "the coerced party has often been the impulse behind proclaiming coerced compliance to be a conspiracy," and he therefore argues that courts should be "wary of extending the same proclamation to cases in which the coerced party is the defendant." Id. at 45. Areeda concedes, however, that "judicial declarations on the matter provide little comfort for coerced parties" because "the legal convention of treating express promises in the vertical context as [section 1] contracts or conspiracies is well established notwithstanding an unwilling dealer." Id. at 45, 48. Indeed, neither A-B nor FDC can cite a single case which holds that a section 1 conspiracy exists only where the coerced [**20] party

or an injured third party seeks a remedy against the coercer.⁹ Professor Areeda acknowledges, [*975] moreover, that courts have found conspiracies even where the coerced party is the defendant. *Id. at 48* (citing *Calnetics Corp., 532 F.2d at 682*); see also, e.g., *Paramount Pictures, 334 U.S. at 161*; *Flintkote, 246 F.2d at 375-76*. In advocating a more flexible rule that takes into account a variety of casespecific factors, Areeda is primarily concerned with the potential injustice of imposing treble damage liability against a coerced party who "may seem more a victim than a sinner." VI Areeda, P 1408, at 46, 48. That potential is particularly acute, Areeda argues, in cases involving a vertical relationship because the coerced party may find it difficult to distinguish unlawful and anticompetitive threats from "lawful persuasion." *Id. at 48*.

[**21] Even given the legitimacy of Professor Areeda's concerns, however, we do not find this an appropriate case to depart from the traditional rule, as MCM's allegations permit the inference that A-B and FDC must have realized that the "persuasion" applied by OG and its principals was unlawful. MCM alleged that both A-B and FDC were induced by threats of labor disruption and of damage to property to rent all of their forklifts and other material handling and personnel moving equipment from OG. At the time these threats were made, A-B had already committed some of its rental business to MCM, but it canceled those commitments after being threatened by Boscarino and Hogan. Taking these allegations as true, A-B and FDC knew or should have known that OG's attempt by such means to procure and to further exclusive dealing relationships would have the effect of excluding MCM from McCormick Place and eliminating competition in that venue. A-B and FDC must have realized, then, that OG's conduct was probably unlawful under the antitrust laws. Cf. *C & W Constr. Co., 687 F. Supp. at 1463*. **HN8** So long as defendants knew that they were acquiescing in conduct that was in all likelihood unlawful, we have no [**22] difficulty concluding that they thereby joined a combination or conspiracy for which they can be held accountable under *section 1*. See *Albrecht, 390 U.S. at 150*; *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 214 (3d Cir. 1992)*, cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993); *Flintkote, 246 F.2d at 375-76*; *C & W Constr. Co., 687 F. Supp. at 1463*; see also *Syufy Enter. v. American Multicinema, Inc., 793 F.2d 990, 1001 (9th Cir. 1986)*, cert. denied, 479 U.S. 1031, 479 U.S. 1034, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987); II E.W. Kintner, *Federal Antitrust Law* § 9.17, at 34 (Supp. 1995); VI Areeda, P 1408, at 44. Indeed, the acquiescence of A-B and FDC was essential to the success of OG's scheme, as only those companies had the ability to effectively exclude MCM from the McCormick Place market by refusing to rent its equipment. See *Duplan Corp., 594 F.2d at 982*.

Although the evidence itself may establish that A-B and FDC made independent business decisions in renting equipment only from OG, MCM's conspiracy allegations were sufficient to survive a motion to dismiss.

2. Relevant Market

⁹ FDC maintains that two more recent decisions "buttress" its argument (FDC Br. at 14-15 (citing *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992)*, cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993); *Garshman v. Universal Resources Holding, Inc., 625 F. Supp. 737 (D.N.J. 1986)*), yet neither case holds that concerted action is absent when the coerced party is named as a defendant. In *Fineman*, the Third Circuit considered whether the plaintiff had shown a conspiracy between a manufacturer and one of its distributors where the manufacturer had pressured the distributor into refusing to deal with one of its competitors. *980 F.2d at 212*. The district court directed a verdict for the defendant manufacturer on the ground that no conspiracy had been established because the distributor did not share the manufacturer's purpose of eliminating the competitor from the market. *Id.* The Third Circuit reversed, believing that the district court's ruling would have the effect of rendering "*section 1*" unavailable to private litigants suffering antitrust injury as a result of concerted action in a vertical matrix." *Id.* The court held that a conspiracy could be found in that circumstance even if the manufacturer and distributor had different motives for engaging in anticompetitive conduct. *Id. at 215*. In reaching that conclusion, the court mentioned Professor Areeda's suggestion that a distributor should not always be subject to liability when coerced by a manufacturer. Yet that question was not actually presented in *Fineman*, as the coerced distributor had not been sued. *Id.* The court addressed the point only to show that Professor Areeda would find a conspiracy in the case actually before the court even if the distributor had its own motives for acquiescing in the manufacturer's plan. *Id.*

In *Garshman*, the court also discussed Professor Areeda's treatise and was reluctant to find a conspiracy where such a finding would subject a possible victim of coercion to liability for treble damages. *625 F. Supp. at 743*. Yet the court did not base its decision on that ground, as it found other defects warranting dismissal of the complaint even if the facts alleged would support an inference of conspiracy. *Id.*

The district court alternatively found that MCM had failed to plead facts supporting its definition of the market where competition allegedly had [**23] been restrained. MCM defined the market as "the rental of forklifts, material handling and personnel moving equipment to the convention and trade show industry in Chicago, Illinois." (R. 1, P 72.) It alleged that the "vast majority" of Chicago's convention and trade show business is conducted at McCormick Place and that the consumers in that market are the "exhibition contractors who set up, install, and disassemble the booths and other physical items" used in the industry. (*Id. at P 72(a)*.) The district court believed that these allegations defined the market too narrowly because the complaint [*976] did not include facts establishing that the market for MCM's equipment was limited to exhibition contractors. In the absence of such allegations, the court took judicial notice of the fact that forklifts and material handling and personnel moving equipment are subject to widespread industrial use, and it therefore found MCM's narrowly-defined market "so improbable" that the suit should not proceed. *MCM Partners*, 1994-1 Trade Cas. P 70,547, at 71,956.¹⁰ MCM contends on appeal that its relevant market allegations were sufficient to withstand a motion to dismiss and that its proof at trial would [**24] establish that the equipment rented by MCM and OG to exhibition contractors at McCormick Place was unique in that it could not readily be used in other locations for other purposes. See *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 481-82, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (proper market definition requires factual inquiry into commercial realities faced by consumers). MCM therefore contends that the district court should not have rejected its definition of the relevant market as a matter of law based solely on the allegations in its complaint.

HN9[] To state a claim for relief under [section 1](#), a plaintiff must allege either that the contract, combination, or conspiracy resulted in a per se violation of the Sherman Act or that it unreasonably restrained competition in a relevant market. See *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 [*25] (7th Cir. 1993); *Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1088 (7th Cir. 1992), cert. denied, 124 L. Ed. 2d 247, 113 S. Ct. 2336 (1993); *Dos Santos v. Columbus-Cuneo-Cabriani Med. Ctr.*, 684 F.2d 1346, 1352 (7th Cir. 1982). In the instant case, MCM did not attempt to make out a per se violation of [section 1](#) but alleged instead that OG, A-B, and FDC restrained competition in the market for rental equipment at McCormick Place by effectively eliminating MCM as a competitor in that market and thereby securing a virtual monopoly for OG. According to MCM, this had the effect of permitting OG to charge higher than market rates for the rental of its equipment at that facility. Assuming that McCormick Place can be characterized as a relevant market, then, these allegations were sufficient to allege an unreasonable restraint on competition.

The district court found it highly improbable, however, that the market could be limited to exhibition contractors in the convention and trade show industry because the equipment rented by MCM had a number of alternative uses. [1994-1 Trade Cas. \(CCH\) P 70,547, at 71,956](#). We are less sure than the district court that the market as defined in the [**26] complaint could not be a relevant market in these circumstances even if there may be other uses for MCM's equipment. See, e.g., *Fishman v. Estate of Wirtz*, 807 F.2d 520, 531-32 (7th Cir. 1986) (defining the relevant market as that to which access had been sought and foreclosed by anticompetitive conduct even if the plaintiff may have had other business opportunities). Yet we need not definitively decide that question at this stage because there is nothing in the record to suggest that there in fact are other uses for MCM's equipment. The district court's willingness to look behind MCM's allegations because it believed MCM had not alleged facts to support the complaint's market definition is in considerable tension with our recent decision in *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778, 782 (7th Cir. 1994). There, we explained that judicial attempts to apply a heightened pleading standard in antitrust cases had been "scotched" by the Supreme Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 122 L. Ed. 2d 517, 113 S. Ct. 1160, 1163 (1993), and that after *Leatherman*, an antitrust plaintiff need not include "the particulars of his claim" to survive [**27] a motion to dismiss. [33 F.3d at 782](#). **HN10**[] It is instead sufficient for the plaintiff to include in its complaint only "a short and plain statement of the claim" showing an entitlement to relief. [Fed. R. Civ. P. 8\(a\)\(2\)](#); see *Leatherman*, 113 S. Ct. at 1163; *Hammes*, 33 F.3d at 778. If a claim is stated against a [*977] municipality under [42 U.S.C. § 1983](#) when a plaintiff alleges only that the municipality maintained an official policy, custom, or

¹⁰ The court did not provide MCM with the opportunity to amend its complaint to attempt to allege facts supporting its market definition but dismissed the [section 1](#) claim with prejudice.

practice and that an individual police officer acted in conformance with that official policy ([Leatherman, 113 S. Ct. at 1162-63](#)), then we fail to see how MCM's allegations in the instant case are insufficient to define the relevant market. See [Hammes, 33 F.3d at 782](#). Moreover, it is not inconceivable to us that MCM could prove a set of facts supporting the relevant market definition alleged in its complaint. See [Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#). It was therefore erroneous for the district court also to dismiss MCM's [section 1](#) claim on this ground.

Having rejected the alternative bases relied on by the district court for dismissing MCM's claim under [section 1](#) of the Sherman Act, we reverse that dismissal and remand for further proceedings.

B. [**28] RICO Claims

MCM also alleged claims for treble damages and injunctive relief under [18 U.S.C. §§ 1962\(c\) & \(d\)](#), but the district court dismissed both claims pursuant to [Reves v. Ernst & Young, 122 L. Ed. 2d 525, 113 S. Ct. 1163 \(1993\)](#). Because the only reasonable inference the court could draw from MCM's complaint was that A-B and FDC were victims of a scheme operated and managed by others, the court concluded that neither defendant had "conducted or participated in the conduct of a racketeering enterprise" under [section 1962\(c\)](#), or had joined a conspiracy to do so under [section 1962\(d\)](#). (R. 108, at 3.) MCM argues on appeal that its allegations were sufficient to establish defendants' participation in the operation or management of a racketeering enterprise under *Reves*. Even if they were not, however, MCM maintains that the district court erred in applying *Reves*, a [section 1962\(c\)](#) case, to its conspiracy claim under [section 1962\(d\)](#). We address each argument in turn.

1. [Section 1962\(c\)](#)

[Section 1962\(c\) HN11](#)[ makes it unlawful for "any person employed by or associated with [an] enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern [**29] of racketeering activity or collection of unlawful debt." [18 U.S.C. § 1962\(c\)](#). The question in *Reves* was whether an outside accounting firm could be liable under this provision for incorrectly valuing a farm cooperative's assets on the cooperative's financial statements. The Supreme Court held that it could not because the accounting firm had not "conducted, or participated, directly or indirectly, in the conduct" of the cooperative's affairs. [113 S. Ct. at 1173-74](#). [HN12](#)[ To be liable under [section 1962\(c\)](#), the Court held, it must be shown that the defendant "participated in the operation or management of the enterprise itself" (*id. at 1172, 1173*), and that requires that the defendant play "some part in directing the enterprise's affairs." *Id. at 1170* (emphasis in *Reves*). At the same time, however, the Court refused to [HN13](#)[ limit [section 1962\(c\)](#)'s reach to upper-level management, explaining that an enterprise also may be operated "by lower-rung participants . . . who are under the direction of upper management." *Id. at 1173*; ¹¹ see also [LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 393-94 \(7th Cir. 1995\)](#); [United States v. Antar, 53 F.3d 568, 580 \(3d Cir. 1995\)](#). Under *Reves*, therefore, a [**30] RICO enterprise may be operated at least by "upper management, 'lower-rung participants in the enterprise who are under the direction of upper management,' or 'others associated with the enterprise who exert control over it, as for example, by bribery.'" [Azrielli v. Cohen Law Offices, 21 F.3d 512, 521 \(2d Cir. 1994\)](#) (quoting [Reves, 113 S. Ct. at 1173](#)).

In the instant case, MCM defined the RICO enterprise as "an association-in-fact" comprised of OG, Boscarino, Hogan, the Teamsters, A-B, and FDC. (R. 94, at [*978] P 23.) ¹² The enterprise's purpose, according to the complaint, was to make OG "the exclusive provider of forklift and material handling and personnel moving equipment for all exhibition contractors at McCormick Place." (*Id. at P 25.*) All activities of A-B and FDC in relation to that enterprise are alleged to have been undertaken "at the direction of" one or more of [**31] the other members of the enterprise, and whenever A-B or FDC disobeyed such directions, it was "subject to discipline,

¹¹ The Court found it clear, however, "that Arthur Young was not acting under the direction of the Co-op's officers or board." [Id. at 1173 n.9](#).

¹² An "enterprise" for RICO purposes may include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." [18 U.S.C. § 1961\(4\)](#).

including threats of strikes and damage to property." (*Id.* at P 26.) The TaftHartley Act violations (the underlying predicate acts of racketeering) were therefore all undertaken by A-B and FDC at the direction of others. Indeed, MCM's counsel conceded at oral argument that his client has not alleged any conduct by these defendants that was not "directed by" OG, Boscarino, or Hogan. The district court determined on the basis of these allegations that neither defendant had played any part in directing the affairs of the enterprise under *Reves*, and it accordingly dismissed the claim.

MCM argues that the dismissal was erroneous because *Reves* itself observes that [**32] lower-rung participants under the direction of upper management may "operate" a racketeering enterprise. See [*Reves, 113 S. Ct. at 1173*](#). Thus, even if Boscarino, Hogan, or perhaps OG may have managed the enterprise here, MCM maintains that both A-B and FDC still participated in the enterprise's operation by carrying out the directions given them. MCM's argument finds support in [*United States v. Oreto, 37 F.3d 739, 750 \(1st Cir. 1994\)*](#), cert. denied, 130 L. Ed. 2d 1116, 115 S. Ct. 1161 (1995), where the First Circuit relied on *Reves'* statement about lower-rung participants to hold that a defendant may participate in the conduct of an enterprise "by knowingly implementing decisions, as well as by making them."¹³ *Oreto* observed that:

Reves is a case about the liability of *outsiders* who may assist the enterprise's affairs. Special care is required in translating *Reves'* concern with "horizontal" connections--focusing on the liability of an outside adviser--into the "vertical" question of how far RICO liability may extend within the enterprise but down the organizational ladder. In our view, the reason the accountants were not liable in *Reves* is that, while they were undeniably involved in the enterprise's [**33] decisions, they neither made those decisions nor carried them out; in other words, the accountants were outside the chain of command through which the enterprise's affairs were conducted.

[*Id. at 750*](#) (emphasis in *Oreto*); see also [*Reves, 113 S. Ct. at 1173; Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 266 \(3d Cir. 1995\)*](#). In our view, *Oreto* correctly reconciles the Supreme Court's holding in *Reves*--that a defendant must play some part in directing the enterprise's affairs--with its subsequent statement that "lower-rung participants . . . under the direction of upper management" may also "operate" the enterprise. See [*Reves, 113 S. Ct. at 1170, 1173*](#) & n.9; see also Daniel R. Fischel & Alan O. Sykes, *Civil RICO After Reves: An Economic Commentary*, 1993 Sup. Ct. Rev. 157, 192 (noting tension between "direction" requirement and statement about lower-rung participants and concluding that [**979] "the 'direction' requirement includes both those who direct, as well as those who take direction."). The question posed in the instant case, then, is whether A-B and FDC should be characterized as "outsiders," like the accounting firm in *Reves*, or as lower-rung participants who acted [**34] under the direction of the enterprise's upper management.

[**35] Although the question is not an easy one under the facts alleged here, we think these defendants are properly characterized as "lower-rung participants who are under the direction of upper management." See [*Reves, 113 S. Ct. at 1173*](#). The primary fact leading us to this conclusion is the nature of the "enterprise" MCM has depicted, as both A-B and FDC are alleged to be members of an "association-in-fact" constituting the RICO enterprise. In *Reves*, by contrast, the plaintiffs maintained that the farm cooperative itself was the RICO enterprise, and the Court was then required to determine whether the accountants had conducted or participated in the conduct of the cooperative's affairs. See [*Reves, 113 S. Ct. at 1169*](#). Under the theory advanced in *Reves*, the accounting firm was considered by the Court as an "outsider" to the enterprise, and the Court found that, as

¹³ See also [*United States v. Starrett, 55 F.3d 1525, 1548 \(11th Cir. 1995\)*](#) ("we agree with the First Circuit that one may be liable under the operation or management test by 'knowingly implementing decisions, as well as by making them.'"); [*United States v. Wong, 40 F.3d 1347, 1373 \(2d Cir. 1994\)*](#) ("*Reves* makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)."), cert. denied, 132 L. Ed. 2d 820, 115 S. Ct. 2568, 63 U.S.L.W. 3873 (1995); cf. [*United States v. Viola, 35 F.3d 37, 41 \(2d Cir. 1994\)*](#) ("Since *Reves*, it is plain that the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)."); [*University of Maryland v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1538-39 \(3d Cir. 1993\)*](#) ("Under [*Reves*], not even action involving some degree of decisionmaking constitutes participation in the affairs of an enterprise.").

outsiders, the accountants had not participated in the operation or management of the cooperative. *Id. at 1173-74*. Here, however, it is difficult on the pleadings to characterize A-B and FDC as "outsiders" because they are alleged to be part of the enterprise itself. Cf. *Jaguar Cars*, 46 F.3d at 265-66 & n.5; Fischel & Sykes, 1993 [**36] Sup. Ct. Rev. at 193-94. MCM also alleged that the predicate acts of racketeering were undertaken by these defendants "at the direction" of the enterprise's managers. Cf. *Reves*, 113 S. Ct. at 1173 n.9. Moreover, these defendants were vital to the achievement of the enterprise's primary goal, as only they had the ability to exclude MCM from the market by dealing exclusively with OG. Thus, even if A-B and FDC may have been reluctant participants in a scheme devised by "upper management," they still knowingly implemented management's decisions, thereby enabling the enterprise to achieve its goals. In our view, *Reves* would not bar a recovery against these defendants if the complaint's allegations were ultimately established after a trial. See *United States v. Wong*, 40 F.3d 1347, 1373-74 (2d Cir. 1994), cert. denied, 132 L. Ed. 2d 820, 115 S. Ct. 2568 (1995); *Oreto*, 37 F.3d at 750-51 (section 1962(c) applies to foot soldiers as well as to generals). We therefore reverse the dismissal of MCM's claim under section 1962(c) and remand for further proceedings.

2. Section 1962(d)

It should be plain from our discussion of MCM's section 1962(c) claim that MCM also has stated a claim against A-B and FDC for a conspiracy [**37] to violate that section. RICO's conspiracy provision makes it unlawful "for any person to conspire to violate" section 1962(a), (b), or (c). 18 U.S.C. § 1962(d). As we observed in *United States v. Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993), this conspiracy provision, "unlike [section] 1962(c), is not a substantive RICO offense; rather, [section] 1962(d) merely makes it illegal to conspire to violate any of the preceding sections of the statute." See also *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986). Section 1962(d)'s HN14[¹] target, then, is "the agreement to violate RICO's substantive provisions, not the actual violations themselves" (*Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 348 (7th Cir. 1992) (emphasis in Schiffels)), and liability under section 1962(d) is therefore "not coterminous with liability under [section] 1962(c)." *Quintanilla*, 2 F.3d at 1485. A defendant may conspire to violate section 1962(c) even if that defendant could not be characterized as an operator or manager of a RICO enterprise under *Reves*. *Quintanilla*, 2 F.3d at 1484-85; see also *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995); [**38] *United States v. Viola*, 35 F.3d 37, 43 (2d Cir. 1994); cf. *Antar*, 53 F.3d at 581. As Quintanilla explains, "Reves addressed only the extent of conduct or participation necessary to violate a substantive provision of the statute; the holding in that case did not address the principles of conspiracy [*980] law undergirding [section] 1962(d)." 2 F.3d at 1485.

Our cases explain that HN15[¹] a defendant may conspire to violate section 1962(c) if it agreed "to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity," and "it is only necessary that the defendant agree to the commission of [at least] two predicate acts on behalf of the conspiracy." *Neapolitan*, 791 F.2d at 498; see also *Quintanilla*, 2 F.3d at 1484; *United States v. Stern*, 858 F.2d 1241, 1246-47 (7th Cir. 1988). The defendant need not have agreed to actually commit the predicate acts itself or even to participate in the commission of those acts so long as it agreed that the acts would be committed on behalf of the conspiracy. *Quintanilla*, 2 F.3d at 1484; *United States v. Campione*, 942 F.2d 429, 437 (7th Cir. 1991); *United States v. Gleier*, 923 F.2d 496, 500 (7th Cir.), cert. denied, 502 U.S. [**39] 810, 116 L. Ed. 2d 31, 112 S. Ct. 54 (1991).

In the instant case, MCM alleged that A-B and FDC agreed to commit, on behalf of the enterprise, the TaftHartley Act violations comprising the pattern of racketeering activity. Defendants maintain, however, that this allegation must be read in conjunction with the remaining allegations in the complaint, which establish that they acted only at the direction of and in response to threats by OG, Boscarino, and Hogan. In essence, then, defendants advance the same argument here that we rejected under section 1 of the Sherman Act--that their actions were coerced and that a coerced party cannot be said to have joined an illegal conspiracy.

The argument is easily answered with respect to A-B, for the allegations in MCM's second amended complaint support the inference that A-B was able to extract work rule concessions from Hogan in return for its agreement to stop doing business with MCM. (See R. 94, at P 39.) The complaint suggests, then, that A-B was not entirely a coerced party, but that it voluntarily agreed to participate in OG's scheme. Accepting those allegations as true, we

may infer that A-B agreed to participate in the affairs of the alleged enterprise through a pattern [**40] of TaftHartley Act violations.

The question is potentially more difficult with respect to FDC, which apparently received nothing of value in return for dealing exclusively with OG at McCormick Place. Any illegal "agreement," then, may well have been thrust upon FDC by the threats and other pressure utilized by OG, Boscarino, and Hogan. We are reluctant to conclude, however, that the allegations in the complaint establish that FDC was coerced into violating the Taft-Hartley Act as a matter of law. Cf. [United States v. Sanders, 962 F.2d 660, 676](#) (7th Cir.), cert. denied, 113 S. Ct. 262, 284 (1992). [HN16](#)[¹⁴] Economic coercion or duress is generally an affirmative defense to a conspiracy charge (see [United States v. Kopituk, 690 F.2d 1289, 1315 \(11th Cir. 1982\)](#), cert. denied, 461 U.S. 928, 463 U.S. 1209, 77 L. Ed. 2d 1391, 103 S. Ct. 3542 (1983)), and that defense takes into consideration the types of pressure or coercion applied to the defendant and any alternatives to acquiescence that may have been available. See [Sanders, 962 F.2d at 674 n.16, 676](#) (approving coercion instruction in RICO conspiracy case which explained that a defendant was "coerced" if he "committed the offense charged only because he reasonably feared that immediate, [**41] serious bodily harm or death would be inflicted upon him if he did not commit the offense, and he had no reasonable opportunity to avoid the injury."); see also [United States v. Bailey, 444 U.S. 394, 410-11, 62 L. Ed. 2d 575, 100 S. Ct. 624 \(1980\)](#); [United States v. Crowder, 36 F.3d 691, 696 \(7th Cir. 1994\)](#), cert. denied, 130 L. Ed. 2d 1105, 115 S. Ct. 1146 (1995); [United States v. Logan, 49 F.3d 352, 359 \(8th Cir. 1995\)](#); [United States v. Stevens, 985 F.2d 1175, 1181 \(2d Cir. 1993\)](#); [United States v. Karr, 742 F.2d 493, 497 \(9th Cir. 1984\)](#); cf. [United States v. Haversat, 22 F.3d 790, 796 \(8th Cir. 1994\)](#) (coercive economic influence of one conspirator does not provide basis for downward departure to sentences of other conspirators under the Sentencing Guidelines). Although MCM's allegations indicate that some economic pressure was applied and that threats of violence were made, the complaint does not establish that FDC lacked a reasonable opportunity to avoid the threatened consequences [*981] in some other way. Thus, although one or both defendants may ultimately succeed in asserting a coercion defense, they do not do so on the basis of the allegations in MCM's complaint alone.

FDC alternatively argues that MCM failed to allege the existence [**42] of a RICO enterprise or of a pattern of racketeering activity.¹⁴ The district court did not address these issues in dismissing MCM's RICO claims, but we of course may affirm the dismissal on any ground finding support in the record. [Indemnified Capital Inv., SA v. R.J. O'Brien & Assoc., Inc., 12 F.3d 1406, 1410 \(7th Cir. 1993\)](#). We think it more efficient here, however, to leave those additional matters to the district court in the first instance, as the resolution of those issues in defendants' favor would not obviate the need for a remand. See *supra*, at 18 (remanding Sherman Act claim).

III. CONCLUSION

For the foregoing reasons, we vacate the dismissal of MCM's claims under [section 1](#) of the Sherman Act and [sections 1962\(c\) & \(d\)](#) of the RICO statute and remand to the district court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

End of Document

¹⁴ A-B has not advanced similar arguments in this appeal.



Westport Taxi Serv. v. Westport Transit Dist.

Supreme Court of Connecticut

April 21, 1995, Argued ; August 15, 1995, decision released

(15199)

Reporter

235 Conn. 1 *; 664 A.2d 719 **; 1995 Conn. LEXIS 315 ***; 1995-2 Trade Cas. (CCH) P71,180

WESTPORT TAXI SERVICE, INC. v. WESTPORT TRANSIT DISTRICT

Prior History: [***1] Action to recover damages for, inter alia, the defendant's alleged violation of the state antitrust act, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, Katz, J.; judgment for the plaintiff, from which the defendant appealed.

Disposition: Reversed in part; judgment directed.

Core Terms

trial court, pricing, prejudgment interest, taxi, predatory, antitrust, damages, rates, fare, competed, immunity, taxi service, costs, lost profits, governmental immunity, percent, anti-competitive, certificate, ride, transportation authority, monopoly power, monopolization, practices, quotation, variable, recoup, marks, reasonable anticipation, treble damages, plain error

LexisNexis® Headnotes

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

[HN1](#) [] **Private Actions, Remedies**

See [Conn. Gen. Stat. § 35-35.](#)

Governments > Local Governments > Licenses

[HN2](#) [] **Local Governments, Licenses**

See [Conn. Gen. Stat. § 13b-97.](#)

Governments > Local Governments > Licenses

Transportation Law > Carrier Duties & Liabilities > Certificates of Public Convenience > Issuance

235 Conn. 1, *1 664 A.2d 719, **719 1995 Conn. LEXIS 315, ***1

HN3 Local Governments, Licenses

Under [Conn. Gen. Stat. § 13b-97](#), no person, association or corporation is permitted to operate a taxi service without first obtaining a certificate of public convenience and necessity from the commission.

Governments > Local Governments > Licenses

HN4 Local Governments, Licenses

Before it issues a certificate, the commission is required to determine the number of taxicabs and the type of taxi service that the community needs, and it is also required to limit the service authorized according to the community's needs.

Governments > Local Governments > Duties & Powers

HN5 Local Governments, Duties & Powers

In addition to regulating the number of taxis permitted to operate, the commission regulates the rates that were chargeable within a given locality. Conn. Gen. Stat. § 16-319 et seq. (Rev. to 1958).

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

Governments > Local Governments > Duties & Powers

HN6 Public Utility Commissions, Authorities & Powers

See [Conn. Gen. Stat. § 7-273d](#) (Rev. to 1975).

Governments > Local Governments > Duties & Powers

HN7 Local Governments, Duties & Powers

See [Conn. Gen. Stat. § 7-273e](#) (Rev. to 1977).

Governments > Local Governments > Duties & Powers

HN8 Local Governments, Duties & Powers

See [Conn. Gen. Stat. § 7-273b \(g\)](#) (Rev. to 1977).

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

HN9 Standards of Review, Clearly Erroneous Review

235 Conn. 1, *1 664 A.2d 719, **719 1995 Conn. LEXIS 315, ***1

To the extent that the trial court has made findings of fact, the reviewing court is limited to deciding whether such findings were clearly erroneous.

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN10[] **Standards of Review, De Novo Review**

When the trial court draws conclusions of law the reviewing court's review is plenary and it must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record.

Civil Procedure > Appeals > Standards of Review > General Overview

HN11[] **Appeals, Standards of Review**

The reviewing court cannot retry the facts or pass upon the credibility of the witnesses.

Civil Procedure > Appeals > Standards of Review > General Overview

HN12[] **Appeals, Standards of Review**

The reviewing court's function is not to examine the record to see if the trier of fact could have reached a contrary conclusion.

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

HN13[] **Standards of Review, Clearly Erroneous Review**

A finding of fact is clearly erroneous when there is no evidence in the record to support it or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Civil Procedure > Appeals > Standards of Review > General Overview

HN14[] **Appeals, Standards of Review**

Because it is the trial court's function to weigh the evidence and determine credibility, the reviewing court gives great deference to its findings.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN15[] **Public Enforcement, State Civil Actions**

235 Conn. 1, *1 664 A.2d 719, **719 1995 Conn. LEXIS 315, ***1

The legislative history of the Connecticut Antitrust Act, [Conn. Gen. Stat. § 35-24 et seq.](#), clearly establishes that it was intentionally patterned after the [antitrust law](#) of the federal government.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

[HN16](#) [] **Public Enforcement, State Civil Actions**

Construction of the Connecticut Antitrust Act, [Conn. Gen. Stat. § 35-24 et seq.](#), is aided by reference to judicial opinions interpreting the federal antitrust statutes. Accordingly, the court follows federal precedent when it interprets the act unless the text of Connecticut Antitrust Act, or other pertinent state law, requires the court to interpret it differently.

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

[HN17](#) [] **Monopolies & Monopolization, Actual Monopolization**

Monopolization requires possession and willful acquisition or maintenance of monopoly power.

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

[HN18](#) [] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power is power to fix or control prices or to exclude or control competition in the relevant market.

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

[HN19](#) [] **Monopolies & Monopolization, Attempts to Monopolize**

A finding of attempt to monopolize requires a showing of predatory or anti-competitive conduct directed at accomplishing an unlawful purpose.

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

[HN20](#) [] **Monopolies & Monopolization, Actual Monopolization**

The plaintiff is required to prove two elements for monopolization, (1) the defendant gained monopoly power, and (2) the defendant attained monopoly power by willfully engaging in anti-competitive business practices.

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

[HN21](#) [] **Monopolies & Monopolization, Actual Monopolization**

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Monopoly power is found where the defendant obtains from 87 to 90 percent of the market.

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

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

HN22 [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

The second element of monopolization requires proof that the defendant engaged in anti-competitive business practices in order to acquire or retain its monopoly power.

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

HN23 [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

Predatory pricing may be 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. It 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.

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

HN24 [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

There are three factors when evaluating a predatory pricing claim: (1) price cost analysis; (2) predatory intent; and (3) likelihood of recoupment.

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

HN25 [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

Predatory pricing is most commonly found when a seller sets its prices below reasonably anticipated marginal or average variable costs, while prices at or above reasonably anticipated marginal or average variable costs are deemed to be non-predatory.

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

HN26 [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

Prices that are below reasonably anticipated marginal cost, and its surrogate, reasonably anticipated average variable cost, are presumed predatory.

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

[HN27](#) [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

If the plaintiff presents proof that a defendant priced below a reasonably anticipated average variable cost, the fact finder may infer that the defendant knew that it was pricing below cost and intended to do so.

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

[HN28](#) [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

Intent is generally proven by circumstantial evidence because direct evidence is rarely available.

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

[HN29](#) [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

The test of the sufficiency of proof by circumstantial evidence is whether rational minds could reasonably and logically draw the inference.

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

[HN30](#) [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

To show predatory pricing, a plaintiff must show not only: (1) that the defendant intended to recoup its investment in below cost prices, but also (2) that the defendant had a reasonable prospect of doing so in order to prove predatory pricing.

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

[HN31](#) [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

For the investment to be rational, the predator must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.

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

[HN32](#) [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market.

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

HN33 [blue icon] **Pleadings, Heightened Pleading Requirements**

Governmental immunity must be raised as a special defense in the defendant's pleadings.

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

HN34 [blue icon] **Pleadings, Heightened Pleading Requirements**

Governmental immunity is essentially a defense of confession and avoidance similar to other defenses required to be affirmatively pleaded. The purpose of requiring affirmative pleading is to apprise the court and the opposing party of the issues to be tried and to prevent concealment of the issues until the trial is underway.

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

HN35 [blue icon] **Pleadings, Heightened Pleading Requirements**

In certain limited circumstances, an appellate court will address the issue of whether governmental immunity is available to a defendant where the defense was not specially pleaded. If the question of governmental immunity was fully litigated at trial, without objection from the plaintiff, the plaintiff is deemed to have waived its objection to the requirement that the defense be specially pleaded.

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

HN36 [blue icon] **Standards of Review, Plain Error**

Although the reviewing court is not bound to review the defendant's claim, it may in the interests of justice notice plain error not brought to the attention of the trial court.

Civil Procedure > ... > Standards of Review > Plain Error > Obvious Errors

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

HN37 [blue icon] **Plain Error, Obvious Errors**

Plain error review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

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

HN38 [] Antitrust & Trade Law, Exemptions & Immunities

In order to be shielded by qualified state action immunity, the defendant must show that its anti-competitive conduct is specifically directed or required by the government. Connecticut Antitrust Act, [Conn. Gen. Stat. § 35-31 \(b\)](#). Whether the monopolistic conduct of the defendant was specifically directed or required by the government is a mixed question of fact and law.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Governments > Local Governments > Claims By & Against

Administrative Law > Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

HN39 [] Defenses, Demurrs & Objections, Affirmative Defenses

Unlike the state, municipalities have no sovereign immunity from suit. Rather, municipal governments have a limited immunity from liability. Nevertheless, regardless of whether a defendant is an agency of the state claiming the protection of sovereign immunity or an agency of the town claiming a limited immunity, the issue of whether it is entitled to such immunity is fact bound.

Civil Procedure > Remedies > Damages > General Overview

HN40 [] Remedies, Damages

The trial court has broad discretion in determining damages.

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

HN41 [] Standards of Review, Clearly Erroneous Review

The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous.

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

HN42 [] Private Actions, Remedies

There is a lesser burden of proving the amount of damages in antitrust suits than in other contexts.

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

[**HN43**](#) [] **Private Actions, Remedies**

A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence.

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

[**HN44**](#) [] **Private Actions, Remedies**

The reasonableness of the assumptions underlying the plaintiff's damage theory is determined by the trier of fact.

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

Civil Procedure > Appeals > General Overview

[**HN45**](#) [] **Private Actions, Remedies**

Reviewing courts refuse to find damage evidence insufficient unless there was no basis for critical assumptions made by the trial court.

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

[**HN46**](#) [] **Private Actions, Remedies**

Lost profits may be awarded as damages for antitrust violations.

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

Torts > Business Torts > General Overview

[**HN47**](#) [] **Private Actions, Remedies**

Where the plaintiff's business is totally or partially destroyed by the defendant's violation, damages may be measured by lost goodwill or the going concern value of the plaintiff's business.

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

[**HN48**](#) [] **Private Actions, Remedies**

A plaintiff injured by an antitrust violation may recover both lost past profits and the probable value of the business.

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

[**HN49**](#) [] **Private Actions, Remedies**

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The owner of property is competent to testify to its value.

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

Business & Corporate Law > Distributorships & Franchises > General Overview

HN50 [] **Private Actions, Remedies**

A franchise owner is competent to testify as to the value of a franchise. The weight to be accorded such testimony is for the trier to decide.

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

HN51 [] **Private Actions, Remedies**

The trial court has broad discretion to admit the testimony of anyone who is involved with a business or property and may have personal knowledge of its value.

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

Civil Procedure > Remedies > Judgment Interest > General Overview

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN52 [] **Pleadings, Heightened Pleading Requirements**

Interest need not be specially claimed in the demand for damages in order to recover.

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

Civil Procedure > Remedies > Judgment Interest > General Overview

HN53 [] **Private Actions, Remedies**

The allowance of interest as an element of damages is primarily an equitable determination and a matter lying within the discretion of the trial court.

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN54 [] **Standards of Review, Plain Error**

The court reaches a statutory interpretation issue under the plain error rule where neither party is prejudiced by the court's decision to review this issue under the plain error rule. Unlike the issues of immunity and treble damages,

the court's interpretation of the statutes does not require further fact-finding by the trial court, and both parties have had an opportunity to present arguments regarding their proposed statutory interpretation in their appellate briefs.

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

HN55[] Standards of Review, Plain Error

Plain error review may be appropriate where the record is complete and the question is essentially one of law, so that neither party is prejudiced.

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

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

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

HN56[] Private Actions, Costs & Attorney Fees

Conn. Gen. Stat. § 35-35 mandates an award of treble damages, attorney's fees and costs for injury to business or property due to any violation of the provisions of the act.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

HN57[] Legislation, Interpretation

First, the court looks to the words of the statute in order to discern the intent of the legislature and then resolve any ambiguity by turning for guidance to the legislative history and purpose.

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

HN58[] Private Actions, Costs & Attorney Fees

Conn. Gen. Stat. § 35-35 specifically provides that a successful plaintiff shall recover its costs.

Governments > Legislation > Interpretation

HN59[] Legislation, Interpretation

A statute must be interpreted to give effect to all its provisions.

Governments > Legislation > Interpretation

HN60[] Legislation, Interpretation

No word within a statute is to be rendered mere surplusage.

Governments > Legislation > Interpretation

HN61[**Legislation, Interpretation**

Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Governments > Legislation > Interpretation

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Procedure > Remedies > Judgment Interest > General Overview

HN62[**Judgment Interest, Prejudgment Interest**

The Connecticut legislature intended specifically to include all available remedies for an antitrust violation in the Connecticut Antitrust Act, [Conn. Gen. Stat. § 35-35](#), and that because prejudgment interest is not specifically included, it may not be awarded.

Counsel: George J. Markley, with whom, on the brief, was Gregory C. Hammonds, for the appellant (defendant).

David S. Golub, with whom was Jonathan M. Levine, for the appellee (plaintiff).

Judges: Callahan, Borden, Berdon, Norcott and Schaller, Js. In this opinion the other justices concurred.

Opinion by: BERDON

Opinion

[**722] BERDON, J. In this appeal, we must decide whether the trial court properly imposed liability upon the defendant under the Connecticut Antitrust Act (act); [General Statutes § 35-24 et seq.](#); and, if so, whether the trial court properly awarded the plaintiff treble damages, including lost profits, business value and prejudgment interest, totaling \$ 1,048,260.96.

The plaintiff, Westport Taxi Service, Inc., brought this action against the defendant, Westport Transit District, claiming that the defendant had intentionally [**2] engaged in monopolistic practices in violation of the act. The plaintiff sought treble damages, attorney's fees and costs pursuant to [General Statutes § 35-35](#)¹ of the act. ² [***3]

¹ [General Statutes § 35-35](#) provides: [HN1](#)["Treble damages for injury to business or property. The state, or any person, including, but not limited to, a consumer, injured in its business or property by any violation of the provisions of this chapter shall recover treble damages, together with a reasonable attorney's fee and costs."

² In addition to claiming that the defendant had violated the act, the plaintiff claimed that: (1) the defendant's conduct constituted a taking of the plaintiff's franchise and business, and that the plaintiff was entitled to adequate compensation; (2) [General Statutes § 7-273e](#) entitles the plaintiff to just compensation from the defendant for the taking of its taxi franchise; (3) the

The trial [**723] court found that the defendant had engaged in monopolistic practices, and awarded damages to the plaintiff for lost profits, the value of the plaintiff's business and prejudgment interest.³ The court then trebled the total damage award. We affirm the trial court's judgment except as it pertains to the award of prejudgment interest.

[*4] The trial court found the following relevant facts. From 1969 until 1978, the plaintiff provided taxi services to the Weston and Westport areas⁴ pursuant to a certificate of public convenience and necessity issued by the Connecticut public utilities commission (commission) pursuant to General Statutes (Rev. to 1958) § 16-320.⁵ Anthony and Michael Gilbertie each owned 50 percent of the plaintiff corporation's stock and served as president and vice president, respectively. The Gilberties actively managed the business and regularly worked as dispatchers.

[***4] [HN3](#) Under § 16-320, no person, association or corporation was permitted to operate a taxi service without first obtaining a certificate of public convenience and necessity [*5] from the commission.⁶ [HN4](#) Before it issued a certificate, the commission was required to determine the number of taxicabs and the type of taxi service that the community needed, and it was also required to limit the service authorized according to the community's needs. The plaintiff's certificate permitted it to provide three types of taxi service: premium ride service involving the transportation of a single fare; shared ride service involving the transportation of multiple fares; and package delivery. During the 1970s, there was a substantially larger demand for shared ride service, and this constituted the major part of the plaintiff's business.

[HN5](#) In addition [***5] to regulating the number of taxis permitted to operate, the commission regulated the rates that were chargeable within a given locality. General Statutes (Rev. to 1958) § 16-319 et seq. The commission adopted the regulatory philosophy that competition among taxi operators was to be with regard to quality of service rather than price. Therefore, the commission required all operators within a given locality to charge the same rates. In determining the appropriate rate structure, the commission considered whether, given the number of vehicles, the rates would permit a reasonable return to the operator on its investment. Certified taxi services were not permitted to charge rates that were lower than those approved by the commission. The last fare increase that the plaintiff had requested was granted by the commission on September 15, 1970, and permitted the

defendant's conduct constituted willful and wanton interference with the plaintiff's economic relations; and (4) the defendant's conduct violated the Connecticut Unfair Trade Practices Act. [General Statutes § 42-110g](#). The trial court did not address these claims.

³ We note that the record does not disclose the disposition of the claim for attorney's fees.

⁴ The business actually had begun many years earlier. The Gilbertie family, who owned and operated the plaintiff corporation, originally purchased the taxi business in 1955 and operated it as a sole proprietorship until it was incorporated in 1968.

⁵ General Statutes (Rev. to 1958) § 16-320, now codified at [§ 13b-97](#), provides: [HN2](#) "No person, association or corporation shall operate a taxicab until such person, association or corporation has obtained a certificate from the commission certifying that public convenience and necessity require the operation of a taxicab or taxicabs for transportation of passengers, the acceptance or solicitation of which originates within the territory specified in such certificate. Such certificate shall be issued only after written application for the same has been made and public hearing held thereon. Upon receipt of such application, the commission shall fix a time and place of hearing thereon and shall give notice of the pendency of such application and of the time and place of hearing thereon to such applicant, the mayor of each city, the warden of each borough or the first selectman of each town in which the applicant desires to originate the transportation of such passengers, and to any common carrier operating within the territory specified. Any town, city or borough within which taxicab service is operated or any interested party may bring a written petition to the commission in respect to fares, service, operation or equipment or the convenience, protection and safety of passengers and the public. Thereupon, the commission shall fix a time and place for a hearing upon such petition, and shall mail notice thereof to the parties in interest and give notice thereof at least one week prior to such hearing. No certificate shall be sold or transferred until the commission, upon written application to it setting forth the purpose, terms and conditions thereof, after investigation, approves the same. The commission may amend or, for sufficient cause shown, may suspend or revoke any such certificate."

⁶ In 1979, the department of transportation assumed the statutory responsibilities of the public utilities commission with respect to taxis. See [General Statutes § 13b-97](#).

plaintiff to charge \$ 1.70 for a **[**724]** three mile one-way trip. In addition, beginning in the fall of 1975, the commission permitted all taxi services in Connecticut to charge an additional ten cents per fare.

[*6] The defendant was formed in 1969, pursuant to General Statutes (Rev. to 1966) § 7-273b.⁷ Initially, pursuant **[***6]** to a financial grant from the federal Urban Mass Transportation Authority (transportation authority), the defendant had intended to establish only a fixed route bus service in Westport.

[*7]** Because the Gilberties were aware of these plans, they did not seek additional fare increases from the commission. The Gilberties hoped that, by maintaining the plaintiff's rates, they would remain competitive and minimize the negative impact they predicted that the bus service would have on the local private taxi operators. On August 11, 1974, the defendant instituted its "Minnybus" service, and the plaintiff's ridership and revenues initially decreased. The plaintiff expanded its services within the Westport area, however, and, in 1976, as a result, increased its revenues over those earned in 1973 and 1974. The trial court determined, therefore, that the defendant's implementation of the Minnybus service did not ultimately cause the plaintiff to go out of business. The plaintiff's increase in revenues, however, was at the expense of Teddy's Taxi, the only other taxi service in the Westport area.

When the defendant first commenced the Minnybus service, both the plaintiff and Teddy's Taxi complained to the defendant about the deleterious effects that the **[*7]** Minnybus initially had on their businesses. In response, in 1975, the defendant applied for, and obtained, an additional **[***8]** \$ 25,000 grant from the transportation authority ostensibly to conduct a study to determine how to remedy that initial negative impact its bus service was having on the private taxi operators. The plaintiff cooperated fully, permitting the defendant access to all its records and books. The information that was made available to the defendant included equipment and employee records, trip data, operating and capital costs, revenue data and ridership data. The study revealed that together the plaintiff and Teddy's Taxi averaged between 200 and 250 trips per day but that, because the companies were operating under a 1970 fare schedule during a highly inflationary period, the companies were subsisting at a marginal level.

The results of the study prompted the defendant to apply for an additional grant from the transportation authority to fund a project for a proposed transportation system that would integrate bus and taxi services under the defendant's auspices and provide all the services that the plaintiff offered. In its application, the defendant represented that it intended substantially to take over all the private taxi business in Westport and assume the regulatory powers of the **[***9]** commission under General Statutes (Rev. to 1975) § 7-273d.⁸ **[***10]** The defendant represented **[*8]**

⁷ There was no evidence presented at trial regarding how the defendant was actually created. It is clear, however, that the defendant applied for and received federal funding as a transit authority and functioned as a transit authority. Therefore, the trial court reasonably assumed, as do we, that the defendant was formed pursuant to General Statutes (Rev. to 1966) § 7-273b, which provides in relevant part: "Formation of district. (a) Any town, city or borough may, by itself or in cooperation with one or more other municipalities, form a transit district, in the manner and for the purposes hereinafter provided. The inhabitants of the municipality or municipalities forming the district shall be a body corporate and politic, and may sue and be sued, plead and be impleaded, hold and convey real or personal estate and adopt and alter a common seal."

⁸ General Statutes (Rev. to 1975) § 7-273d provides in relevant part: **HNC** "Assumption of public utilities commission powers relative to transit system within district. Appeals. Upon written notice to the public utilities commission, to the chief executive officer of a private transit system, and to the elected chief executive officer of each municipality composing the district, the district, by its board of directors, may assume all powers of the public utilities commission to regulate and supervise the operation of any such transit system within the district, provided that such transit system would be subject to the supervision of the public utilities commission except for this section. Upon assuming such supervision the district, by its board of directors, shall establish passenger fares and any other rates to be charged and shall establish service standards, may order abandonment of uneconomic routes and shall exercise all powers of regulation and supervision over such transit system as are conferred on the public utilities commission by title 16, in the same manner and under the same standards are established by said title 16. Any company, town, city, borough, corporation or person aggrieved by any order, authorization or decision of the board of directors, except an order, authorization or decision approving the taking of land, in any matter to which he or it was or ought to have been made a party, may appeal therefrom to the public utilities commission within thirty days after the filing of such order, authorization or decision. . . ."

that [**725] it intended to revoke the certificates of the private companies and issue new certificates to them that would exclude shared ride service. Under [General Statutes \(Rev. to 1977\) § 7-273e \(c\)](#), if the defendant were to acquire by eminent domain the plaintiff's right to provide shared ride service, the defendant would have been required to compensate the plaintiff.⁹ Furthermore the defendant represented that it intended to consolidate [*9] the dispatching services of the plaintiff and Teddy's Taxi into one service provided by the defendant. The defendant also represented that for the first year of its operations, it would offer the contract for providing shared ride service to one of the two private taxi companies then operating in Westport. Because the transportation authority was concerned about the impact that a government subsidized transit authority could have on private operators, the defendant's representation in its application about its intended treatment of the existing franchises was critical to the defendant's ability to obtain the federal grant.

[***11] After the defendant completed its study and before it received the federal grant to [**726] expand its services, the [*10] defendant's executive director, Richard H. Bradley, notified the Gilberties of the defendant's intentions to establish a taxi service, which eventually became known as the "Maxytaxy," and to eliminate the plaintiff's certificate of public convenience and necessity. Bradley informed the Gilberties that the defendant proposed to hire them as salaried employees, but neither Bradley nor any other representative of the defendant ever offered to compensate the Gilberties for the proposed elimination of the plaintiff's certificate or the value of their business. The Gilberties informed Bradley that they were unwilling to give up their business without compensation and that they chose to remain independent businessmen. The trial court found that "when the Gilberties expressed their unwillingness to give up their own business without compensation and their desire to

⁹ [General Statutes \(Rev. to 1977\) § 7-273e](#) provides in relevant part: [HNT](#) [↑] "(b) In order to insure the continuance of adequate transit services when it appears that the holder of the franchise is or will be incapable of continuing to offer satisfactory service to meet present or future public passenger transportation requirements and it is improbable that such franchise will be sought by any other private concern, the public utilities control authority, on its own initiative, may or, on request of the transit district or the legislative body of one or more municipalities in the area served, shall fix a time and place for a hearing as to whether such franchise is suitable for acquisition by a transit district. Said authority shall give written notice of such hearing to the board of selectmen of each town, or in the case of cities and boroughs to the chief executive of each, within the area not less than fourteen days prior to such hearing, and shall cause to be published twice, not more than fourteen nor less than seven days prior to such hearing, notice of such hearing in a newspaper or newspapers having a substantial circulation in each municipality within such area. Suitability of a franchise for acquisition by a transit district shall be determined from the following considerations: (1) That public convenience and necessity require the continuance of transit service within the area, (2) that the present franchise holder is or will be incapable of continuing to offer satisfactory service, (3) that it is improbable that such franchise will be sought by a private concern and (4) that continuance of transit service may require the operation of such service by a transit district. After a public hearing thereon and consideration of the above-mentioned factors, the public utilities control authority may declare such franchise suitable for acquisition by a transit district, provided such declaration shall not affect the authority of the municipalities in the area to establish such a district. Ability to offer satisfactory service shall be based upon the financial stability of the franchise holder as determined from past, current and projected net income and from an estimate of financial ability to meet future public passenger transportation requirements in the area. The public utilities control authority may make periodic inspections of transit system franchise holders to determine the financial stability of each and for this purpose may examine the books, accounts and other pertinent documents of such franchise holders and shall have the power to compel the attendance of witnesses and the production of books, accounts and other pertinent documents by the issuance of a subpoena.

"(c) A transit district shall have the power to acquire real property and interests and rights in real property by eminent domain in the name of the transit district for the purposes of the transit district subject to the prior approval of the legislative body or bodies of the municipality or municipalities in which the real property is located. The owner shall be paid by the transit district for all damages. Where the transit district and the owner of such property cannot agree upon the amount to be paid to the owner for any property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8-129 to 8-133, inclusive. Where the public utilities control authority has determined that a franchise is suitable for acquisition pursuant to subsection (b) of this section, the transit district shall have the power to acquire by eminent domain all or any part of the franchise and of the holder's transit system, including the holder's real estate or interests therein, personal property, and funds under the control or held for the use of or the benefit of such holder. Where the transit district and the holder of such franchise and property cannot agree upon the amount to be paid to the holder for any franchise or property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8-129 to 8-133, inclusive."

remain independent businessmen Mr. Bradley stated, 'We are going to run this thing at below cost fares. You can't compete with us. . . . We are going to put you out of business . . . !'

In the summer [***12] of 1976, the transportation authority approved a \$ 635,000 grant to fund the defendant's project, and in December, 1976, the defendant executed a contract with the federal government for the implementation of the project, including the Maxytaxy. The contract included a clause that obligated the defendant to comply with the terms of its application, which were incorporated by reference into the contract.

In early 1977, pursuant to a complaint from the private operators that the defendant intended to operate taxis without the commission's authority, an investigator from the commission visited the defendant and the private taxi operators of Westport. The investigator, Robert L. Cumpstone, concluded that the services the defendant intended to provide were the same as those provided by the private taxi operators but that, under [General Statutes \[*11\] \(Rev. to 1977\) § 7-273b \(g\)](#),¹⁰ [***13] the defendant was exempt from regulation by the commission.¹¹

In April, 1977, the defendant began providing taxi services. The defendant offered substantially the same services as the plaintiff and competed for the same customers at substantially lower rates. Accordingly, the defendant's ridership increased and the plaintiff's ridership declined. The defendant never assumed the regulatory powers of the commission.¹² Consequently, it also failed to eliminate the plaintiff's certificate and issue a more limited permit, acts which would have required the defendant to compensate the plaintiff. Furthermore, the defendant awarded the shared ride service contract to a newly formed company, Westport Transport Corporation, and not to the plaintiff or Teddy's Taxi as it had asserted [***14] in its agreement with the transportation authority.

The plaintiff discontinued its taxi operations in May, 1978. Teddy's Taxi had discontinued its taxi operations one month earlier. In 1978, after the plaintiff had closed its business, the defendant increased its rates 28 percent and thereafter continued to raise its prices. The plaintiff brought this action against the defendant in 1979. Subsequently, on September 22, 1989, the plaintiff amended its complaint and the case was heard by the trial court in January, 1991.

[*12] The trial court found that the evidence of the defendant's intentional anti-competitive conduct for the purpose of monopolizing the Westport taxi business was overwhelming. The trial court determined that the defendant knew that the plaintiff would not be able to compete with government subsidized, below cost taxi rates, [***15] and that the defendant [*727] had instituted such fares in order to put competing taxi companies out of business and monopolize the market for taxi services in Westport. The trial court found that once the defendant had eliminated its competition, it had intended to raise rates so that it would no longer require federal government subsidies.

The court also found that the defendant had acted upon its monopolistic intent, had forced the plaintiff out of business by virtue of predatory pricing, and that, after the defendant had monopolized the taxi services in Westport, it had raised its prices substantially.¹³ The trial court concluded that the defendant had engaged in both attempted

¹⁰ [General Statutes \(Rev. to 1977\) § 7-273b \(g\)](#) provides in relevant part: [HNB](#) [+] "Whenever any transit district is formed under the provisions of this chapter, no provision of chapter] . . . 287 [regulation of taxicabs] . . . shall apply to the operation of transit systems by such district."

¹¹ Cumpstone testified that, had the defendant been subject to regulation by the commission, it would not have received permission to operate the number of vehicles it proposed because Westport's requirements did not justify the increases. Furthermore, he stated that the commission would not have approved the defendant's rates because they were below cost and below existing rates.

¹² If the defendant had assumed the commission's regulatory powers, the plaintiff would have had a right to appeal from the defendant's actions. See footnote 8.

¹³ The trial court further found that the defendant had misrepresented its intended treatment of the plaintiff to the transportation authority in order to obtain funding for the project. Because the transportation authority is concerned about the impact that government subsidized transport districts may have on private operators, it evaluates this impact when considering an

monopolization and actual monopolization in violation of [General Statutes § 35-27](#) of the act.¹⁴ After considering and rejecting the defendant's special defenses, the trial court concluded that the plaintiff was entitled to damages for: lost profits from April, 1977, through May, 1978, the period during which the defendant directly competed with the plaintiff, in the amount of \$ 12,144; the value of the business in the amount of [*13] \$ 150,000; prejudgment interest of \$ 14,026.32 on lost [***16] profits; and prejudgment interest of \$ 173,250 on the value of the business. The court further concluded that the plaintiff was entitled to recover treble damages under [§ 35-35](#) and awarded the plaintiff damages totaling \$ 1,048,260.96.¹⁵

application for a grant. Although the defendant's application assured that private operators would receive fair treatment, the trial court found that the defendant had failed to comply with these assurances.

¹⁴ [General Statutes § 35-27](#) provides: "Monopolization or attempt to monopolize unlawful. Every contract, combination, or conspiracy to monopolize, or attempt to monopolize, or monopolization of any part of trade or commerce is unlawful."

¹⁵ The trial court arrived at this figure as follows:

\$ 12,144.00

Lost profits

14,026.32

Prejudgment interest on lost profits

150,000.00

Value of business

173,250.00

Prejudgment interest on value of business

\$ 349,420.32

Subtotal

multiplied by 3

Trebled

\$ 1,048,260.96

Total treble damages

[***17] The defendants appealed from the judgment of the trial court to the Appellate Court, and the appeal was transferred to this court pursuant to Practice Book § 4023 and [General Statutes § 51-199 \(c\)](#). On appeal, the defendant claims that the trial court improperly: (1) determined that the defendant had engaged in predatory pricing in violation of the act; (2) rejected the defendant's alleged defense of governmental immunity; (3) awarded the plaintiff damages based on speculative assumptions; and (4) awarded prejudgment interest from 1978.¹⁶ We address [**728] the defendant's claims in the order in which they are raised.

[***18] [*14] I

We begin our analysis by setting forth our standard of review and the construction that guides our interpretation of the act. "The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. [HN9](#) To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. [HN10](#) When, however, the trial court draws conclusions of law our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) [Gateway Co. v. DiNoia, 232 Conn. 223, 229, 654 A.2d 342 \(1995\)](#); Practice Book § 4061. [HN11](#) "This court cannot retry the facts or pass upon the credibility of the witnesses." [Holy Trinity Church of God in Christ v. Aetna Casualty & Surety Co., 214 Conn. 216, 223, 571 A.2d 107 \(1990\)](#). Furthermore, [HN12](#) "our function is not to examine the record to see if the trier of fact could have reached a contrary conclusion." (Internal quotation marks omitted.) [Ranciato v. Nelson, 36 Conn. App. 678, 680, 654 A.2d 358](#), cert. denied, [233 Conn. 911, ***191 659 A.2d 184 \(1995\)](#). [HN13](#) "A finding of fact is clearly erroneous when there is no evidence in the [*15] record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) [Dornfried v. October Twenty-Four, Inc., 230 Conn. 622, 636, 646 A.2d 772 \(1994\)](#). [HN14](#) Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings.

[HN15](#) The legislative history of the act clearly establishes that it was intentionally patterned after the [antitrust law](#) of the federal government. See 14 H.R. Proc. Pt. 9, 1971 Sess., p. 4182, remarks of Representative David H. Neiditz ("this bill gives Connecticut an Anti-Trust Law similar to the existing Federal Anti-Trust Law in every respect"); 14 S. Proc., Pt. 7, 1971 Sess., p. 3211, remarks of Senator William J. Sullivan ("[the proposed act] gives the small businessman the protection afforded to the large corporations under the Federal Anti-Trust Act"). [HN16](#) Therefore, "our construction of the Connecticut Anti-Trust [***20] Act is aided by reference to judicial opinions interpreting the federal antitrust statutes. [Elida, Inc. v. Harmar Realty Corporation, 177 Conn. 218, 226-27,](#)

¹⁶ The defendant also claims that the trial court improperly based its conclusion that the defendant had violated the act on its determination that the defendant had the power to acquire the plaintiff's franchise and should have exercised that power. This claim mischaracterizes the opinion of the trial court and we conclude that it is without merit. The court based its findings of monopolistic intent upon the actions and statements of the defendant relating to achieving domination of the relevant market and driving competitors out of business. Furthermore, the trial court determined that the defendant's predatory pricing was anti-competitive and illegal. On that basis, the court imposed liability upon the defendant. The defendant's failure to acquire the plaintiff was not a significant factor in the trial court's analysis of this issue and we need not address it further.

In addition, the defendant claims that the trial court improperly trebled the prejudgment interest award. Because we conclude that the plaintiff is not entitled to prejudgment interest, we do not address this claim.

Finally, the defendant claims that the trial court improperly awarded treble damages against it because it was a government agency against which such damages may not be awarded unless there is explicit statutory authority for such an award. For the same reasons set forth in part III of this opinion in which we decline to review the defendant's claim that it is shielded from liability by governmental immunity, we likewise do not review this claim. It was not raised before the trial court, either by special pleading or otherwise, and the record does not indicate the nature of the defendant with respect to its governmental characteristics. See footnote 25.

The plaintiff raises as an alternate ground for affirmance that the trial court properly awarded the plaintiff compensation because the defendant infringed on the plaintiff's property right to be free from competition absent a finding of public convenience and necessity. Because we affirm the treble damages awarded by the trial court, with the exception of prejudgment interest, we do not reach the alternate ground for affirmance.

[413 A.2d 1226](#) [1979]; [Mazzola v. Southern New England Telephone Co.](#), 169 Conn. 344, 348, 363 A.2d 170 [1975]. Cf. [Wilson v. Freedom of Information Commission](#), 181 Conn. 324, 435 A.2d 353 [1980]."¹⁷ [State v. Hossan-Maxwell, Inc.](#), 181 Conn. 655, 660, 436 A.2d 284 (1980). Accordingly, we follow federal precedent when we interpret the act unless the text of our antitrust statutes, [*16] or other pertinent state law, requires us to interpret it differently.

[***21] II

The defendant first contends that its actions did not violate the act and that it did not engage in predatory pricing. The defendant claims that consumers benefited from [*729] the lower prices that the defendant offered and that it had no ulterior motive other than the desire to relieve traffic congestion in Westport. The defendant also contends that it did not actually compete with the plaintiff because it offered only shared ride services and not premium ride services. Furthermore, the defendant claims that the plaintiff has failed to show that the defendant engaged in predatory pricing because it had no intention of making a profit and indeed never earned a profit. We are unpersuaded.

[HN17](#) "Monopolization requires possession and willful acquisition or maintenance of monopoly power. . . . [HN18](#) Monopoly power is power to fix or control prices or to exclude or control competition in the relevant market." (Citations omitted.) [Shea v. First Federal Savings & Loan Assn. of New Haven](#), 184 Conn. 285, 304, 439 A.2d 997 (1981), citing [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). Similarly, [HN19](#) a finding of attempt to monopolize [*22] requires a showing of predatory or anti-competitive conduct directed at accomplishing an unlawful purpose. [Shea v. First Federal Savings & Loan Assn. of New Haven](#), *supra*, 304. Therefore, [HN20](#) the plaintiff was required to prove two elements: (1) the defendant gained monopoly power; and (2) the defendant attained monopoly power by willfully engaging in anti-competitive business practices. See *id.*

A

Accordingly, the trial court first determined that "by May, 1978, [the] defendant indisputably possessed [*17] monopoly power over taxi services in the Westport area -- the 'relevant market' for antitrust purposes. After [the] plaintiff was forced to close its taxi business in May, 1978, as a result of [the] defendant's below-cost operations, [the] defendant controlled over 95 percent of the taxi market in Westport." This finding is not in dispute. [HN21](#) As the trial court noted, monopoly power has been found where the defendant obtains from 87 to 90 percent of the market. See, e.g., [United States v. Grinnell Corp.](#), *supra*, 384 U.S. 571; [United States v. Aluminum Co. of America](#), 148 F.2d 416, 428-31 (2d Cir. 1945). Therefore, the trial court's undisputed finding that the [*23] defendant captured 95 percent of the relevant market was sufficient to support its conclusion that the defendant had obtained monopoly power.

B

[HN22](#) The second element of monopolization requires proof that the defendant engaged in anti-competitive business practices in order to acquire or retain its monopoly power. The plaintiff based its theory of anti-competitive practices on predatory pricing and, indeed, the trial court found that the defendant had engaged in the practice of predatory pricing. [HN23](#) "Predatory pricing may be 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. It 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." (Emphasis in original.) [Cargill, Inc. v. Monfort of](#)

¹⁷ We note that in 1992, the legislature explicitly incorporated into law its intent that the judiciary be guided by interpretations of federal antitrust statutes when it enacted No. 92-248 of the 1992 Public Acts, now [General Statutes § 35-44b](#), which provides that "it is the intent of the general assembly that in construing [sections 35-24 to 35-46](#), inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes."

Colorado, Inc., 479 U.S. 104, 117-18, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986); 3 P. Areeda & D. Turner, Antitrust Law (1978) P 715b. HN24[] Recent federal court cases have focused on three factors when evaluating a predatory pricing claim: (1) price cost analysis; [***24] (2) predatory intent; and (3) likelihood of recoupment. [*18] 1 A.B.A. Antitrust Section, Antitrust Law Developments (3d Ed. 1992) p. 227 (Antitrust Law Developments).

1

HN25[] Predatory pricing is most commonly found when a seller sets its prices below reasonably anticipated marginal or average variable costs,¹⁸ while prices at or above reasonably anticipated marginal or average variable [**730] costs are deemed to be nonpredatory. See McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1503-1504 (11th Cir. 1988), cert. denied, 490 U.S. 1084, 109 S. Ct. 2110, 104 L. Ed. 2d 670 (1989) (average variable cost may usually be used as surrogate for marginal cost in determining whether pricing is predatory); Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 88 (2d Cir. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed. 2d 654 (1982) (reasonably anticipated marginal cost is best determinant for predatory pricing). HN26[] The Second Circuit Court of Appeals has held that "prices that are below reasonably anticipated marginal cost, and its surrogate, reasonably anticipated average variable cost . . . are presumed predatory." (Citations [***25] omitted; emphasis added.) Kelco Disposal, Inc. v. Browning Ferris Industries of Vermont, Inc., 845 F.2d 404, 407 (2d Cir. 1988), aff'd on other grounds, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989); see Irvin Industries, Inc. v. Goodyear Aerospace Corp., 974 F.2d 241, 245 (2d Cir. 1992); Northeastern Telephone Co. v. American Telephone & Telegraph Co., supra. [*19] 88; see P. Areeda & D. Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 Harv. L. Rev. 697, 716-18 and 733 (1975).

[***26] In this case, the defendant does not contest that its fares were not only below cost but substantially below average variable costs. Indeed, as the trial court found, "[the] defendant's own analysis of its fare structure over the first two years of operation indicates [the] defendant's non-capital operating costs were \$ 12 per operating hour per taxi as against revenues of only \$ 6 per operating hour, literally a 50 percent below cost pricing structure."

2

Although there is substantial conflict among the federal Circuit Courts of Appeals as to whether intent is relevant to predatory pricing; 1 Antitrust Law Developments, *supra*, p. 234; cases have generally focused on whether a plaintiff must prove that pricing below the relevant cost standard was motivated by anti-competitive intent. Id., *p. 234 n.209*. The Second Circuit Court of Appeals, stating that predatory pricing requires proof that the defendant priced below "reasonably anticipated" average variable cost, has held that a trier of fact that has "evidence that [the] defendants had engaged in predatory pricing . . . could have inferred intent from this fact." Kelco Disposal, Inc. v. Browning Ferris Industries [***27] *of Vermont, Inc., supra*, 845 F.2d 408. Therefore, under Kelco Disposal, Inc., HN27[] if the plaintiff presents proof that a defendant priced below a reasonably anticipated average variable cost, the fact finder may infer that the defendant knew that it was pricing below cost and intended to do so.

HN28[] Furthermore, we have held that intent is generally proven by circumstantial evidence because direct evidence is rarely available. State v. Mejia, 233 Conn. 215, 223, 658 A.2d 571 (1995). HN29[] "The test of the sufficiency [*20] of proof by circumstantial evidence is whether rational minds could reasonably and logically draw the inference." (Internal quotation marks omitted.) Puro v. Henry, 188 Conn. 301, 310, 449 A.2d 176 (1982); Andrea v. New York, N.H. & H.R. Co., 144 Conn. 340, 344, 131 A.2d 642 (1957).

¹⁸ Marginal cost "is traditionally defined as 'the increment to total cost that results from producing an additional increment of output.'" Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 87 (2d Cir. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed. 2d 654 (1982). "Average variable cost is the sum of all variable costs those that vary with output -- divided by output." Morgan v. Ponder, 892 F.2d 1355, 1360 n.11 (8th Cir. 1989). Variable costs are those costs that are dependent on a firm's output, while fixed costs are not. Kelco Disposal, Inc. v. Browning Ferris Industries of Vermont, Inc., 845 F.2d 404, 407 (2d Cir. 1988), aff'd on other grounds, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989).

In this case, there was ample evidence to support the trial court's conclusion that the defendant's below cost pricing was instituted to drive its competitors out of business and not merely to gain market share. Despite the defendant's contention that it did not compete with the plaintiff, the trial court determined that it did compete¹⁹ and that due to the defendant's **[***28]** anti-competitive business **[**731]** practices the plaintiff was forced out of business. The trial court specifically found, as we previously have pointed out, that the defendant's prices were below average variable costs and that the defendant's monopolistic intent had been expressed in its application to the transportation authority. The trial court further noted that these facts were admitted by an officer **[*21]** of the defendant and that the defendant's executive director had told the Gilberties, "we are going to run this thing at below cost fares. You can't compete with us. . . . We are going to put you out of business . . ." In addition, the trial court found that the defendant had extensive knowledge of the plaintiff's business due to the federally funded study of the plaintiff it had conducted in 1975, and that it therefore knew the plaintiff could not withstand below cost price competition.

[*29]** We conclude that not only was there sufficient circumstantial evidence to support the trial court's conclusion of predatory intent, but there was also direct evidence regarding that intent.

3

The United States Supreme Court has recently held in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., U.S. , 113 S. Ct. 2578, 2587-88, 125 L. Ed. 2d 168 (1993)*, that **HN30**[↑] a plaintiff must show not only: (1) that the defendant intended to recoup its investment in below cost prices,²⁰ but also (2) that the defendant had a reasonable prospect of doing so in order to prove predatory pricing.²¹ **HN31**[↑] "For the investment to be rational, **[*22]** the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. . . . Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, **[***30]** unsuccessful predation is in

¹⁹ The defendant contends that it did not provide premium ride service and therefore did not compete with the plaintiff in this area. The trial court determined, however, that the services that the defendant offered were substantially similar to those offered by the plaintiff. This finding is supported by the testimony of commission investigator Cumpstone. There was evidence that although shared ride service comprised most of the market for taxi services, the defendants provided premium service when it was requested. Its application to the transportation authority, which was incorporated by reference into the contract between the defendant and the federal government, stated that "[a] fully integrated taxi service will offer premium ride, shared-ride and small package delivery services within the town of Westport . . ." Furthermore, Paul Green, one of the organizers and directors of the defendant, testified that Maxytaxi at times offered the equivalent of premium ride service. Finally, in its request for proposal for a personnel and management services contract pertaining to what became the Maxytaxi, the defendant stated that, in addition to shared ride service, it intended to provide "special market services," which was described as a demand response, advance request service. This is an apparent description of premium ride service. We conclude that there is ample evidence to support the trial court's conclusion that the defendant did compete with the plaintiff.

²⁰ The trial court's found that the defendant intended to raise its prices to eliminate the government subsidy and this finding was supported by the evidence and is not clearly erroneous. Furthermore, the defendant admitted that it intended to raise its prices in order to continue to operate after the subsidy was expended.

²¹ In *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., supra, 113 S. Ct. 2578*, the plaintiff alleged that the defendant had engaged in price discrimination in violation of the Clayton Act as amended by **§ 2 (a)** of the Robinson-Patman Price Discrimination Act. **15 U.S.C. § 13 (a) (1982)**. The court recognized that the standard for analyzing recoupment is somewhat different under the Sherman Antitrust Act, which provides for a general prohibition against monopolistic business practices, comparable to *General Statutes § 35-27. 15 U.S.C. § 2 (1982)*. The Sherman Antitrust Act has been interpreted to require the plaintiff to show that there was a dangerous probability that the defendant would recoup its investment in below cost pricing. *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., supra, 2588*. Therefore, under federal law the level of probable recoupment that the plaintiff must show varies according to which act the plaintiff alleges that the defendant violated. Because, in this case, we conclude that the defendant had no investment or losses to recoup, we leave for another day the issue of the level of probability of recoupment that must be shown in order to prove predatory pricing under the Connecticut act.

general a boon to consumers." (Citation omitted; internal quotation marks omitted.) *Id.*, 2588. [HN32](#)[↑] "Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Id.*, 2589.

[***31] [**732] In this regard, the defendant claims that it never intended to generate profits and that the price increases that were implemented after the plaintiff had gone out of business did not recoup the defendant's losses. The defendant further claims that it never intended to recoup its losses, which were covered by the government subsidies, that its ridership dropped after its rates increased, and that it subsequently was forced to cease operations.

Because the case before us presents a novel circumstance,²² we do not employ literally the second prong of *Brooke Group, Ltd.* -- that is, the requirement of a [*23] reasonable prospect of recoupment. Although there may have been little prospect of recouping the federal grants that the government had provided to the defendant, federal funding enabled the defendant to charge below cost prices at no risk to itself. As a result of its below cost pricing, the defendant was able to drive all its competitors out of the market at the expense of the federal government.²³ After the plaintiff was forced out of business, which was well before the defendant expended its government subsidy, the trial court determined that the defendant [***32] substantially raised its prices, by 28 percent. It continued to raise its fares after the initial increase. In reality, the defendant suffered no losses from pricing below cost. Moreover, as the trial court specifically found, once its competition had been eliminated, the defendant intended to raise rates so that it would no longer depend upon the government subsidies. Accordingly, in considering whether the second prong was satisfied, the trial court could have taken into account the government subsidy together with the increases in pricing once the plaintiff closed its doors. Therefore, there was sufficient evidence to support the trial court's conclusion that the defendant's pricing was predatory and that the defendant was liable under the act.

[***33] III

The defendant claims that the trial court improperly concluded that the defendant is not entitled to either absolute governmental immunity or qualified immunity pursuant to [General Statutes § 35-31 \(b\)](#).²⁴ The plaintiff [*24] argues that because the defendant failed to plead immunity as a special defense, or to raise the defense at trial, the issue of whether the defendant is entitled to governmental immunity is not reviewable by this court.

We have previously determined that [HN33](#)[↑] governmental immunity must be raised as a special defense in the defendant's pleadings. [Gauvin v. New Haven, 187 Conn. 180, 184-85, 445 A.2d 1 \(1982\)](#). [HN34](#)[↑] "Governmental immunity is essentially a defense of confession and avoidance similar to other defenses required to be affirmatively [***34] pleaded [under Practice Book § 164]. . . . The purpose of requiring affirmative pleading is to apprise the court and the opposing party of the issues to be tried and to prevent concealment of the issues until the

²² The parties have been unable to point to any analogous case involving a similar instance of an alleged predatory pricing scheme that was federally funded either in Connecticut or elsewhere. In addition, our research has not revealed such a case.

²³ Maxytaxi's only competition after May, 1978, was from Teddy's Taxi which, under new ownership, reinitiated its limousine services in the fall of 1978. The town of Westport conditioned the lease for livery service at the train station on a requirement that Teddy's Taxi provide limited taxi service. As a result, that taxi service, which operated at a substantial loss, totaled two taxis and averaged ten rides per day within Westport.

²⁴ [General Statutes § 35-31 \(b\)](#) provides: "Nothing contained in this chapter shall apply to those activities of any person when said activity is specifically directed or required by a statute of this state, or of the United States."

trial is underway." (Citations omitted.) [*Id.*, 185](#).²⁵ In this [\[***733\]](#) case, the defendant did not specially plead any immunity defense -- absolute or qualified.

[\[***35\]](#) [**HN35**](#) In certain limited circumstances, an appellate court will address the issue of whether governmental immunity is available to a defendant where the defense was not specially pleaded. If the question of governmental immunity was fully litigated at trial, without objection [\[*25\]](#) from the plaintiff, the plaintiff is deemed to have waived its objection to the requirement that the defense be specially pleaded. [*Id.*, 184](#). In this case, the defendant did not raise the issue of governmental immunity at trial and the plaintiff cannot be deemed to have waived its objection. In fact, the issue was first raised by the plaintiff in its posttrial brief in which it urged that the defendant was not entitled to immunity. In its reply brief, the defendant addressed the issue of immunity for the first time.

The defendant argues that we should invoke plain error review to decide the issue of qualified immunity pursuant to [§ 35-31 \(b\)](#). Under Practice Book § 4185, [**HN36**](#) although we are not bound to review the defendant's claim, we "may in the interests of justice notice plain error not brought to the attention of the trial court." See [*Magnan v. Anaconda Industries, Inc.*, 193 Conn. 558, 577-78, 479 A.2d 781 \(1984\)](#). [**HN37**](#) Plain error review "is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) [*Scott v. Barrett*, 212 Conn. 217, 222, 561 A.2d 941 \(1989\)](#).

[**HN38**](#) In order to be shielded by qualified state action immunity, the defendant must show that its anti-competitive conduct was "specifically directed or required" by the government; [*General Statutes § 35-31 \(b\)*](#); [*Mazzola v. Southern New England Telephone Co., supra*](#), [169 Conn. 359, 366](#) (interpreting act to apply more stringent standards for exemption from liability than federal law because "[§ 135-31 \(b\)](#) of our General Statutes has no parallel in the federal antitrust statutes," and holding that governmental role amounting to mere acquiescence cannot be construed as directing or requiring an action under the state statute). We conclude that plain error review is not warranted with respect to the issue [\[*26\]](#) of qualified immunity in this case because the record is factually insufficient to permit such a review. Whether the monopolistic conduct of the [\[***37\]](#) defendant was "specifically directed or required" by the government is a mixed question of fact and law; see [*Schnabel v. Tyler*, 230 Conn. 735, 743, 646 A.2d 152 \(1994\)](#) (question of immunity predicated on factual issues as well as law); and the record before us is insufficient to make such a determination. See [*Genovese v. Gallo Wine Merchants, Inc.*, 226 Conn. 475, 480 n.6, 628 A.2d 946 \(1993\)](#).

The defendant also claims that it is shielded from liability by the governmental immunity applicable to municipalities and their agencies because it is a transit district established by the town of Westport.²⁶ [\[***39\]](#) [**HN39**](#) Unlike

²⁵ We note that in [*Gauvin*](#), although governmental immunity was not specially pleaded and the trial court therefore refused to consider it for that reason, this court remanded the case for articulation regarding whether the defendant was entitled to governmental immunity because the trial court had requested certain clarifications from the parties after the trial wherein the defendant raised the defense. We concluded that, because the trial court specifically requested the information through which the defense was introduced, the court created the opportunity for the defense to be raised and, therefore, we held that the court had no discretion regarding whether to consider the defense. [*Gauvin v. New Haven, supra*](#), [187 Conn. 185-86](#). More importantly, however, this court based its decision on the determination that there was apparently "an adequate basis for the trial court to determine whether . . . the defense of governmental immunity could have been sustained." [*Id.*, 187](#). In the case before us, the issue was introduced in the normal course of filing posttrial memoranda of law, and there was no evidence introduced by the defendant upon which the court could make a determination on the merits.

²⁶ The defendant also argues that because the federal antitrust laws exempt local government from liability, it should also be protected under the Connecticut act. In 1984, long after the actions at issue in this case took place, the Local Government Antitrust Act was enacted, which exempts local government entities from federal antitrust damage awards. [*15 U.S.C. §§ 34-36 \(1989\)*](#). Prior to the amendment, however, municipalities were liable under federal law for treble antitrust damages. See [*Palm Springs Medical Clinic, Inc. v. Desert Hospital*, 628 F. Supp. 454, 459-60 n.4 \(C.D. Cal. 1986\)](#). In Connecticut, municipalities

the state, municipalities "have no sovereign immunity from suit." *Cone v. Waterford*, 158 Conn. 276, 278, 259 A.2d 615 (1969). Rather, municipal governments have a limited immunity from liability. *Tango v. New Haven*, I**7341 173 Conn. 203, 204-205, 377 A.2d 284 (1977). Nevertheless, regardless of whether a defendant is an agency of the state claiming the protection of sovereign immunity or an agency of the town claiming a limited immunity, the issue of whether it is entitled to such immunity is fact bound. See *Gauvin v. New Haven, supra*, 187 Conn. 186 [***38] (whether town is entitled to limited governmental immunity is question of fact); *Dolnack v. Metro-North Commuter Railroad Co.*, 33 Conn. App. 832, 836-37, I*271 639 A.2d 530 (1994) (listing several fact based factors that must be considered in determining whether given entity is entitled to immunity of state); see also 5 F. Harper, F. James & O. Grey, Torts (2d Ed. 1986) § 29.6, p. 627 (in considering whether immunity applies based on government-proprietary distinction, criteria most commonly considered are: [1] whether function is allocated to municipality for its profit or special advantage; and [2] whether function is one historically performed by government). Because this issue was raised only in the posttrial briefs of the parties, the record is insufficient to determine whether the defendant is a municipal agent and, if so, whether it may be shielded by governmental immunity from antitrust liability.²⁷ Accordingly, we also decline to review whether the defendant is entitled to the limited governmental immunity available to municipalities and their agencies.

IV

We next turn to the defendant's allegation that the trial court improperly awarded the plaintiff damages based on [***40] speculative data and that, therefore, the plaintiff failed to establish damages with reasonable certainty.

HN40[] The trial court has broad discretion in determining damages. *Buckman v. People Express, Inc.*, 205 Conn. 166, 175, I*281 530 A.2d 596 (1987); *Amwax Corp. v. Chadwick*, 28 Conn. App. 739, 745, 612 A.2d 127 (1992). **HN41**[] The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. *Beckman v. Jalich Homes, Inc.*, 190 Conn. 299, 309-10, 460 A.2d 488 (1983); *Gerber & Hurley, Inc. v. CCC Corp.*, 36 Conn. App. 539, 545, 651 A.2d 1302 (1995). "The vagaries of the marketplace usually deny us sure knowledge of what [the] plaintiff's situation would have been in the absence of the defendant's antitrust violation." **HN42**[] This fact and the general belief that it would be inequitable to allow a wrongdoer to defeat recovery by insisting on rigorous proof of damages have resulted in a lesser burden of proving the amount of damages in antitrust suits than in other contexts." 1 *Antitrust Law* Developments, *supra*, p. 668. **HN43**[] "A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record [***41] evidence." *Id.*, p. 673; see, e.g., *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1301-1303 (8th Cir. 1988), cert. denied, 489 U.S. 1081, 109 S. Ct. 1535, 103 L. Ed. 2d 840 (1989). **HN44**[] The reasonableness of the assumptions underlying the plaintiff's damage theory is determined by the trier of fact. *General Leaseways, Inc. v. National Truck Leasing Assn.*, 830 F.2d 716, 726-27 (7th Cir. 1987). **HN45**[] Federal appellate courts have refused to find damage evidence insufficient unless there was no basis for critical assumptions made by the trial court. See *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 806-807 (9th Cir. 1988).

have not been exempted by statute from antitrust damages. Accordingly, we reject the defendant's argument that its actions during 1977 and 1978 should be exempt from antitrust liability.

²⁷ Although the trial court discussed governmental immunity in its memorandum of decision, and held that the defendant was not entitled to it, the court reached this conclusion by determining that governmental immunity is not available to transit districts pursuant to *General Statutes § 7-273h*. *Section 7-273h (a)* provides in relevant part: "Any district operating a transit service pursuant to the provisions of this chapter shall be responsible for any injury or damage to persons or property, happening or arising by reason of the maintenance or operation of the same, in the same manner and to the same extent as though the same were owned and operated by individuals or by a private corporation. . . . Because we are unable to determine in the first instance whether the defendant would have otherwise been entitled to governmental immunity, we leave for another day the question of whether *§ 7-273h* constitutes a waiver of immunity from liability under the Connecticut act."

The defendant challenges the trial court's findings that the plaintiff is entitled to damages for lost profits for the year ending May, 1978, in the amount of \$ 12,144, and for the [**735] loss of the business, which the court valued at \$ 150,000.

A

HN46 [+] It is well established that lost profits may be awarded as damages for antitrust violations. See, e.g., *H.J. Inc. v. I*291 International Telephone & Telegraph Corp.*, 867 F.2d 1531, 1549 (8th Cir. 1989); *D&S Redi-Mix v. Sierra Redi-Mix & Contracting* [**421] Co., 692 F.2d 1245, 1249 (9th Cir. 1982). In this case, the trial court made meticulous findings of fact and clearly detailed its calculations regarding the plaintiff's damages for the year in which the defendant directly competed with the plaintiff.

The defendant points to the fact that although the plaintiff's rates were controlled by the commission, the plaintiff did not choose to seek a rate increase from 1970, until it ceased business in 1978. The defendant claims that, therefore, the trial court's finding that if the defendant had not competed at below cost rates the plaintiff would have requested and received authorization to increase its rates from the commission was purely speculative.²⁸ We disagree.

[**43] First, we must view the defendant's claim in its proper context. The trial court found that the plaintiff had been unable to request an increase in its rates from 1976, onward, initially because of the advent of the Minnybus [*30] service and subsequently because the Gilberties knew that the defendant intended to compete with them directly at rates set below cost. The plaintiff sought damages, however, exclusively for the one year period in which it competed directly with the defendant's Maxytaxy. The trial court specifically found that the "plaintiff legitimately feared that it would have trouble enough competing with Maxytaxy's service at present rates without adding to the problem by increasing its fares." The defendant does not challenge these findings.

The trial court found that when the commission reviews an application for an increase in rates, it considers the rates charged in comparable localities and the profitability to the taxi operator. The commission considers a reasonable rate of return to be a ratio of operating costs to gross revenue of between 85 and 95 percent, or, in other words, a return of between five cents and fifteen cents on every dollar. In 1977, [**44] the plaintiff was permitted to charge only \$ 1.80 for a one-way three mile trip, which the trial court found was the plaintiff's average fare, while taxi companies in the surrounding areas of Bridgeport, Greenwich and Stamford were permitted to charge \$ 2.70 for the same distance.

The trial court further determined that, if the plaintiff had increased its average fare to \$ 2.70, it would have had a net operating ratio of 87 percent, which was within the commissioner's guidelines for a fair rate of return. Accordingly, the trial court found that during the year in which the plaintiff was competing with the Maxytaxy, the plaintiff could have obtained permission to charge \$ 2.70 for a one-way three mile trip instead of \$ 1.80 because the surrounding communities were charging that rate. The trial court concluded that if the defendant had not competed illegally, the plaintiff would have sought permission to charge an average \$ 2.70 fare and that such an increase would have been [**736] [*31] granted.²⁹ Therefore, the trial court based its award of the damages for lost

²⁸ The defendant contends that the trial court incorrectly calculated the plaintiff's damages based on the rates for premium ride service in the surrounding localities because the defendant did not compete with the plaintiff in this area. There was contradictory testimony on this point. See footnote 19. The trial court concluded that the defendant and the plaintiff provided substantially the same services and this conclusion is supported by the testimony presented at trial.

A related argument that the defendant sets forth is that the trial court improperly applied the premium ride service rate of \$ 2.70 to calculate the plaintiff's damages. There was a wide range of rates that applied according to the distance traveled. The trial court determined that \$ 2.70 was the rate charged for the average distance traveled. There was no evidence offered to show that shared ride service resulted in lower per ride revenues to the taxi companies than premium ride service. On the contrary, although the record is unclear regarding how shared rider service was charged, it was reasonable for the trial court to assume that although individual shared ride passengers paid less than they would have for premium service, the total revenue to the taxi company was at least the same as premium service. Therefore, we conclude that the use by the trial court of an average distance and rate was reasonable.

profits on the difference between the \$ 1.80 average fare the plaintiff collected during the year ending May, [***45] 1978, and the \$ 2.70 average fare it could have earned.

The trial court found, on the basis of the plaintiff's financial information, that the plaintiff earned a net profit of \$ 5759.12³⁰ during the year it competed directly with the defendant.³¹ [***47] The trial court then determined that if Maxytaxi had not illegally competed with the plaintiff and if the plaintiff had requested and received rate increases comparable to those charged in the surrounding communities, based on its actual 1977 ridership,³² [***48] the plaintiff would have earned an adjusted [*32] operating profit of \$ 17,903.³³ Accordingly, the trial court concluded that the plaintiff had suffered [***46] lost profits between April, 1977, and May, 1978, of the difference between \$ 17,903 and \$ 5759, which totals \$ 12,144.³⁴

We conclude that the trial court based its calculation of the plaintiff's damages due to lost profits on sufficient evidence and reasonable assumptions, and, accordingly, the trial court's calculation of the plaintiff's damages from lost profits was not clearly erroneous.³⁵

²⁹ In addition, John Riley, a senior rate specialist with the commission who was responsible for the development and approval of taxi rates, testified that if the plaintiff had requested a fare increase in 1977, the commission would have approved such an increase to the rate of \$ 2.70 for a three mile trip that was charged in other nearby localities.

³⁰ The defendant argues that, because the plaintiff generated greater revenues in 1977, after the defendant initiated the Maxytaxi, than in 1974, before the defendant began its operations, the plaintiff, therefore, was not negatively impacted by the Maxytaxi. This argument is without merit. It is true that the plaintiff's revenues from taxi operations were \$ 114,070 in 1977, as opposed to \$ 100,362 in 1974. We have already affirmed the trial court's determination, however, that if the defendant had not competed illegally at below cost prices in order to drive the plaintiff out of business, the plaintiff's revenue would have been much higher. This is the dispositive issue that entitles the plaintiff to lost profits.

³¹ In addition to revenues from its taxi operations, the plaintiff also earned revenue from a rental car business, vending machines and the sale of lottery tickets. The trial court subtracted all revenue that was not directly derived from the plaintiff's taxi services from its damage calculations. The defendant does not dispute the trial court's calculations or conclusion regarding the plaintiff's actual profits for this period.

³² The defendant argues that the trial court improperly based its calculations on the assumption that the defendant did not exist at all and awarded damages according to what the plaintiff would have earned without any competition from the defendant.

It is impossible to speculate regarding what would have happened if the defendant had chosen to compete legally. It certainly would have had to charge fares sufficient to perpetuate its existence. What those fares would have been is not determinable and, therefore, as the trial court stated, the level of competition the defendant would have given the plaintiff is similarly indeterminate.

Contrary to the defendant's allegation, however, the trial court did not assume the defendant's nonexistence when it calculated the plaintiff's damages. The trial court used the plaintiff's actual ridership during the period between 1977 and 1978, which had been adversely impacted by competition from the defendant and was lower than it otherwise would have been. Michael Gilbertie testified that the plaintiff's ridership dropped noticeably in 1977. In contrast, the defendant's ridership increased from 1458 in April, 1977, to 11,319 in January, 1978. It is reasonable to assume that a substantial portion of the plaintiff's lost ridership was the defendant's gain. Therefore, a competitive impact was included in the calculation.

³³ The trial court further determined that this outcome was reasonable because it was within the range that the commission deemed an acceptable profit margin. The plaintiff's adjusted revenue for 1977 would have been \$ 176,587, which amounts to a net operating ratio of 87 percent.

³⁴ The defendant has not challenged on appeal any aspect of the mathematic methodology employed by the trial court and, therefore, we do not review it.

³⁵ The defendant argues that any decrease in revenues between 1976 and 1977 was due to the closing of the plaintiff's evening operations, which was, in turn, due to the death of John Gilbertie, who worked as the night dispatcher. Michael Gilbertie testified, however, that the decision was precipitated by the fact that, due to competition from the defendant, the evening operations were not profitable and that was the basis of the decision to discontinue them. The trial court obviously decided to credit his testimony and the defendant has failed to show that the court's decision was clearly erroneous.

[***49] [**737] B

The defendant also claims that the trial court improperly awarded the plaintiff damages of \$ 150,000 for the loss of the business. [HN47](#) "Where the plaintiff's business is totally or partially destroyed by [the] defendant's [*33] violation . . . damages may be measured by lost goodwill or the 'going concern' value of [the] plaintiff's business." 1 [Antitrust Law](#) Developments, supra, p. 670; [Sciambra v. Graham News Co.](#), 841 F.2d 651, 657 (5th Cir.), cert. denied sub nom. [Sciambra v. ARA Services, Inc.](#), 488 U.S. 855, 109 S. Ct. 143, 102 L. Ed. 2d 115 (1988). [HN48](#) A plaintiff injured by an antitrust violation may recover both lost past profits and the probable value of the business. [Northeastern Telephone Co. v. American Telephone & Telegraph Co.](#), *supra*, 651 F.2d 95 n.30.

After calculating the plaintiff's lost profits, the trial court determined what the plaintiff's value would have been if the defendant had not forced it out of business due to its illegal, anti-competitive business practices. The court found that an appropriate return on investment for the period of 1976 through 1978 would have been approximately 10 to 12 percent. By capitalizing the [***50] plaintiff's projected profits for the year ending May, 1978, the trial court concluded that the value of the plaintiff's business was \$ 150,000.³⁶

The defendant first argues that its operations had nothing to do with the plaintiff's decision to cease operations and that the trial court improperly awarded the plaintiff damages for the value of the business. The defendant claims that the plaintiff closed because the severe winter necessitated the purchase of new vehicles and the Gilberties were unwilling personally to secure business loans that would have been required to acquire the new vehicles. Michael Gilbertie testified, however, that the underlying reason for their decision not to purchase new vehicles was that they felt that, because of competition from the defendant, such an investment [*34] would not have been prudent.³⁷ The trial court [***51] credited Gilbertie's testimony and the defendant has failed to show that the decision was clearly erroneous.

The defendant next claims that the trial court improperly credited Michael Gilbertie's suggested valuation of the business. Although the defendant concedes that Gilbertie was entitled to testify as to the company's value, it claims that Gilbertie's testimony concerned the proper method to value a taxi company and that it should not have been credited because such an opinion could only have been given by a qualified expert. The defendant argues, therefore, that the trial court improperly permitted Gilbertie to give expert testimony without being qualified or disclosed [***52] as an expert. We are not persuaded by the defendant's distinction between Gilbertie's valuation of the business and his method of valuation.

Gilbertie testified that, because a fair return on a taxi business would be 10 percent to 12 percent, he valued the business at between \$ 194,875 and \$ 233,850. The trial court determined that Gilbertie's valuation of the business was "based on his own experience in the taxi business for more than twenty years, his knowledge of how a taxi business was valued by the industry, his discussions with other owners, his knowledge of other sales, his membership in the Connecticut Taxi Cab Association, his membership in the International Taxi Cab Association, and finally, his own personal experience and practice in the 1960s and 1970s . . ." The trial court applied this rate of return to its own calculations of the plaintiff's lost profits and concluded that the plaintiff's value was \$ 150,000.

[*35] [HN49](#) It is well settled that the owner of property is competent to testify to its value. [Somers v. LeVasseur](#), 230 Conn. 560, 566 n.2, 645 A.2d 993 (1994); [Griffin v. Nationwide Moving & Storage Co.](#), 187 Conn. 405, 422, [\[**738\]](#) 446 A.2d 799 [\[*53\]](#) (1982); [Anderson v. Zweigbaum](#), 150 Conn. 478, 483 n.1, 191 A.2d 133 (1963); [State v. Rochette](#), 25 Conn. App. 298, 307, 594 A.2d 1006, cert. denied, 220 Conn. 912, 597 A.2d 337 (1991), cert. denied, 502 U.S. 1045, 112 S. Ct. 905, 116 L. Ed. 2d 806 (1992). Furthermore, we have determined that [HN50](#) a franchise owner is competent to testify as to the value of a franchise. [Lovejoy v. Darien](#), 131 Conn.

³⁶ The trial court capitalized \$ 17,903 at between 10 to 12 percent, and valued the plaintiff's taxi franchise at between approximately \$ 149,000 and \$ 179,000.

³⁷ Michael Gilbertie explained: "We just saw no way from a business point of view that we should risk our private property to continue beating our head against the wall and competing with these people. And like my father said, don't throw good money after bad. And we were in a no win situation. So we just said, close the doors"

[533, 536, 41 A.2d 98 \(1945\)](#). This is "based in part on the common experience that an owner is familiar with her property" (Internal quotation marks omitted.) [Somers v. LeVasseur, supra, 566 n.2](#). "The weight to be accorded such testimony is for the trier to decide." [Ridgeway v. Ridgeway, 180 Conn. 533, 544 n.7, 429 A.2d 801 \(1980\)](#).

We note that [HN51](#) the trial court has broad discretion to admit the testimony of anyone who is involved with a business or property and may have personal knowledge of its value. [Lovejoy v. Darien, supra, 131 Conn. 536](#). We conclude that as an owner, Gilbertie was competent to testify as to the method he employed in valuing his business, and that the weight given such testimony was for the trial court to decide.

Gilbertie testified as [\[***54\]](#) to what he thought his business would have been worth according to the return that he expected on his investment if the defendant had not illegally competed with the plaintiff. The defendant did not object to the substance of this testimony and, as the trial court noted, there was no motion to strike Gilbertie's testimony for lack of foundation or competence. The trial court determined that the asserted rate was reasonable and the defendant has provided no basis for overturning the trial court's determination. The court did not characterize Gilbertie's testimony as [\[*36\]](#) expert, nor do we. The testimony was that of a business owner testifying as to the value of his business and the method he employed to value it. Its admission was a matter within the discretion of the trial court.³⁸

[***55] V

Finally, we turn to the defendant's claim that the trial court improperly awarded prejudgment interest to the plaintiff.
39

[*37] A

The plaintiff contends that because the defendant failed to object in the trial [\[**739\]](#) court to the plaintiff's claim that it was entitled to prejudgment interest, [\[***56\]](#) and raises its various objections to the award for the first time on appeal, we should not reach this issue. The plaintiff clearly argued that it was entitled to prejudgment interest in its proposed posttrial findings of fact and conclusions of law, and in its posttrial memorandum of law. The defendant

³⁸ The defendant further claims that the plaintiff did not suffer a total loss when it chose to discontinue operations and that the trial court did not properly credit the defendant for several transactions and retained assets. First, the defendant contends that the plaintiff's Weston operation and package delivery service should have been deducted from the damages awarded. We do not agree. The defendant's illegal conduct caused the plaintiff to lose its entire business, not only the parts in which the plaintiff and the defendant directly competed. The defendant offered no evidence that the plaintiff could have continued to run a profitable enterprise by operating one taxi in Weston and delivering packages.

The defendant next contends that the plaintiff's certificate of public necessity and convenience had value and should have been deducted from its damages. Although the defendant did not raise this issue at trial and the trial court did not make any findings regarding the certificate, it reasonably could have found that the certificate was worthless at the time the plaintiff ceased operations. The below cost fares offered by the defendant would have been a serious disincentive for any private taxi operator to begin operations in Westport, and it is doubtful that any such operator would have attempted to enter the Westport market.

Finally, the defendant claims that the plaintiff retained two cars and its dispatching equipment and that the value of this equipment should have been discounted from the damage calculation. We disagree. The plaintiff unsuccessfully attempted to sell its dispatching equipment and sold two fully depreciated taxis for between \$ 200 and \$ 300. Accordingly, the dispatching equipment had no value and the value of the cars was negligible. We conclude that none of the defendant's contentions shows that the trial court's damage determination was clearly erroneous.

³⁹ In addition to arguing that the act includes no provision for prejudgment interest, the defendant alleges that the plaintiff is not entitled to prejudgment interest because it did not seek prejudgment interest in its amended complaint. [HN52](#) "The allowance of interest as an element of damages is . . . primarily an equitable determination and a matter lying within the discretion of the trial court." [State v. Stengel, 192 Conn. 484, 487, 472 A.2d 350 \(1984\)](#). We conclude that the plaintiff's claim for prejudgment interest was properly before the trial court.

had an opportunity to respond to the plaintiff's claim in its reply brief but failed to argue that prejudgment interest was not an appropriate remedy. Thus, because the defendant makes this argument for the first time on appeal, the trial court was never alerted to the claim that, as a matter of law, the plaintiff is not entitled to prejudgment interest.⁴⁰ [***57] Nevertheless, we reach this issue under the plain error rule for several reasons.⁴¹

First, because we conclude that the statutory scheme of the act does not permit an award of interest, it was plain error for the trial court to rely on an improper statute to provide for such an award even though this was not brought to the attention of the court during trial. See *Genovese v. Gallo Wine Merchants, Inc., supra, 226 Conn. 480 n.6*. Second, [HN54](#)[⁴²] neither party is prejudiced by our decision to review this issue under the plain error rule. Id. Unlike the issues of immunity and treble [*38] damages⁴² in this case, our interpretation of the statutes does not require further fact-finding by the trial court, and both parties have had an opportunity to present arguments regarding their proposed statutory interpretation in their appellate briefs. [HN55](#)[⁴³] Plain error review may be appropriate where the record is complete and the question is essentially one of law, so that neither party is prejudiced. Id.

[***58] Finally, we note that a substantial amount of the total damages awarded by the trial court consists of prejudgment interest. This is largely because the case has lingered in our court system since 1979, when the plaintiff filed its initial complaint. It lay virtually dormant from 1979 to 1989, when the plaintiff amended its complaint. During that interval, the case was subject to the dormancy program; Practice Book § 251; which requires dismissal if the plaintiff fails to prosecute with reasonable diligence. Indeed, the case was dismissed at least once in 1981, but was restored to the docket pursuant to motions by the plaintiff. As a result of this leisurely progression, the case was not heard by the trial court until 1991, twelve years after it had been commenced. The trial court awarded prejudgment interest in the amount of \$ 187,276 for that entire length of time and then trebled the award, the total of which amounted to \$ 561,828.

Although the plaintiff submitted one motion for default in 1989, and the defendant filed one motion for an extension of time, most of the delay was apparently due to the plaintiff's failure to pursue the action. Surely, it would be unjust to compensate [***59] the plaintiff for its own procrastination. We conclude that the interests of justice demand that we review the trial court's award of prejudgment interest. *Magnan v. Anaconda Industries, Inc., supra, 193 Conn. 577-78* (plain error review appropriate where interests of justice require it).

[*39] B

In this case, for the first time, we are asked to decide whether a plaintiff may be awarded prejudgment interest under the act.

Our analysis is guided by the well established rules of statutory interpretation, the intent of the legislature and interpretations of federal law upon which the act is structured. [Section 35-35 HN56](#)[⁴⁴] mandates an award of treble damages, attorney's fees and costs for injury to business or property due to any violation of the provisions of the act. The plaintiff argues that, although the act includes [*740] no explicit provision for prejudgment interest, it is entitled to such an award pursuant to [General Statutes § 35-44](#), which provides that "unless otherwise set forth in this chapter, all actions or proceedings under the provisions of this chapter shall be according to the statutes of Connecticut pertaining to civil actions." See [General Statutes J***601 § 37-3a](#).⁴⁵ Therefore, the plaintiff claims that the trial court had discretion to award prejudgment interest. We disagree.

⁴⁰ Practice Book § 285A requires that "if a party intends to raise any claim of law which may be the subject of an appeal, he must either state the same distinctly to the court before his argument is closed or state it in a written trial brief. If this is not done, it will not be the duty of either the trial court or the appellate court to decide the claim."

⁴¹ Reference is made to our discussion of plain error review in part III of this opinion.

⁴² See footnote 16.

⁴³ [General Statutes § 37-3a](#) provides: "Rate recoverable as damages. Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings

[***61] We begin our analysis with the principles of statutory interpretation. [HN57](#) First, we look to the words of the statute in order to discern the intent of the legislature and then resolve any ambiguity by turning for guidance to the [*40] legislative history and purpose. [*In re Sheldon G., 216 Conn. 563, 568-69, 583 A.2d 112 \(1990\)*](#). In this case, the plain meaning of the statutes, in conjunction with the principle that no statutory phrase or word will be interpreted as superfluous; [*Rydingsword v. Liberty Mutual Ins. Co., 224 Conn. 8, 16, 615 A.2d 1032 \(1992\)*](#); leads us to conclude that the legislature intended to include in [§ 35-35](#) all the elements of damage available to an injured plaintiff in an antitrust action.

[Section 35-35 HN58](#) specifically provides that a successful plaintiff shall recover its costs. Similarly, chapter 901 of the General Statutes provides for the recovery of costs by a successful plaintiff in a civil action. If the legislature had intended [§ 35-44](#) to incorporate all civil remedies into the antitrust act, it would not have had to specify that costs were recoverable because chapter 901 would have been incorporated into the antitrust act through [§ 35-44](#).
 [***62] [HN59](#) A statute must be interpreted to give effect to all its provisions. [*Pintavalle v. Valkanos, 216 Conn. 412, 418, 581 A.2d 1050 \(1990\)*](#). [HN60](#) No word within a statute is to be rendered mere surplusage. [*Rydingsword v. Liberty Mutual Ins. Co., supra, 224 Conn. 16*](#). Therefore, we cannot interpret [§ 35-44](#) to incorporate all civil remedies because such an interpretation would render the inclusion of costs superfluous in [§ 35-35](#). [HN61](#) Furthermore "unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive." (Internal quotation marks omitted.) [*White Oak Corp. v. Dept. of Transportation, 217 Conn. 281, 301, 585 A.2d 1199 \(1991\)*](#). We conclude that [HN62](#) the Connecticut legislature intended specifically to include all available remedies for an antitrust violation in [§ 35-35](#) and that because prejudgment interest is not specifically included, it may not be awarded.

We note that this statutory interpretation is consistent with our law that prohibits awards of interest on [*41] punitive damages.⁴⁴ [*Nielsen v. Wisniewski, 32 Conn. App. 133, 140, 628 A.2d 25 \(1993\)*](#). In *Nielsen*, the court reasoned that "the purpose of [***63] an award of interest is to compensate a party for a wrong. . . . Such an allowance is primarily an equitable determination within the discretion of the trial court. . . . Under [General Statutes § 37-3a](#), interest 'may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable.' For example, interest is awarded at the maturity of a debt from the time the money becomes due. . . . Since punitive damages do not become payable before judgment, however, [§ 37-3a](#) is inapplicable." (Citations omitted.) [*Id.* 139.](#) [**741] We believe this reasoning is equally pertinent in the case before us.

Our conclusion that prejudgment interest is not available under the Connecticut antitrust act is supported by judicial interpretations of the federal antitrust statutes.⁴⁵ Until 1980, the federal [*64] antitrust statutes did not provide for prejudgment interest and federal courts universally refused to award it.⁴⁶ "Although federal courts [*42] generally

under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. Judgment maybe given for the recovery of taxes assessed and paid upon the loan, and the insurance upon the estate mortgaged to secure the loan, whenever the borrower has agreed in writing to pay such taxes or insurance or both. Whenever the maker of any contract is a resident of another state or the mortgage security is located in another state, any obligee or holder of such contract, residing in this state, may lawfully recover any agreed rate of interest or damages on such contract until it is fully performed, not exceeding the legal rate of interest in the state where such contract purports to have been made or such mortgage security is located."

⁴⁴ Treble damages are punitive damages. [*Avis Rent A Car System, Inc. v. Liberty Mutual Ins. Co., 203 Conn. 667, 671, 526 A.2d 522 \(1987\)*](#); 3 P. Areeda & D. Turner, *supra*, P 630c.

⁴⁵ We note that the federal statutes include no equivalent to [§ 35-44](#) and that there is no discussion of this provision in the legislative history of the act. Therefore, we cannot ascertain the precise legislative intent for its enactment. Title [15 of the United States Code, § 21](#), details, however, how federal antitrust actions must be handled procedurally. [Section 21](#) discusses at length, for example, the issuance of complaints for violations, hearing procedures, review of orders, jurisdiction, conclusiveness of findings, finality of judgment and service of process. No such procedural detail is included in the Connecticut antitrust act and it is reasonable to assume that the legislature included [§ 35-44](#) to indicate that state antitrust actions are to be managed procedurally in the same manner as any other civil action unless otherwise stated in the act.

have the discretion to award pre-judgment interest, it [was] widely believed that such discretion does not exist in antitrust cases since trebling provides adequate compensation for delay." A. Joslyn, "Measures of Damages for the Destruction of a Business," 48 Brook. L. Rev. 409, 462 (1993). Because the statutes mandate an award of treble antitrust damages, courts have reasoned that any such award is intended to be substantial enough to include all that the plaintiff is entitled to receive. See, e.g., [Strobl v. New York Mercantile Exchange, 768 F.2d 22, 24 \(2d Cir. 1985\)](#) (summarily affirming reasoning in [Strobl v. New York Mercantile Exchange, 590 F. Supp. 875, 882-83](#) [S.D.N.Y. 1984]; [Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 80 \(2d Cir. 1971\)](#), rev'd on other grounds, [409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 \(1973\)](#); [Locklin v. Day-Glo Color Corp., 429 F.2d 873, 877 \(7th Cir. 1970\)](#), cert. denied, 400 U.S. 1020, 91 S. Ct. 582, 584, 27 L. Ed. 2d 632; [Smith v. Pro-Football, Inc., 528 F. Supp. 1266, 1275 \(D.D.C. 1981\)](#); [Cape Cod Food Products, Inc. v. National Cranberry Assn., 119 F. Supp. 900, 911 \(D. Mass. 1954\)](#)).

[***66] In 1980, the federal antitrust statutes were amended to permit the recovery of prejudgment interest on actual damages in specific and limited circumstances. [15 U.S.C. §§ 15 \(a\)](#) and [15a \(1982\)](#), as amended, Act of Sept. 12, 1980, Pub. L. No. 96-349, 94 Stat. 1156.⁴⁷ [***67] Federal [*43] courts may now award [**742] prejudgment interest but only on actual damages in private antitrust actions⁴⁸ and only for the period between the commencement of the suit and the judgment provided that the court finds that the defendant acted in bad faith by engaging in dilatory behavior to delay the court proceedings. The amendment was interpreted as a change in the existing law, not a technical amendment or clarification, and therefore it has not been permitted retroactive application. See, e.g., [Fishman v. Estate of Wirtz, 807 F.2d 520, 561-62 \(7th Cir. 1986\)](#). Courts have refused to consider any award of prejudgment interest in actions that had been brought before the amendment was enacted but were decided afterwards. Id.

⁴⁶ Our research has revealed only two cases in which prejudgment interest had been awarded in an antitrust action. [Uniroyal, Inc. v. Jetco Auto Service, Inc.](#), 1980-81 Trade Cas. CCH P 63,806, pp. 78,315, 78,321 (S.D.N.Y. 1981); [Eiberger v. Sony Corp. of America, 459 F. Supp. 1276, 1289 \(S.D.N.Y. 1978\)](#), rev'd on other grounds, [622 F.2d 1068 \(2d Cir. 1980\)](#). This precedent was effectively overruled in [Strobl v. New York Mercantile Exchange, 768 F.2d 22](#) (2d Cir.), cert. denied sub nom. [Simplot v. Strobl, 474 U.S. 1006, 106 S. Ct. 527, 88 L. Ed. 2d 459 \(1985\)](#), which affirmed the lower court's adoption of the reasoning in [Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 80 \(2d Cir. 1971\)](#), rev'd on other grounds, [409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 \(1973\)](#), that mandatory treble damages are sufficient to compensate a plaintiff in an antitrust action. See [Strobl v. New York Mercantile Exchange, 590 F. Supp. 875, 882-83 \(S.D.N.Y. 1984\)](#) (providing detailed discussion of why prejudgment interest is unavailable where damages are trebled).

⁴⁷ Title [15 of the United States Code § 15 \(a\) \(1982\)](#) provides in relevant part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section . . . simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only --

"(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof."

⁴⁸ We note that there is a divergence in the federal act between damages available to private plaintiffs and to the United States as plaintiff. While prejudgment interest may be awarded to a private plaintiff on actual damages only; see [15 U.S.C. § 15\(a\) \(1982\)](#); the United States may recover prejudgment interest on its threefold damages. [15 U.S.C. § 15a \(1982\)](#).

Nonetheless, even after the amendment permitting prejudgment interest, federal courts have refused to award prejudgment interest under [15 U.S.C. § 15 \(a\) \(1982\)](#) unless there was proof that the defendant acted [***44**] with extreme bad faith. See, e.g., [Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Authority, 133 F.R.D. 481, 486-87 \(E.D. La. 1990\)](#), appeal dismissed, [925 F.2d 812](#) (5th Cir.), cert. denied, 501 U.S. 1262, 111 S. Ct. 2917, 115 L. Ed. 2d 1080 (1991) (no prejudgment interest awarded where there was no evidence defendant acted in deliberate and extreme bad faith); [Automotive Products v. Tilton Engineering, Inc., 1993 U.S. Dist. LEXIS 20813, 33 U.S.P.Q.2d \(BNA\) 1065, 1072 \(C.D. Cal. 1993\) \[***68\]](#) (same). Indeed, our research indicates, with only the exceptions cited in footnote 46, that prejudgment interest has never been awarded by any federal court under [15 U.S.C. § 15 \(a\)](#), nor has it revealed an award of prejudgment interest by a state court in an antitrust action. See [Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Authority, supra, 487 n.4](#) (court and parties unable to find case where court imposed prejudgment interest under [15 U.S.C. § 15](#)); [Automotive Products v. Tilton Engineering, Inc., supra, 1072](#) (although [15 U.S.C. § 15](#) permits imposition of prejudgment interest, no court has actually awarded them); 2 A.B.A. Antitrust Section, Annual Review of 1993 [Antitrust Law](#) Developments (3d Ed. 1994) p. 170 (there is no reported decision awarding prejudgment interest in an antitrust case under [15 U.S.C. § 15 \(a\)](#)).

Like the federal statutes, [§ 35-35](#) mandates an award of treble damages, the award of attorney's fees and costs. We believe that [§ 35-35](#) provides an ample recovery in damages for an injured plaintiff. Federal courts have refused to consider an award of prejudgment interest prior to its specific inclusion in the federal statutes and even [*****69**] after the provision for prejudgment interest was included for a limited purpose, courts have declined to make any such award. Therefore, federal precedent reinforces our interpretation of the act. We conclude that prejudgment interest is not available to the plaintiff under the act.

[***45**] In sum, we affirm the trial court's judgment that the defendant had violated the Connecticut Antitrust Act and that the defense of immunity was not available to the defendant. We further conclude that the trial court properly awarded the plaintiff treble damages for lost profits and for the loss of the value of the business. We reverse, however, the trial court's decision to award prejudgment interest. Accordingly, the judgment is reversed in part and the case is remanded to the trial court with instructions to vacate the judgment of \$ 1,048,260.96 and render judgment in favor of the plaintiff in the amount of \$ 486,432.⁴⁹

[*****70**] In this opinion the other justices concurred.

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⁴⁹ Judgment shall enter in the amount of \$ 12,144 for lost profits and \$ 150,000 for the value of the lost business, totaling \$ 162,144. These damages are to be trebled and the total judgment to be rendered is \$ 486,432.



Doctor's Hosp. v. Southeast Medical Alliance

United States District Court for the Eastern District of Louisiana

August 18, 1995, Decided ; August 21, 1995, FILED, ENTERED

CIVIL ACTION NO. 93-2493 SECTION "S"(1)

Reporter

897 F. Supp. 290 *; 1995 U.S. Dist. LEXIS 12207 **

DOCTOR'S HOSPITAL OF JEFFERSON, INC. VERSUS SOUTHEAST MEDICAL ALLIANCE, INC. and JEFFERSON PARISH HOSPITAL SERVICE DISTRICT NO. 2

Core Terms

antitrust, Reasons, summary judgment, per se rule, Sherman Act, defendants', anti trust law, partial summary judgment, competitor, consumers, prices, entry of judgment, court of appeals, conspiracy, horizontal, increased price, reconsideration, deposition, terminated, argues, cases

LexisNexis® Headnotes

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN1 [] Entry of Judgments, Multiple Claims & Parties

Fed. R. Civ. P. 54(b) states, in pertinent part, that any order which adjudicates fewer than all the claims is subject to revision at any time before entry of judgment adjudicating all the claims.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

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Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN2 Justiciability, Standing

In an antitrust case, a private plaintiff must prove that it has suffered or will suffer an "antitrust injury." For the purposes of standing, "antitrust injury" is of the type that flows from that which makes a defendant's acts unlawful. Whether a plaintiff seeks damages or injunctive relief, the plaintiff must prove antitrust injury. Neither does it matter whether the plaintiff makes a claim under [§ 1](#) or [§ 2](#) of the Sherman Act; antitrust injury must still be established.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

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

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN3 Justiciability, Standing

In determining antitrust standing, the question is whether the injuries allegedly sustained by a plaintiff are of the type that the antitrust laws were intended to prevent. The court's focus must be upon competition in the allegedly restrained market. Restraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN4 Private Actions, Remedies

Injury to a single competitor does not constitute an "antitrust injury."

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

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

HN5 Antitrust Actions, Facilities

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The narrow standard for showing antitrust injury requires more than mere threat of antitrust injury.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN6 [+] **Private Actions, Remedies**

Part of the requirement for antitrust standing is not only that the injury was the type that antitrust laws were intended to prevent, but also that the injury was "a direct and determinable injury" to a plaintiff.

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

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN7 [+] **Practices Governed by Per Se Rule, Boycotts**

A group boycott requires a concerted refusal by traders to deal with traders. There must be a plurality of actors on the same market level who refuse to deal with another entity before there can be a per se violation of the antitrust laws under a group boycott.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Judgments > Entry of Judgments > General Overview

HN8 [+] **Entry of Judgments, Multiple Claims & Parties**

Fed. R. Civ. P. 54(b) provides, in pertinent part, that the court may direct the entry of a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay and upon express direction for entry of judgment. The decision whether to enter a "54(b) judgment" is within the discretion of the court.

Counsel: [**1] For DOCTOR'S HOSPITAL OF JEFFERSON, INC., plaintiff: Gene W. Lafitte, Sr., Frank E. Massengale, Marie Breaux, Shannon Skelton Holtzman, Liskow & Lewis, New Orleans, LA.

For SOUTHEAST MEDICAL ALLIANCE, INC., defendant: Peter Joseph Butler, Peter J. Butler, Jr., Richard G. Passler, Locke, Purnell, et al, New Orleans, LA. For JEFFERSON PARISH HOSPITAL SERVICE DISTRICT NO. 2, defendant: Harry Simms Hardin, III, Howard Earl Sinor, Jr., Katy Kimbell Theriot, Jones, Walker, et al, New Orleans, LA. Lucas Joseph Giordano, East Jefferson General Hospital, General Counsel, Metairie, LA.

Judges: OKLA JONES II, UNITED STATES DISTRICT JUDGE

Opinion by: OKLA JONES II

Opinion

[*291] ORDER AND REASONS

Pending before the Court is plaintiff's "Motion for Reconsideration, or, Alternatively for Entry of Final Judgment Under [Rule 54\(b\)](#)," which was taken under submission on a previous date without oral argument. Having considered the memoranda of the parties, the record and the applicable law, the Court GRANTS the motion to the extent that the Court clarifies the basis for its original ruling but REAFFIRMS the grant of partial summary judgment in defendants' favor. Further, the Court DEFERS ruling on plaintiff's request [**2] for entry of judgment pursuant to [Fed.R.Civ.P. 54\(b\)](#).

Background

The background of this matter is set forth at length in an "Order and Reasons" dated April 18, 1995, in which the Court granted partial summary judgment in favor of defendants on plaintiff's federal and state antitrust claims. (R.Doc. 282.) Without repeating the factual situation at length, suffice it to say that plaintiff, Doctor's Hospital of Jefferson, Inc., sued defendants, Southeast Medical Alliance, Inc. (hereinafter "SMA") and Jefferson Parish Hospital District No. 2 (hereinafter "East Jefferson Hospital"), alleging violations of [Sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1](#) and [2](#); Louisiana antitrust laws, LSA-R.S. 51:122 *et seq.*; the Louisiana Unfair Trade Practices and Consumer Protection Act, LSA-R.S. 51:1401 *et seq.*; and various other state-law based claims, including civil conspiracy, tortious interference with business relations, and breach of contract. Suit was brought pursuant to Sections 4 and 16 of the Clayton Act, [15 U.S.C. §§ 15, 26](#).

The defendants filed a motion for partial summary judgment, which was based partly on the contention that the plaintiff, Doctor's Hospital of Jefferson, [**3] Inc. (hereinafter "Doctor's Hospital"), had no standing to proceed because it could not prove that there had been any "antitrust injury." ("Order and Reasons, p. 4, R.Doc. 282. See Defendants' memorandum in support of motion for partial summary judgment, p. 8-24, R.Doc. 247.) The Court agreed with defendants while at the same time rejecting plaintiff's arguments in opposition. (R.Doc. 282.)

Doctor's Hospital seeks reconsideration of the Court's decision, or, alternatively, for entry of judgment pursuant to [Fed.R.Civ.P. 54\(b\)](#) on the Court's ruling. In its 95-page memorandum in support, Doctor's Hospital argues that the Court committed legal error in numerous ways in granting partial summary judgment. The legal error included:

- 1) misapplication of the summary judgment standard;
- 2) misapplication of the requirement of "standing" under [antitrust law](#);
- 3) improper analysis of its [§ 2](#) Sherman Act claim;
- 4) improper rejection of its argument for applicability of the *per se* rule of [antitrust law](#); and,
- 5) improper analysis of its *prima facie* showing of injury to competition under the "rule of reason" analysis.

In opposition, defendants argue that the Court correctly [**4] applied the law to the record in finding that defendants' failed to establish "antitrust standing" because there was no proof of "antitrust injury." Defendants alternatively address plaintiff's other contentions. Finally, as to plaintiff's request for entry of judgment pursuant to [Rule 54\(b\)](#), defendants contend that such entry is premature and/or would be improper.

Law and Application

I. Reconsideration

In addition to providing the standard for entry of partial judgments, [Rule 54\(b\)](#) also sets forth the standard by which the Court may reconsider its grant of partial summary judgment in defendants' favor. [HN1](#)[]. The rule states, in

pertinent part, that "any order . . . which adjudicates fewer than all the claims . . . is subject to revision at any time before entry of judgment adjudicating all the claims . . ." Cf. [Zimzores v. Veterans Administration, 778 F.2d 264, 266 \(5th Cir. 1985\)](#) (analogizing [Rule 54\(b\)](#) provision on revision to entry of summary judgment on liability alone under [Rule 56\(c\)](#)).

[*292] Clearly, the Court has the power to revise its previous order. However, for the following reasons, the Court declines to exercise its discretion to change or vacate the grant of partial [*5] summary judgment.

II. Summary Judgment Standard

Plaintiff's initial argument is that the Court misapplied summary judgment standards. First, plaintiff argues that the Court did not apply the standard "cautiously" as required in an antitrust case. Second, defendant contends that the Court improperly decided issues of motive and intent central to Doctor's Hospital's claims.

Doctor's Hospital is correct that the Supreme Court stated in [Poller v. CBS, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 \(1962\)](#), that "summary (judgment) procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators, and hostile witnesses thicken the plot." However, as the Fifth Circuit recognized in discussing *Poller* and finding the foregoing statement to be *Obiter dictum*, "simply because a case is based upon the antitrust laws does not suspend the application of [Rule 56](#)." [Aladdin Oil Company v. Texaco, Inc., 603 F.2d 1107, 1111 \(5th Cir. 1979\)](#). Cf. [Little v. Liquid Air Corporation, 37 F.3d 1069, 1075, n. 14 \(5th Cir. 1994\)](#) (en banc) (rejecting any notion that "appropriateness [*6] of summary judgment can be determined" by case classification).

Thus, where motive and intent play important roles in determination of factual issues, summary judgment may be inappropriate in antitrust cases. However, where -- as here -- the Court's determination of summary judgment was based on the legal issue of "antitrust injury" as part of "antitrust standing" and on plaintiff's expert's recitation of that "antitrust injury," the use summary judgment was clearly appropriate.

Further, as the Court will explain, because the Court did not have to reach the specific elements of the claims under [§§ 1 or 2](#) of the Sherman Act, the Court did not improperly construe any inferences of motive and intent in favor of defendants.

III. "Antitrust Injury" Necessary for Antitrust Standing

Doctor's Hospital next argues that the Court confused "antitrust injury" as an element of standing with "injury to competition" as one of the elements of a Sherman Act offense. As a result, plaintiff maintains that the Court improperly mixed a question of law -- "antitrust injury" -- with a question of fact -- injury to competition. Upon review of the earlier decision, the Court agrees that the manner [*7] in which the Court addressed "antitrust injury" as an element of standing was confusing. Therefore, the Court clarifies its ruling as follows.

In the "Order and Reasons," the Court noted defendants' contention that plaintiff did not have antitrust standing. ("Order and Reasons," p. 4, R.Doc. 282.) The Court then correctly framed the threshold legal standard for antitrust standing, i.e., [HN2](#) in an antitrust case, a private plaintiff must prove that it has suffered or will suffer an 'antitrust injury,'" citing [Anago, Inc. v. Tecnol Medical Products, Inc., 976 F.2d 248, 249 \(5th Cir. 1992\)](#), citing [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 491, 93 L. Ed. 2d 427 \(1986\)](#). ("Order and Reasons," pp. 5-6, R.Doc. 82.) For the purposes of standing, "antitrust injury" is "of the type that flows from that which makes defendants' acts unlawful." *Id.* at 109, 107 S. Ct. at 489, quoting [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 \(1977\)](#). Whether a plaintiff seeks damages or injunctive relief, as Doctor's Hospital does here, the plaintiff must prove antitrust injury. [Cargill, 479 U.S. at 113, 107](#) [*8] [S. Ct. at 491](#). Neither does it matter whether the plaintiff makes a claim under [§ 1](#) or [§ 2](#) of the Sherman Act; antitrust injury must still be established. See [Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 \(1982\)](#) (applying *Brunswick* "antitrust injury" requirement to [§ 1](#) claim); [T.O. Bell v. Dow Chemical Company, 847 F.2d 1179, 1182 and n. 4 \(5th Cir. 1988\)](#) ("antitrust injury" applicable to violations of [§ 2](#) of Sherman Act).

[*293] [HN3](#)¹ The question, then, is whether the injuries allegedly sustained by Doctor's Hospital are of the "type that the antitrust laws were intended to prevent." [Id. at 1183](#), citing [Brunswick, supra](#). "The court's focus must be upon competition in the allegedly restrained market. Restraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue." [Bell, 847 F.2d at 1183](#), citing [Associated General Contractors v. Carpenters, 459 U.S. 519, 539, 103 S. Ct. 897, 909, 74 L. Ed. 2d 723 \(1983\)](#).

As stated in the Court's earlier decision, the Fifth Circuit has described "typical anticompetitive effects [as] including increased prices and decreased [*9] output." [Anago, 976 F.2d at 249](#). The *Anago* court also "narrowly interpreted the meaning of antitrust injury, excluding from it the threat of decreased competition." *Id.*¹

With these principles in mind, the Court turns to plaintiff's main contentions that "antitrust injury" exists, which are based on its expert report. Specifically, as noted in the Court's previous "Order and Reasons," Dr. Henry Zaretsky opined for Doctor's Hospital that antitrust injury occurred in three ways when Doctor's Hospital was terminated from SMA: consumers would pay more; consumers had less choice, and Doctor's Hospital was weakened as a competitor. (R.Doc. 82, p. 23.)²

[**10] Addressing this last contention first, the Court notes, as it did in its earlier ruling, that Doctor's Hospital concedes that [HN4](#)¹ injury to a single competitor does not constitute an "antitrust injury." (Plaintiff's reply memorandum, R.Doc. 276, p. 12, n. 8). See, e.g., [Green v. State Bar of Texas, 27 F.3d 1083, 1087 \(5th Cir. 1994\)](#) ("Appellant may not just show that defendants' actions injured him but must also demonstrate that the defendants' actions unreasonably restrained competition").

In the previous ruling the Court also distinguished [Reazin v. Blue Cross and Blue Shield of Kansas, 899 F.2d 951, 963 \(10th Cir. 1990\)](#), on which plaintiff relied for the proposition that "under appropriate circumstances," injury to a single competitor may be actionable. (R.Doc. 282, pp. 22-26.) The Court adopts its previous statements as to the inapplicability of *Reazin* as set forth in the prior decision and will not repeat it here. Simply put, *Reazin* is inapposite to the case at hand.

Doctor's Hospital also relies on Dr. Zaretsky's expert report for the proposition that the increase in consumer prices constitutes antitrust injury. However, as the Court recognized in its earlier [*11] ruling, Dr. Zaretsky's opinions hedge on whether prices will rise. For example, Dr. Zaretsky states that "studies suggest that the success of [East Jefferson] and SMA in eliminating [Doctor's Hospital] as a competitor is *likely* to lead to an increase in prices of all hospitals in the geographic market, not to mention prices paid by SMA members to its contracting hospitals." (Exh. 13, p. 24, R.Doc. 247, emphasis added.) Dr. Zaretsky also stated that "by eliminating competition, the termination of [Doctor's Hospital] immediately harmed consumers by creating an environment *conducive* to increased prices." *Id.* at 23. These speculative statements about anticompetitive effects are insufficient to create antitrust injury under [HN5](#)¹ the narrow standard set forth by the Fifth Circuit in *Anago*, which requires more than mere "threat of antitrust injury." [Anago, 976 F.2d at 249](#) (emphasis added). As the Court stated previously, "the mere 'likelihood' that prices will increase or that an environment is 'conducive' to increased prices for inpatient and outpatient hospital care on the east bank of Jefferson [Parish] falls short of the strict Fifth Circuit standard for showing [*12] antitrust injury." ("Order and Reasons," p. 27, R.Doc. 282.)

[*294] There is an additional reason why plaintiff's claims of increased price fail to establish standing. Doctor's Hospital alleges that East Jefferson insisted on a 10 percent price increase from SMA that was higher than that of other SMA entities. (R.Doc. 290, p. 6.) This argument fails to establish standing for the reasons set forth by the Supreme Court in [Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 583, 106 S. Ct. 1348, 1354, 89 L. Ed. 2d 538 \(1976\)](#) as to actions that do not violate the Sherman Act:

¹ Plaintiff attempts to distinguish *Anago* as factually inapposite because it is a merger case. (Plaintiff's memorandum in support, pp. 20-21, R.Doc. 290.) While *Anago* did involve a merger, its facts do not lessen the principle of law set forth therein.

² In the instant motion, Doctor's Hospital offers no new contentions specifically as to "antitrust injury" in terms of standing other than new supporting evidence for its contention as to the effect on consumer choice. This new proof is discussed herein.

Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price Finally, for the same reasons, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of . . . raising market price Such restrictions, though harmful to competition, actually benefit competitors by making supracompetitive [**13] pricing more attractive.

As the Fifth Circuit has noted, [HNG](#) part of the requirement for antitrust standing is not only that the injury was "the type that antitrust laws were intended to prevent" but also that the injury was "a direct and determinable injury" to plaintiff. *Walker v. U-Haul Co. of Mississippi*, 747 F.2d 1011, 1014 (5th Cir. 1984). Assuming that the prices were increased by 10 percent, the Court finds that there was no injury of a direct and determinable nature to Doctor's Hospital. Although rates may have been increased, Doctor's Hospital would only stand to gain from this increase as set forth in *Matsushita*.

Finally, the Court turns to Dr. Zaretsky's third statement bearing on evidence of antitrust injury, i.e., that consumers have less choice as a result of the exclusion of Doctor's Hospital from SMA. Specifically, Dr. Zaretsky believes that this exclusion reduces "the SMA subscribers' choices among providers (hospitals and some physicians). This reduces both price and nonprice competition." (Exh. 13, p. 25, R.Doc. 247.) However, as explained in the prior ruling, this only addresses "antitrust injury" in the SMA market, not in the allegedly restrained [**14] market as required under [Bell, supra](#), which Dr. Zaretsky defined as the acute care inpatient services and hospital-based outpatient services on the east bank of Jefferson Parish. (Exh. 13, p. 14-15, R.Doc. 247.) Additionally, according to the deposition of the former chairman of Doctor's Hospital, nearly all of the doctors on staff at Doctor's Hospital are also on staff at East Jefferson. (Exh. 27, p. 23, R.Doc. 247.) Thus, as the Court stated in its earlier decision, there does not appear to be any reduction in physician choice.

In the prior ruling, the Court rejected plaintiff's argument that consumer choice was affected because consumers would choose Doctor's Hospital over East Jefferson because Doctor's Hospital was less bureaucratic, more efficient and more comfortable than East Jefferson. This was based on the lack of support provided in the form of affidavits, depositions or otherwise as required by [Fed.R.Civ.P. 56\(c\)](#). Doctor's Hospital now argues that this patient choice is supported by an affidavit and deposition testimony of Dr. Alvin S. Merlin. (Attachments to motion for reconsideration, Exhs. 4 and 8, respectively, R.Doc. 290.)

The Court first notes that Dr. Merlin's [**15] affidavit was executed after the Court's prior decision in this matter. This fact constitutes reason enough to disregard the affidavit, as Doctor's Hospital could have presented it to the Court earlier. See [Abbott v. The Equity Group](#), 2 F.3d 613, 619 (5th Cir. 1993) (court under no obligation to allow new legal theory to be presented following grant of summary judgment). Even considering the affidavit, however, the Court finds that it contains conclusory, self-supporting statements, which the Court finds does not constitute a genuine issue of material fact. As to the deposition testimony of Dr. Merlin, it refers to alleged problems at East Jefferson at the time Doctor's Hospital began, not at the time of SMA's termination of Doctor's Hospital's. There is no indication that the alleged problems existed at the time that SMA terminated Doctor's Hospital. Therefore, the deposition [*295] testimony of Dr. Merlin also does not raise a genuine issue of material fact.

In the instant motion, Doctor's Hospital also claims that it is entitled to standing as a matter of law under [Crimpers Promotions, Inc. v. Home Box Office, Inc.](#), 724 F.2d 290, 294-97 (2nd Cir. 1983), because it is alleging [**16] a concerted refusal to deal with Doctor's Hospital. However, in *Crimpers*, although the question before the Court of Appeals was whether plaintiff had standing, the defendants "conceded that their alleged activities were within the concern of Congress insofar as they adversely affected the producers or the stations." [Id. at 294](#). Thus, "antitrust injury" at issue here and as refined by the cases cited above was not an issue in *Crimpers*. Quite obviously, there was no similar concession by defendants in this matter.

Therefore, for the foregoing reasons, the Court finds that Doctor's Hospital lacks standing to proceed with this matter due to an absence of "antitrust injury."

IV. [Section 2](#) "Monopolization" Claim

Doctor's Hospital also contends that this Court erred in dismissing its § 2 Sherman Act claim because the Court failed to analyze the various elements necessary to justify summary judgment on its claims of monopolization, attempted monopolization, and conspiracy to monopolize. Plaintiff also maintains that the Court failed to take into account East Jefferson's use of market power and the applicability of *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 [**17] S. Ct. 181, 96 L. Ed. 162 (1951). As set forth above, however, an antitrust plaintiff must establish "antitrust injury" under both § 1 and § 2 claims. See, e.g., *Bell*, 847 F.2d at 1182 and n. 4. Therefore, because plaintiff has failed to establish antitrust injury here under either of his Sherman Act claims, the Court dismisses the § 2 claim without having to reach the substantive elements of its § 2 claim or the *Lorain Journal* argument.

V. Analysis of § 1 Claim

Doctor's Hospital also contends that this Court undertook an improper analysis of its § 1 claim. The Court rejects this argument for two reasons. First, as set forth above, Doctor's Hospital has failed to establish "antitrust injury" necessary to pursue its § 1 claim. Second, as explained herein, the Court properly found that this was not a case for the application of the *per se* rule of liability of **antitrust law**.

Doctor's Hospital argues that *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959) and its progeny control this matter as a group boycott, or concerted refusal to deal. Hence, plaintiff maintains that the *per se* rule is applicable.

The Court [**18] dismisses this argument for the same reason as set forth in the previous "Order and Reasons." In *Klor's* the Supreme Court clearly stated that HNT[↑] a group boycott requires "a concerted refusal by traders to deal with traders." *Id. at 212, 79 S. Ct. at 709*. Here, there was only one entity -- SMA -- which terminated Doctor's Hospital. There must be a plurality of actors on the same market level who refuse to deal with another entity before there can be a *per se* violation of the antitrust laws under a group boycott. See *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567-68 (11th Cir. 1991).

Further, the contention of Doctor's Hospital's that *Klor's* must be given a broad reading such that the present case falls within its ambit ignores Supreme Court recognition of *Klor's* as involving a horizontal combination. *Business Electronics Corporation v. Sharp Electronics Corporation*, 485 U.S. 717, 734, 108 S. Ct. 1515, 1525, 99 L. Ed. 2d 808 (1988) (both *Klor's* and another Supreme Court case "involved horizontal combinations"). Plaintiff's argument also ignores the Supreme Court's admonition that "*per se* rules are appropriate only for 'conduct that is manifestly [**19] anticompetitive. . . .' " *Id. at 723, 108 S. Ct. at 1519*. See also *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59, 106 S. Ct. 2009, 2017-2018, 90 L. Ed. 2d 445 (1986) ("We have been slow . . . to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.")

[*296] Finally, the Court addresses plaintiff's reliance on two cases, *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966) and *St. Bernard Hospital, Inc. v. Hospital Service Association of New Orleans, Inc.*, 712 F.2d 978 (5th Cir. 1983) for its argument that the *per se* rule of antitrust liability is applicable to this case.

In *Six Twenty-Nine Productions* it was alleged that a television station "engaged in a combination or conspiracy with another advertising agency for the purpose of eliminating plaintiff as a competitor in the field of advertising services." *Six Twenty-Nine Productions*, 365 F.2d at 484. The Fifth Circuit analyzed whether a cause of action was stated for a § 1 claim and found, based on *United States v. General Motors Corp.*, 384 U.S. 127, [*201] 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966) that the complaint stated a cause of action. *Six Twenty-Nine Productions*, 365 F.2d at 484-85. However, the court of appeals analyzed *General Motors* and, implicitly, *Klor's*, on which the court of appeals stated *General Motors* relied, as vertical restraints of trade. *Six Twenty-Nine Productions*, 365 F.2d at 484. As noted, the Supreme Court has since stated that both *General Motors* and *Klor's* involved horizontal combinations. *Sharp Electronics Corporation*, 485 U.S. at 734, 108 S. Ct. at 1525. Because the Court has found that the instant case does not constitute a horizontal restraint of trade and because plaintiff does not claim that the present case involves a vertical restraint of trade, the Court finds *Six Twenty-Nine Productions* inapplicable.

There are two additional reasons why *Six Twenty-Nine Productions* is inapposite. First, the Court notes that the Fifth Circuit at the time of that decision did not have the benefit of later Supreme Court statements as to its hesitancy to impose the *per se* rule of liability in antitrust cases. *Id. at 723, 108 S. Ct. at 1519; FTC v. Indiana Federation of Dentists, [*21] 476 U.S. at 458-59, 106 S. Ct. at 2017-18*. Second, the Fifth Circuit did not specifically state in *Six Twenty-Nine Productions* that the *per se* rule should be applied to the facts of that case. The court of appeals only found that a cause of action existed under § 1 and that summary judgment was inappropriate and remanded the case.

Turning to *St. Bernard Hospital*, the Court finds that this case also is inapplicable. First, the Court first notes that the Fifth Circuit had doubts whether the cause of action could be construed under the *per se* rules of antitrust liability because the allegations did "not assume a strictly horizontal restraint, but rather include a vertical link from supplier to customer." *St. Bernard Hospital, 712 F.2d 978*. "These charges are not so clearly *per se* violations of antitrust laws." *Id.* Having made that statement, the Fifth Circuit refused to find that the factual scenario in *St. Bernard Hospital* required use of the *per se* rule but remanded the case for further consideration of the "*per se* charges." *Id. at 987*. Additionally, the allegation of *per se* liability in *St. Bernard Hospital* was based on price fixing, *id.*, [**22] an allegation not made by Doctor's Hospital in this case. Finally, in discussing various other alternative forms for relief, the court of appeals noted that the evidence might indicate a refusal to deal. *Id. at 987-88*. However, the court of appeals did not state that there was any less of a requirement for a plurality of traders at one level in considering whether the *per se* rule should be applied. *Id.* Finally, as noted, since the decision in *St. Bernard Hospital*, the Supreme Court has recognized the specific horizontal nature of cases such as *Klor's*, on which plaintiff relies for its contention that the present case requires imposition of a *per se* rule for refusal to deal. *Sharp Electronics Corporation, 485 U.S. at 734, 108 S. Ct. at 1525*.

Therefore, for the foregoing reasons, the Court reaffirms its earlier decision that this case is not one where *per se* rules of illegality under the Sherman Act should be applied.

VI. Rule of Reason Analysis

Doctor's Hospital contends that the Court committed numerous errors in its analysis of plaintiff's claims under the rule of reason. However, in view of the Court's findings set forth above as to plaintiff's lack [**23] of antitrust standing, the Court recalls Section IV of its previous "Order and Reasons" except as specifically [*297] adopted above and except as to its discussion of *Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988)*. ("Order and Reasons," pp. 28-29, R.Doc. 282.)

VIII. Request for 54(b) Judgment

HN8 [↑] *Rule 54(b) of the Federal Rules of Civil Procedure* provides, in pertinent part, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . upon only upon an express determination that there is no just reason for delay and upon express direction for entry of judgment." The decision whether to enter a "54(b) judgment" is within the discretion of the Court. *H & W Industries v. Formosa Plastics Corp., 860 F.2d 172, 175 (5th Cir. 1988)*. The policy underlying *Rule 54(b)* is to prohibit "piecemeal appeals" except in limited circumstances. *Road Sprinkler Fitters v. Continental Sprinkler, 967 F.2d 145, 148 (5th Cir. 1992)*.

Although through its prior order and this ruling the Court dismisses plaintiff's federal and state antitrust claims, there still remain other claims based upon state law. The defendants have filed motions [**24] for summary judgment on those claims, which are set for hearing in the near future.

Therefore, pending a ruling on those motions, the Court defers ruling on plaintiff's request for entry of a judgment pursuant to *Rule 54(b)*. Should defendants be successful on those motions, then a judgment will be entered in the entire matter. Should plaintiff prevail on those motions, the Court will consider whether to enter judgment pursuant to *Rule 54(b)* at that time. This decision is in accord with the policy against "piecemeal appeals" and follows the most judicially efficient path.

Accordingly,

897 F. Supp. 290, *297 1995 U.S. Dist. LEXIS 12207, **24

IT IS ORDERED that plaintiff's motion for reconsideration is GRANTED insofar as the Court clarifies its earlier ruling.

IT IS FURTHER ORDERED that, in accord with the foregoing, partial summary judgment is GRANTED in favor of defendants' as to plaintiff's antitrust claims under federal and state law.

IT IS FURTHER ORDERED that the Court's prior "Order and Reasons" dated April 18, 1995, be AMENDED AND MODIFIED in accord with the foregoing.

IT IS FURTHER ORDERED that plaintiff's motion for entry of judgment pursuant to Fed.R.Civ.P. 54(b) is DEFERRED pending ruling on defendants' remaining motions for **[**25]** summary judgment.

New Orleans, Louisiana, this 18th day of August, 1995.

OKLA JONES II

UNITED STATES DISTRICT JUDGE

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FTC v. Onkyo U.S.A Corp.

United States District Court for the District of Columbia

August 18, 1995, Decided

Civil Action No. 95-1378-LFO

Reporter

1995 U.S. Dist. LEXIS 21222 *; 1995-2 Trade Cas. (CCH) P71,111

FEDERAL TRADE COMMISSION, Plaintiff, v. ONKYO U.S.A. CORPORATION, Defendant.

Disposition: [*1] Judgment entered in favor of plaintiff.

Core Terms

final judgment, parties, public interest, civil penalty, orders, entry of final judgment, consent decree, FTC Act, settlement, costs

Counsel: Richard R. Lury, Esq., Kelley Drye & Warren, New York, New York, Attorney for Onkyo U.S.A. Corporation.

Elizabeth A. Piotrowski, Esq., Deputy Assistant Director, Bureau of Competition, Federal Trade Commission, Washington, D.C., Attorney for Federal Trade Commission.

Judges: Louis F. Oberdorfer, UNITED STATES DISTRICT JUDGE

Opinion by: Louis F. Oberdorfer

Opinion

FINAL JUDGMENT

Plaintiff, Federal Trade Commission, commenced this action against defendant, Onkyo U.S.A. Corporation, for violations of an order issued by the Federal Trade Commission on July 2, 1982, in FTC Docket No. C-3092, [100 F.T.C. 59 \(1982\)](#). The parties have consented to entry of Final Judgment without trial or adjudication of any issue of fact or law, and without the Final Judgment constituting any evidence against or an admission by any party with respect to any such issue. They filed a joint motion for entry of judgment and a Stipulation on July 25, 1995.

The proposed Final Judgment contemplates a finding that: "Entry of this Final Judgment is in the public interest." An Order of July 25, 1995, requested that counsel submit to this Court a statement demonstrating the public interest in the entry of this judgment. Pursuant [*2] to that Order, counsel submitted a "Joint Statement Demonstrating the Public Interest in Entry of the Final Judgment in This Case" on August 4, 1995, a copy of which is attached. For the reasons provided in that Statement, the proposed Final Judgment is deemed to be in the public interest. Accordingly, it is this 18th day of August, 1995, hereby

ORDERED: that this Court has jurisdiction of the subject matter herein and of each of the parties consenting hereto, and the Complaint states a claim upon which relief can be granted against defendant under Sections 5(1) and 16(a)(1) of the Federal Trade Commission Act, [15 U.S.C. §§ 45\(1\)](#) and [56\(a\)\(1\)](#); and it is further

ORDERED: that judgment is entered in favor of plaintiff and against defendant, who shall pay to the United States, pursuant to Section 5(1) of the Federal Trade Commission Act, a civil penalty in the amount of two hundred twenty-five thousand U.S. dollars (\$ 225,000) within thirty (30) days after entry of this Final Judgment; the payment shall be made by wire transfer of funds to the U.S. Treasury through the Treasury Financial Communications System; in the event of default in payment, interest at the rate of twelve (12) percent [*3] per annum shall accrue thereon from the date of default to the date of payment; and it is further

ORDERED: that each party shall bear its own costs of the within action.

Louis F. Oberdorfer

UNITED STATES DISTRICT JUDGE

Attachment

FEDERAL TRADE COMMISSION, Plaintiff, v. ONKYO U.S.A. CORPORATION, Defendant.

Civ. Action No. 95-1378-LFO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AUG 21 1995, FILED

JOINT STATEMENT DEMONSTRATING THE PUBLIC INTEREST IN ENTRY OF THE FINAL JUDGMENT IN THIS CASE

This statement is submitted pursuant to this Court's July 25, 1995, Notice To Counsel, asking the parties to submit, either jointly or separately, "demonstration of the public interest in the entry of this [Final Judgment]." ¹

[*4] On July 25, 1995, the Federal Trade Commission ("Commission") filed a motion for entry of judgment in the above-entitled case, together with a Stipulation by which defendant consents to the filing and entry of a Final Judgment without trial or adjudication of any issue of fact or law. The proposed Final Judgment requires defendant to pay a civil penalty to the United States Treasury in the amount of \$ 225,000 for alleged violations of an order issued by the Commission on July 2, 1982, in FTC Docket No. C-3092, [100 F.T.C. 59 \(1982\)](#). No injunctive or other relief is required by the proposed Final Judgment, which also asserts that "Entry of this Final Judgment is in the public interest."

BACKGROUND

This action is brought by the Commission under Section 5(1) of the Federal Trade Commission Act ("FTC Act"), as amended, [15 U.S.C. §§ 45\(1\)](#), pursuant to its residual authority under [Section 16\(a\)\(1\)](#) of the FTC Act, [15 U.S.C. § 56\(a\)\(1\)](#), to obtain civil penalties for alleged violations of a final consent order issued by the Commission in FTC

¹ In doing so, the Court referred to this Circuit's recent decision in [United States v. Microsoft Corporation, 56 F.3d 1448 \(D.C. Cir. 1995\)](#), which held that a proposed antitrust consent decree was in the public interest. As discussed herein, this action is not subject to the requirements of the Antitrust Procedures and Penalties Act, [15 U.S.C. § 16\(b\)-\(h\)](#), which governed the court proceedings in *Microsoft*. Nonetheless, we show here that the relevant public interest standards that apply to the consent settlement met in this case. See, e.g., [SEC v. Randolph, 736 F.2d 525 \(9th Cir. 1984\)](#).

Docket No. C-3092.² [*6] Under Section 5(1) of the FTC Act, civil penalties may be imposed up to \$ 10,000 a day for each day of a continuing [*5] failure to obey a final order of the Commission.³ Under Section 16(a)(1) of the FTC Act, the Commission may bring any civil action under the FTC Act, including an action for civil penalties, in its own name if it notifies the Attorney General before commencing such an action and the Attorney General fails within 45 days of such notification to commence the litigation of the contemplated action.⁴

The Commission and the defendant have agreed [*7] to a settlement under which the defendant will pay \$ 225,000 to the United States Treasury for alleged violations of the Commission's order in Docket No. C-3092. Defendant has agreed to pay the sum within thirty days of entry of the final judgment.

ENTRY OF THE PROPOSED FINAL JUDGMENT IS IN THE PUBLIC INTEREST

As the Supreme Court has recognized:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971). Likewise, when it stated that "the Tunney Act was not intended to create a disincentive to the use of the consent decree," the court in *Microsoft* acknowledged that consent decrees are substantial antitrust enforcement tools. [*8] *United States v. Microsoft Corporation, 56 F.3d 1448, 1456 (D.C. Cir. 1995)*. See also *SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984)* ("The use of consent decrees encourages informal resolution of disputes, thereby lessening the risks and costs of litigation.").

² We note that the Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. § 16(b)-(h), to which the government's proposed consent decree in *Microsoft* was subject, requires that any proposal for a "consent judgment" submitted by the United States in a civil case filed "under the antitrust laws" be filed with the court at least 60 days in advance of its effective date, published in the Federal Register and a newspaper for public comment, and reviewed by the court for the purpose of determining whether it is in the public interest. The FTC Act is not an "antitrust law" within the meaning of the Clayton Act, 15 U.S.C. § 12(a). Accordingly, it is well settled that any action brought pursuant to the FTC Act for the recovery of civil penalties is not subject to the requirements of the Tunney Act. Even in procedures involving the assessment of civil penalties under Section 11(1) of the Clayton Act, 15 U.S.C. § 21(1), for violation of Federal Trade Commission orders, the courts have not required use of Tunney Act procedures in cases involving only the payment of civil penalties. Indeed, this Court has consistently entered consent judgments for civil penalties under the Hart-Scott-Rodino Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, without employing Tunney Act procedures. See, e.g., *United States v. Harold A. Honickman, 1992 U.S. Dist. LEXIS 18148, 1992-2 Trade Cas. (CCH) P17,018* (D.D.C.); *United States v. Beazer, plc, 1992 U.S. Dist. LEXIS 12755, 1992-2 Trade Cas. (CCH) P62,923* (D.D.C.); and *United States v. Atlantic Richfield Company, 1992 U.S. Dist. LEXIS 738, 1992-1 Trade Cas. (CCH) P69,695* (D.D.C.).

³ Section 5(1) of the FTC Act, 15 U.S.C. § 45(1) provides that:

Any person, partnership, or corporation who violates an order of the Commission after it becomes final, shall forfeit and pay to the United States a civil penalty of not more than \$ 10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General for the United States. Each separate violation of such an order shall be a separate offense, except that in the case of violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense . . .

⁴ On June 9, 1995, the Commission notified the Attorney General of its intention to commence the civil penalty action against the defendant in accordance with Section 16(a)(1) of the FTC Act. On July 19, 1995, the U.S. Department of Justice informed the Commission that it could file the action at any time without allowing 45 days to elapse.

The parties submit that the proposed settlement in this action is in the public interest in that it is fair, adequate and reasonable based on consideration of the factors discussed below.⁵ These factors include, among others: the need to deter similar conduct by this defendant and others;⁶ [*9] the need to vindicate the authority of the Commission and the rule of law⁷; and the defendant's ability to pay civil penalties.

Here, payment to the United States Treasury by the defendant of the \$ 225,000 civil penalty set by the Final Judgment is in the public interest because it likely will have the desired deterrent effect, by signaling to the defendant, other industry participants and other respondents subject to Commission orders, that Commission orders cannot be violated without significant consequences. It will also demonstrate the Commission's commitment to monitoring the compliance by respondents subject to its orders with the terms of such orders, as well as the Commission's willingness to enforce its orders. In addition, entry of the proposed Final Judgment is in the public interest because it will vindicate the authority of the Commission and the rule of law. The credibility of the Commission as a serious enforcer of its orders is essential. Consequently, the Commission must demonstrate to the business and legal communities that its orders must [*10] be complied with.⁸

The defendant's financial condition was also an element in the parties' agreement [*11] to settle for a \$ 225,000 payment. In 1994, the defendant's share of the United States home audio products market was only about 3%, and its net profits were only in the range of 1.2% of its gross sales. Moreover, the defendant already has significant lines of credit in place and is not in a position to materially increase its debt. It is in the public interest for the defendant to continue to be a viable competitor in the relevant market, and the Court should enter the proposed Final Judgement because its implementation would enable the defendant to continue its operations without having to cut costs or divert funds from activities directly involved in attempts to improve its financial and competitive positions in the marketplace.

The parties separately also considered the litigation risks present in this case,⁹ and the fact that, without settlement, both parties would incur substantial costs in litigation. In the case of the Commission, even if litigation resulted in an outcome favorable to the Commission, there is certainly some risk that the amount of civil penalties imposed on the defendant would be less than the \$ 225,000 agreed upon. In the defendant's case, the costs that [*12] it would incur in litigation would negatively impact its resources available for new product development and promotion and would make it a less viable competitor, to the public's detriment. Under the circumstances, the amount of the civil penalty agreed upon is entirely appropriate.

⁵ See [SEC v. Randolph, 736 F.2d 525, 529 \(9th Cir. 1984\)](#) ("unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved.").

⁶ To have any deterrent effect, a penalty must be large enough to be more than just a license fee or an acceptable cost of doing business. On the other hand, a penalty must not be so large that it threatens the financial health or competitive viability of the penalized entity. See [United States v. I.T.T. Continental Baking Co., 420 U.S. 223, 231, 43 L. Ed. 2d 148, 95 S. Ct. 926 \(1975\)](#).

⁷ See [United States v. J.B. Williams Co., Inc., 354 F. Supp. 521, 551 \(S.D.N.Y. 1973\)](#), rev'd and modified on other grounds, [498 F.2d 414 \(2d Cir. 1974\)](#).

⁸ At the same time, it should be noted that the defendant is not charged with *de novo* violations of the antitrust laws. The principal conduct alleged in the complaint in this matter involves the defendant, one of its independent sales representatives and one of its former retail dealers with which the defendant was in litigation at the time the Commission's investigation was commenced. The former retail dealer, Best Buy, had filed suit against the defendant alleging that it had been terminated due to its failure to continue participating in a nationwide resale price maintenance conspiracy among the defendant and all its dealers. The Commission's complaint does not allege that defendant was engaged in a resale price maintenance conspiracy with its dealers or that defendant's former retail dealer, Best Buy, was terminated by the defendant in violation of any provision of the order in Docket No. C-3092.

⁹ For example, the age of the evidence concerning the alleged order violations was considered by the Commission.

Finally, although the proposed Final Judgment, involving only the payment of a civil penalty by the defendant for alleged violations of a final Commission order, is not subject to review under the Tunney Act, the parties believe that the concerns raised by the district court and third parties in *Microsoft*, in any event, are not present here. For example, the proposed Final Judgment is not ambiguous; it clearly sets out the amount and method of payment by the defendant of the agreed-to civil penalty. It also contains a finding that each party shall bear its own costs of the action. The specificity with which these [*13] matters are addressed in the proposed Final Judgment eliminates any chance that its implementation would be difficult to achieve. In addition, in *Microsoft*, third parties contended that they would be injured by entry of the consent decree. In this case, the government seeks only civil penalties and no third parties are involved.

The proposed settlement is in the public interest because it is fair and reasonable under the circumstances described above.¹⁰ The Commission believes that the proposed settlement is adequate to deter violations of Commission orders by the defendant and others, and to vindicate the Commission's authority, while providing a fair amount of latitude to accommodate the defendant's ability to pay a civil penalty without jeopardizing its competitive viability.

[*14] CONCLUSION

For the reasons expressed above, we ask the Court to grant the Commission's Motion For Entry of Judgment and enter the Final Judgment in the form stipulated by the parties.

Respectfully submitted,

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Federal Trade Commission

Dated: August 4, 1995

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¹⁰ The Commission also considered the following factors before determining to accept the settlement: (1) the good or bad faith of the defendant; (2) any benefits that the defendant may have derived from its alleged violation of the order; and (3) the harm to the public resulting from the defendant's alleged conduct.



Hialeah, Inc. v. Florida Horsemen's Benevolent & Protective Ass'n

United States District Court for the Southern District of Florida

August 24, 1995, Decided ; August 25, 1995, FILED

CASE NO. 94-0480-CIV-NESBITT

Reporter

899 F. Supp. 616 *; 1995 U.S. Dist. LEXIS 13174 **; 1995-2 Trade Cas. (CCH) P71,130; 9 Fla. L. Weekly Fed. D 263

HIALEAH, INC., a Florida corporation, and HIALEAH PARK, INC., a Florida corporation, Plaintiffs, vs. FLORIDA HORSEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION, INC., a dissolved Florida corporation; KENT H. STIRLING, individually and as President; SCOTT SAVIN, individually and as First Vice President and Treasurer; JAMES R. CHAMPMAN, individually and as Second Vice President; WILLIAM P. WHITE, individually and as Secretary; J.C. BARNHILL; JACQUELINE BRITTAINE; VINCENT CINCOTTA; ANDREW COLANDO; O.S. EDWARDS; MANUEL ESTEVEZ; FRANK GOMEZ; JOSE MENDEZ; SHAWN MUSGRAVE; LINDA PETERSON; R.J. RICHARDS, JR.; EMANUEL TORTORA; and RALPH ZIADIE, individually and as directors of FLORIDA HORSEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION, INC., a dissolved Florida corporation, Defendants.

Core Terms

betting, racing, Antitrust, cause of action, simulcasting, horse, off-track, motion to dismiss, horsemen's, alleges, host, wagering, takeout, track, mootness, purposes, parties, season, transmissions, horseracing, Injunction, Damages, anti trust law, race track, Sherman Act, Declaratory, interstate, concerted, trainers, entity

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > Elements

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > General Overview

HN1[] State & Territorial Government Licensing, Gaming & Lotteries

15 U.S.C.S. § 3004(a) prohibits wagering at off-track betting offices unless three parties consent: (1) the track which conducts the live race; (2) the racing commission having jurisdiction to regulate racing within the state where the live race occurs; and (3) the racing commission having jurisdiction over race wagering in the state where the simulcast occurs.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN2 Contract Conditions & Provisions, Conditions Precedent

The Interstate Horseracing Act (IHA) requires that, as a condition precedent to obtaining the consent of a host racing association, the host racing association must also have a written agreement with the horsemen's group. [15 U.S.C.S. § 3004\(a\)\(1\)\(A\)](#). The "horsemen's group" is defined by the IHA as the group which represents the majority of owners and trainers racing at a horserace track. [15 U.S.C.S. § 3002\(12\)](#).

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > Elements

HN3 State & Territorial Government Licensing, Gaming & Lotteries

The Interstate Horseracing Act (IHA) states in a section entitled "Liability and damages" that any person accepting an interstate off-track wager in violation of the chapter shall be civilly liable for damages to the host state, the host racing association and the horsemen's group. [15 U.S.C.S. § 3005](#). The IHA provides, under a section entitled "Civil Action," that the host state, the host racing association, or the horsemen's group may commence a civil action against any person alleged to be in violation of the chapter, for injunctive relief to restrain violations and for damages in accordance with [15 U.S.C.S. 3005](#). [15 U.S.C.S. § 3006](#).

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

HN4 Motions to Dismiss, Failure to State Claim

[Fed. R. Civ. P. 12\(b\)\(6\)](#) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. A court is confined to a review of the allegations pled in a complaint, must accept those allegations as true, and must resolve any factual issues in a manner favorable to the nonmovant. A claim may be dismissed pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) only if it is clear that no relief could be granted under any set of facts consistent with the allegations.

Civil Procedure > ... > Justiciability > Mootness > Evading Review Exception

Civil Procedure > ... > Justiciability > Mootness > General Overview

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

HN5 Mootness, Evading Review Exception

An exception to the mootness doctrine exists for situations which are capable of repetition, yet evading review. The "capable of repetition, yet evading review" exception to the mootness doctrine applies when a case meets the exception's following criteria: (1) a challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN6 State & Territorial Government Licensing, Gaming & Lotteries

The Interstate Horseracing Act provides no immunity to any party from federal [antitrust law](#).

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7 [] Sherman Act, Remedies

Section 1 of the Sherman Antitrust Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states is declared to be illegal. [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8 [] Higher Education & Professional Associations, Colleges & Universities

Since every contract could be considered a restraint of trade, the Sherman Act prohibits only unreasonable restraints of trade.

Antitrust & Trade Law > Sherman Act > Claims

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

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

HN9 [] Sherman Act, Claims

To establish a violation of section 1 of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must prove that two or more distinct entities agreed to take action against him.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN10 [] Antitrust & Trade Law, Sherman Act

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Trade associations have been recognized as being comprised of competitors. Merely because the members of a trade association act in a unified manner instead of individually does not remove their actions from enforcement under [section 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN11**](#) [L] Antitrust & Trade Law, Sherman Act

The Florida Antitrust Act of 1980 provides that every contract, combination, or conspiracy in restraint of trade or commerce in the state is unlawful. [Fla. Stat. ch. 542.18](#) (1995). This language is nearly identical to [section 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#). Florida's **antitrust law** states that it is the intent of the legislature that, in construing the chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes. [Fla. Stat. ch. 542.32](#) (1995).

Governments > Courts > Judicial Precedent

[**HN12**](#) [L] Courts, Judicial Precedent

A decision of a sister circuit court of appeals is not binding precedent on a district court in another circuit, but is merely persuasive authority.

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

[**HN13**](#) [L] State & Territorial Government Licensing, Gaming & Lotteries

[15 U.S.C.S. § 3006\(a\)](#) provides that a horsemen's group may commence a civil action against any person alleged to be in violation of the chapter.

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For Defendants: Bruce David Green, Esquire, Bruce David Green, P.A., 2600 South Andrews Avenue, Suite 400, Fort Lauderdale, Florida 33316. Steven Wisotsky, Esquire, Steven Wisotsky, P.A., 3050 Jefferson Street, Miami, Florida 33133.

Judges: LENORE C. NESBITT, UNITED STATES DISTRICT JUDGE

Opinion by: LENORE C. NESBITT

Opinion

[*617] ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This cause comes before the Court upon Defendants' Motion to Dismiss Second Amended Complaint for Failure to State a Claim Upon Which Relief Can be Granted, filed March 28, 1995 (D.E. #78), and Plaintiffs' Motion to Dismiss

Count I of First Amended Counterclaims for Damages, Injunction [*618] and Declaratory Relief for Failure to State a Claim Upon Which Relief Can be Granted, filed May 27, 1994 (D.E. #26).

I. FACTUAL BACKGROUND

A. Simulcasting

According to Plaintiff's Second Amended Civil Complaint, the parties are as follows: Plaintiff Hialeah, Inc. ("Hialeah") is the operator of Hialeah Park Race Track, a thoroughbred horseracing track located [**2] in South Florida. Defendant Florida Horsemen's Benevolent & Protective Association, Inc. ("FHBPA") is a not-for-profit group that represents the interests of horse owners and trainers at Florida's thoroughbred horseracing tracks, including Hialeah Park. The remaining individually named Defendants are either officers or directors of Defendant FHBPA.

This action stems from Plaintiff Hialeah's desire to transmit simulcasts of horseraces held at Hialeah Park to betting places outside of the state of Florida. These out of state betting establishments -- termed "off-track betting offices" -- would then pay a portion of their proceeds to Plaintiff Hialeah for the permission to receive the transmission of, and to bet on, races held at Hialeah Park.

Congress was concerned about the effects such interstate transmissions would have on attendance at small horse race tracks that were located near off-track betting offices, as these off-track betting offices could receive transmissions of and take bets on races held at much more prestigious tracks involving a higher caliber of horses than was commonly found at small local tracks. See [Alabama Sportservice, Inc. v. National Horsemen's Benevolent & Protective Ass'n, 767 F. Supp. 1573, 1578 \(M.D. Fla. 1991\)](#). Congress also appeared concerned with the possibility that off-track betting offices could take bets on simulcasted horse races without compensating either the track where the race occurred or the horse owners. In addition, Congress recognized that, "In the limited area of interstate off-track wagering on horse races, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers." [15 U.S.C. § 3001\(a\)\(3\) \(1995\)](#). Consequently, in 1978 Congress passed the Interstate Horseracing Act, [15 U.S.C. § 3001, et seq.](#) ("the IHA"), to regulate such wagering, as well as to "further the horseracing and legal off-track betting industries in the United States." [§ 3001\(b\)](#).

B. The IHA

The IHA mandates that before betting can be accepted in another state on a simulcasted horserace, the consent of a number of interested parties must first be obtained.

HN1[] Title [15, U.S.C. § 3004\(a\)](#) prohibits such wagering at ["off-track betting offices"] unless three parties consent: (1) the track which conducts the live race [termed the "host racing association"]; [**4] (2) the racing commission having jurisdiction to regulate racing within the state where the live race occurs [the "host racing commission"]; and (3) the racing commission having jurisdiction over race wagering in the state where the simulcast occurs [the "off-track racing commission"].

[Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass'n, Inc., 989 F.2d 1266, 1267 \(1st Cir. 1993\)](#), cert. denied, [126 L. Ed. 2d 593, U.S. ___, 114 S. Ct. 634 \(1993\)](#). In addition, and of most importance to the action before this Court, **HN2**[] the IHA requires that, as a condition precedent to obtaining the consent of the host racing association, the host racing association must also "have a written agreement with the horsemen's group." [§ 3004\(a\)\(1\)\(A\)](#). The "horsemen's group" is defined by the IHA as "the group which represents the majority of owners and trainers racing . . ." at the horserace track. [§ 3002\(12\)](#).

Two sections of the IHA discuss the enforcement of this consent requirement. First, [HN3](#)¹ the IHA states in a section entitled "Liability and damages" that, "Any person accepting an interstate off-track wager in violation of this chapter shall be **[**5]** civilly liable for damages to the host State, the host racing association and the horsemen's group." [§ 3005](#). In addition, the IHA provides, under a section entitled "Civil Action," that, "The host State, the host racing association, or the horsemen's group may commence a civil action against any person alleged to be **[*619]** in violation of this chapter, for injunctive relief to restrain violations and for damages in accordance with [section 3005](#) of this title." [§ 3006](#).

C. The Instant Action

1. Background

In the action presently before the Court, Plaintiff Hialeah alleges that it is a "host racing association" as defined by the IHA. (2nd Am. Compl. P 6.) Plaintiff Hialeah also states that Defendant FHBPA "asserts that it is a 'horsemen's group,'" as defined by the IHA (2nd Am. Compl. P 7.).¹

[6]** The underlying basis for Plaintiff Hialeah's action is that, because of longstanding hostilities between Plaintiff Hialeah and Defendant FHBPA, "Defendants are operating contrary to their best economic interest in a predatory attempt to injure the Plaintiff's business or property." (2nd Am. Compl. P 41.) One of the main ways in which Defendants are carrying out this objective, Plaintiff Hialeah believes, is by unjustifiably withholding their consent to the simulcasting for betting purposes of races held at Hialeah Park.²

Before Hialeah Park's 1994 racing season, Plaintiff Hialeah entered into twenty-five contracts with off-track betting offices for the simulcasting of races held at Hialeah Park Race Track.³ Defendant FHBPA, however, pursuant to the IHA, initially refused to give its consent to Plaintiff Hialeah to simulcast Hialeah Park races to these twenty-five off-track **[**7]** betting offices until Plaintiff Hialeah agreed to enter into "Paragraph H" of a contract between Plaintiff Hialeah and Defendant FHBPA. Paragraph H is "a provision in a proposed agreement between the parties which limited the amount of 'takeout'... Plaintiff would be able to use to cover its operating expenses and attempt to make a profit." (2nd Am. Compl. P 50.) The "takeout" is defined by Plaintiff Hialeah as the "total pari-mutuel handle to cover its operating expenses and account for profit." (2nd Am. Compl. P 23.) In sum, then, Plaintiff Hialeah alleges that, as part of its scheme to destroy Plaintiff's business, Defendant FHBPA has refused to give consent to simulcast races for betting purposes unless Plaintiff Hialeah agrees to be restricted to what Hialeah believes is an unfairly small amount of the takeout. Without a suitable takeout amount, Plaintiff Hialeah alleges that it will be unable to maintain its facilities, to make a profit, and to stay in business.

[8]** In addition, Plaintiff Hialeah has also alleged that Defendant FHBPA has attempted to damage Plaintiff Hialeah's business by refusing to send FHBPA-member horses to Plaintiff Hialeah's race track. Without horses, of course, Plaintiff Hialeah cannot run races, cannot take bets, and cannot derive suitable income to maintain its operations. (Compl. PP 35-37.)

¹ The Court notes that although Plaintiff Hialeah seems reluctant to admit that Defendant FHBPA is the relevant "horsemen's group" as defined by the IHA, Plaintiff Hialeah does not contest the status of Defendant FHBPA as the relevant horsemen's group in any of Plaintiff's moving papers.

² This refusal by Defendant FHBPA to give consent to the simulcasts has been referred to by Defendants as the "horsemen's veto."

³ Although Plaintiff Hialeah has not affirmatively asserted that it has obtained the necessary consent from the appropriate "host racing commission" and the "off-track racing commissions" to simulcast the races, Defendants have also not asserted that Plaintiff Hialeah has failed to obtain the consent of these agencies.

In an attempt to bypass the FHBPA and obtain the consent to simulcast races for betting purposes from the individual horse owners and trainers themselves, Plaintiff Hialeah has required individual horsemen to give such consent when they rent a stall from Plaintiff Hialeah or when they enter their horse in a race.

In applying for a stall at Plaintiff's racetrack to stable a horse, a release must be completed by each horse owner or trainer authorizing Plaintiff to "televise, or authorize or license the televising of horse racing. . .at the Track. . .without compensation". . .In addition, the entry blank for all horses entered by trainers or owners in a race at the Plaintiff's facility also authorizes Plaintiff to "televise, or authorize or license the televising of, with or [***620**] without consideration therefor, certain horse **[**9]** races to be conducted in its racing plant."

(2nd Am. Compl. PP 66-67.)

2. The 1994 Racing Season

Having not received Defendant FHBPA's consent on the eve of the 1994 racing season, Plaintiff Hialeah brought suit against Defendants on March 11, 1994, seeking, along with other relief, a declaration that the IHA is unconstitutional. Plaintiff Hialeah also sought an emergency preliminary injunction "prohibiting Defendants from further unreasonable withholding of their consent required under the [IHA]. . . ." (Emergency Mot. for Prelim. Injunctive Relief at 1-2.) After a hearing held before the Court on March 14, 1994, Defendant FHBPA agreed to give its consent to simulcasting for betting purposes after Plaintiff Hialeah agreed to enter into the above-mentioned Paragraph H.

Subsequent to this agreement, the parties have had continuous disputes regarding the amount of takeout Plaintiff Hialeah should receive from simulcasting revenue. As a further development bearing on this ongoing action, soon after Plaintiff Hialeah originally filed its action, the Sixth Circuit Court of Appeals held in a similar suit that the IHA is constitutional. *Kentucky Division, Horsemen's* **[**10]** [*Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc., 20 F.3d 1406 \(6th Cir. 1994\)*](#). These circumstances compelled Plaintiff Hialeah to amend its Amended Complaint.

In its Second Amended Complaint, Plaintiff Hialeah alleges three causes of action: (1) for violation of [section 1](#) of the Sherman Antitrust Act; (2) for violation of the Florida Antitrust Act of 1980; and (3) for declaratory relief that the IHA is unconstitutional as applied to Plaintiff Hialeah. Defendants have moved to dismiss Plaintiff's entire Second Amended Complaint.

Defendants have also filed a Counterclaim alleging first, a count seeking damages for violation of the IHA, and second, declaratory judgments that its horsemen's veto is valid and that Plaintiff's actions to require the giving of consent in its stall and entry applications is a violation of the IHA. In response, Plaintiff Hialeah moved to dismiss Count I of Defendants Counterclaim brought for violation of the IHA.

II. DISCUSSION

A. Standard for Motion to Dismiss

HN4  [*Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure*](#) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. [*Neitzke v. Williams, \[*11\] 490 U.S. 319, 326, 104 L. Ed. 2d 338, 109 S. Ct. 1827 \(1989\)*](#). The Court, however, is confined to a review of the allegations pled in the complaint, must accept those allegations as true, and must resolve any factual issues in a manner favorable to the nonmovant. See [*Quinones v. Durkis, 638 F. Supp. 856, 858 \(S.D. Fla. 1986\)*](#). Thus, a claim may be dismissed pursuant to [*Rule 12\(b\)\(6\)*](#) only if it is clear that no relief could be granted under any set of facts consistent with the allegations. [*Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 \(1984\); Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)*](#).

B. Defendant FHBPA's Motion to Dismiss

The primary basis for Defendants' Motion to Dismiss is that Plaintiff Hialeah has failed to allege anti-competitive behavior on the part of Defendants as required under section 1 of the Sherman Antitrust Act. Defendants also raise two prudential issues, which the Court must first address.

1. Mootness

Initially, Defendants argue that this case is now moot, as Defendant FHBPA has already given its consent to Plaintiff Hialeah to simulcast races for betting purposes during the 1994 [**12] racing season. The parties agree that those races were, indeed, simulcasted for betting purposes, and therefore any cause of action against Defendant FHBPA for failure to give its consent to the simulcasting is now moot.

Although the 1994 races and simulcasting may have already occurred -- thus apparently terminating the controversy between the parties -- HNS [] an exception to the mootness doctrine exists for situations which are "capable [*621] of repetition, yet evading review." See New Suffolk Downs Corp. v. Rockingham Venture, Inc., 656 F. Supp. 1190, 1191 (D.N.H. 1987) (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515, 55 L. Ed. 310, 31 S. Ct. 279 (1911)). When a similar argument regarding mootness was brought in an action involving the IHA -- where the racing season had already been completed at the time the court reviewed a motion for summary judgment -- the District Court for the District of New Hampshire held that the "capable of repetition, yet evading review" exception to the mootness doctrine applied because the case met the exception's following criteria: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation [**13] or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Suffolk Downs, 656 F. Supp. at 1191 (quoting Weinstein v. Bradford, 423 U.S. 147, 149, 46 L. Ed. 2d 350, 96 S. Ct. 347 (1975)) (other citations omitted).

The instant action also meets both of these criteria. The 58-day 1994 racing season is certainly too short a duration to fully litigate an action, and Plaintiff Hialeah believes that it will be subject to Defendant FHBPA's refusal to give consent before each following year's racing season. Consequently, this is a classic case for application of the "capable of repetition, yet evading review" exception to the mootness doctrine, and the Court, therefore, finds that the doctrine of mootness does not bar this action.

2. Standing

Second, Defendants argue that Plaintiff Hialeah lacks standing to bring its action. Defendants explain their argument in this way:

Plaintiff has not and will not suffer injury as transmission of racing from Hialeah Race Track is not prohibited, nor is wagering on the racing at Hialeah Race Track prohibited. Rather, wagering is only prohibited at remote [**14] "off-track betting systems," which are the only parties who would, could or might suffer a cognizable injury as a result of their inability to accept wagers on such racing transmissions in the absence of a written agreement between the "host racing association" and the "horsemen's group." The IHA does not give standing to a "host racing association" to seek redress against a "horsemen's group" due to the inability of the host racing association to successfully negotiate an agreement.

(Defs.' Mem. of Law in Support of Mot. to Dismiss P 14) (footnotes omitted).

First, Plaintiff Hialeah has clearly alleged in its Second Amended Complaint that it will suffer economic injury from Defendants' refusal to give consent to simulcasting for betting purposes. "Revenues obtained by Plaintiff pursuant to the off-track wagers placed as a result of the broadcast of its signal make up a large percentage of the total revenues received by the Plaintiff for its racing meet." (2nd Am. Compl. P 45. See also 2nd Am. Compl. P 80, listing

injury to Plaintiff's business "as a direct result of Defendant's conduct. . . .") Without the additional revenues from off-track transmissions and betting, [**15] Plaintiff Hialeah believes it will have difficulty staying in business.

Second, Plaintiff Hialeah is not proceeding under a cause of action provided for by the IHA, but is proceeding under federal and state antitrust laws. Whether the IHA confers standing to Plaintiff Hialeah is irrelevant to the causes of action brought by Plaintiff in its Second Amended Complaint, and Defendant does not challenge that Plaintiff Hialeah has standing to bring antitrust causes of action against Defendants. Consequently, the Court finds that Plaintiff Hialeah has standing to bring its current action against Defendants.

3. Anti-Competitive Activity

a. Harm to Competition

Defendants' remaining arguments revolve around the applicability of an antitrust cause of action to the allegations in Plaintiff's Second Amended Complaint. Initially, the Court recognizes that [HN6](#) the IHA provides no immunity to any party from federal antitrust law, nor does the legislative history indicate that this was Congress's intent:

The legislative history further provides:

[*622] This legislation in no way modifies or affects the scope or application of the antitrust laws of the United States, nor does it confer [**16] upon any person or persons the right to enter into any agreement in restraint of trade which would be prohibited under the antitrust laws.

[Alabama Sportservice, 767 F. Supp. at 1578](#) (quoting H.R. Rep. No. 1733, 95th Cong., 2d Sess., at 4 (1978) U.S. Code Cong. & Admin. News 1978, pp. 4132).

Next, turning to the heart of Defendants' argument, the Court first recognizes that [HN7](#) section 1 of the Sherman Antitrust Act provides that, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . is declared to be illegal." [15 U.S.C. § 1 \(1995\)](#).⁴ Defendants allege that Plaintiff's Sherman Antitrust Act action must be dismissed because "Plaintiff has failed to state a basis for relief under [Section 1](#) of the Sherman Act [in that] it has failed to allege that the acts of the FHBPA are and were injurious to competition in general." (Defs.' Mem. of Law in Support of Mot. to Dismiss at 11.) (See [American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 n.8 \(11th Cir. 1985\)](#) ("Harm to competition is a necessary element of all private antitrust suits under [Sections 1](#) and [2](#) of the Sherman Act. . . ."). [**17] In response, Plaintiff Hialeah argues that it has alleged an injury to competition, because its theory is that Defendants have engaged in a "concerted refusal to deal" with Plaintiff Hialeah, one of the recognized "unreasonable restraints of trade" prohibited by [section 1](#) of the Sherman Antitrust Act which have been determined to cause a harm to competition. See [Cha-Car, 752 F.2d at 612-13](#).

The Court agrees that Plaintiff Hialeah has set forth a sufficient cause of action against Defendants under [section 1](#) of the Sherman Antitrust Act. Plaintiff has sufficiently alleged that [**18] Defendant FHBPA's refusal to give consent consists of a concerted refusal to deal with Plaintiff Hialeah.⁵ This theory can either be analyzed under a "rule of reason" (i.e., a determination as to whether the activity unreasonably harms competition), or can be declared *per se* illegal. *Id.* The Court has not yet been asked to decide whether to apply a rule of *per se* illegality or rule of reason analysis to this action, but under either analysis, if plaintiff Hialeah is able to establish that

⁴ Of course, [HN8](#) since "every contract could be considered a restraint of trade, the Sherman Act prohibits only 'unreasonable restraints of trade.'" [Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609, 612 \(11th Cir. 1985\)](#) (quoting [National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 2959, 82 L. Ed. 2d 70 \(1984\)](#), *reh'g denied, 762 F.2d 1023 (11th Cir. 1985)*).

⁵ Also termed a "group boycott."

Defendants have engaged in a concerted refusal to deal or in a group boycott, then Plaintiff Hialeah will have established a harm to competition.

b. Single Entity

Second, Defendants argue that Plaintiff Hialeah has failed to set forth a cause of action under [section 1](#) of the Sherman Antitrust Act upon which relief can be granted because Plaintiff Hialeah cannot establish that more than one entity is involved in the allegedly actionable activity. [HN9](#) "To establish a violation [**19] of [section 1](#) of the Sherman Act, a plaintiff must prove that two or more distinct entities agreed to take action against him." [Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 818 \(11th Cir. 1990\)](#), cert. denied, 495 U.S. 924, 109 L. Ed. 2d 322, 110 S. Ct. 1960 (1990). Defendants argue that they are really one entity -- the FHBPA -- and, therefore, in not giving consent to Plaintiff Hialeah to simulcast its races for betting purposes, Defendants have not conspired with anyone else to restrain trade.

While the FHBPA may be one entity, it is composed of a number of competitors that can act together in a concerted fashion. Therefore, the actions of a number of horsemen, taken by one association representing them, can be a concerted action such as to meet the definition of a Sherman Act violation. [HN10](#) Trade associations have been recognized as being comprised of competitors. See [Alabama Sportservice, 767 F. Supp. at 1580](#). Consequently, merely because the members of the FHBPA have acted with one unified vote instead of individually withholding [*623] consent does not, at this time, remove their actions from enforcement under [section 1](#) of the Sherman Antitrust Act.

Consequently, [**20] Defendants have failed to meet their burden of establishing that Count I of Plaintiff Hialeah's Second Amended Complaint, alleging a violation [section 1](#) of the Sherman Antitrust Act, does not allege a cause of action upon which relief can be granted.

4. State Antitrust Cause of Action

In addition to Plaintiff's Sherman Antitrust Act cause of action at Count I, Plaintiff Hialeah's Second Amended Complaint also alleges a cause of action at Count II for violation of [HN11](#) the Florida Antitrust Act of 1980, which provides that, "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." [FLA. STAT. ch. 542.18](#) (1995). This language is nearly identical to [section 1](#) of the Sherman Antitrust Act. Recognizing this, Florida's [antitrust law](#) states that, "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 comparable federal antitrust statutes." [FLA. STAT. ch. 542.32](#) (1995).

Defendants' sole basis for seeking the dismissal of Plaintiff's Florida Antitrust Act cause of action is that, because Plaintiff Hialeah's Sherman Act cause [**21] of action is untenable based on federal law, so, too, must Plaintiff's Florida antitrust action be untenable when that same federal law is applied to it. "Because Plaintiffs [sic] have failed to state a claim upon which relief may be granted under [Section 1](#) of the Sherman Act, they have similarly failed to state a basis upon which relief may be granted under the Florida Antitrust Act of 1980." (Defs.' Mem. of Law in Support of Mot. to Dismiss P 27.) As the Court, however, has held that Defendants have failed to meet their burden of establishing that Count I of Plaintiff Hialeah's Second Amended Complaint does not allege a cause of action upon which relief can be granted, Defendants have also failed to meet their burden as to Count II.

5. Challenge to Constitutionality

Plaintiff Hialeah's third and final cause of action challenges the constitutionality of the IHA as it is applied to these facts.⁶ Plaintiff Hialeah alleges that because the IHA, as applied, is void for vagueness, bears no rational relationship to legitimate government goals, and is violative of substantive due process rights, the Court should declare the IHA unconstitutional.

[**22] Defendants moved to dismiss Count III of Plaintiff Hialeah's Second Amended Complaint on the grounds that, because the Sixth Circuit in *Kentucky Division* has declared that the IHA is constitutional, the additional language "as applied" to the current challenge to constitutionality does "absolutely nothing to make these claims tenable." (Defs.' Mem. of Law in Support of Mot. to Dismiss P 28.) In short, Defendants' sole basis for dismissal of Count III is that, "These issues have all been considered and rejected by the Sixth Circuit Court of Appeal." (*Id.*)

HN12 [↑] A decision of a sister circuit court of appeals is not binding precedent on a district court in another circuit, but is merely persuasive authority. See *Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985). Therefore, Defendants cannot establish that Plaintiff's cause of action fails to state a cause of action upon which relief can be granted, as any district court outside of the Sixth Circuit could disagree with the Sixth Circuit's analysis and declare the IHA unconstitutional. Because Defendants have not raised any other grounds for dismissal of Plaintiff's Count III other than that the Sixth Circuit's decision [**23] should preclude it, Defendants have failed to meet their burden of establishing that Plaintiff's Count III fails to state a cause of action upon which relief can be granted, and Defendants' motion to dismiss must be denied as to this Count. After more discovery, and at the summary judgment stage, the Court will examine the constitutionality of the IHA, keeping in mind the persuasive effect of the Sixth Circuit's decision.

[*624] C. Plaintiff Hialeah's Motion to Dismiss Count I of Defendants' First Amended Counterclaims

The Court finally turns to Defendants' Counterclaim and the challenge made to it by Plaintiff Hialeah. In Count I of its First Amended Counterclaims for Damages, Injunction and Declaratory Relief ("Amended Counterclaims"), Defendant FHBPA alleges that the "FHBPA has suffered, and will continue to suffer, significant financial losses resulting from the excessive takeout of HIALEAH INC. and its refusal to bargain in 'the regular contractual process' over the takeout. . . . The past and continuing violations of the IHA stated above entitles counterplaintiff FHBPA to relief under [15 U.S.C. § 3006](#). . . ." (Am. Counterclaim PP 11-12.)

In its Motion to Dismiss Count I of [**24] Defendants' Amended Counterclaims, Plaintiff Hialeah argues that [§ 3006](#) of the IHA cannot be the basis for a cause of action against it because Defendant FHBPA has given its consent to the acceptance of off-track wagers. Therefore, because Defendants cannot allege that a violation of the IHA has occurred, they cannot bring an action against Plaintiff Hialeah for the violation of the IHA.

The Court agrees. **HN13** [↑] [Section 3006\(a\)](#) provides that "the horsemen's group may commence a civil action against any person alleged to be in violation of this chapter. . . ." [§ 3006\(a\)](#). The question then becomes whether Defendant FHBPA's action alleges a violation of the IHA by Plaintiff Hialeah. It does not. The IHA only requires that the consent of the horsemen's group be obtained before bets can be taken at an off-track site, and Defendants concede that that consent was obtained. The IHA does not limit the amount of takeout a horse racing association can demand, nor does it impose on a horse racing association a requirement to negotiate for such consent by some standard defined by Defendant FHBPA as "the regular contract process." Accordingly, taking Defendant FHBPA's allegations in Count I of its [**25] Counterclaim as true, Defendant FHBPA's statements that Plaintiff Hialeah is taking an excessive takeout and is refusing to bargain in the regular contract process does not adequately state a violation of the IHA such that relief may be granted. Consequently, Count I of Defendant FHBPA's Counterclaim must be dismissed.

⁶ The Court has granted the United States of America leave to intervene in this action so that it may defend Plaintiff Hialeah's challenge to the constitutionality of the IHA.

III. CONCLUSION

Based on the preceding analysis, it is hereby

ORDERED and **ADJUDGED** that:

1. Defendants' Motion to Dismiss Second Amended Complaint for Failure to State a Claim Upon Which Relief Can be Granted, filed March 28, 1995 (D.E. #78), is **DENIED**.

2. Plaintiffs' Motion to Dismiss Count I of First Amended Counterclaims for Damages, Injunction and Declaratory Relief for Failure to State a Claim Upon Which Relief Can be Granted, filed May 27, 1994 (D.E. #26), is **GRANTED**.

DONE and ORDERED in chambers, Miami, Florida, this 24 day of August, 1995.

LENORE C. NESBITT

UNITED STATES DISTRICT JUDGE

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Leslie v. Lloyd's of London

United States District Court for the Southern District of Texas, Houston Division

August 25, 1995, Decided ; August 28, 1995, ENTERED

CIVIL ACTION NO. H-90-1907 CONSOLIDATED

Reporter

1995 U.S. Dist. LEXIS 15380 *

CHARLES ROBERT LESLIE, Plaintiff, v. LLOYD'S OF LONDON, a/k/a LLOYD'S, a/k/a THE CORPORATION OF LLOYD'S, a/k/a THE SOCIETY OF LLOYD'S, and R.W. STURGE & CO., a/k/a R.W. STURGE LTD., Defendants.

Core Terms

syndicates, underwriting, clauses, alleges, consumers, courts, risks, extraterritorially, recommendation, choice-of-law, rights, forum-selection, transactions, securities law, regulation, motion to dismiss, participations, Supplemental, Memorandum, reinsurers, remedies, reconsideration motion, securities fraud, public policy, membership, provisions, comity, misrepresentations, retroactive, commerce

LexisNexis® Headnotes

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

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] Motions to Dismiss, Failure to State Claim

When ruling on a motion to dismiss for failure to state a claim, the court is not concerned with the proof either side has offered, but solely with the plaintiff's allegations.

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

HN2[] Motions to Dismiss, Failure to State Claim

A complaint is subject to dismissal 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. The court must accept all well-pleaded allegations as true and view them in the light most favorable to the plaintiff.

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

HN3 Implied Private Rights of Action, Deceptive & Manipulative Devices

See [17 C.F.R. § 240.10b-5](#).

Business & Corporate Compliance > ... > Postoffering & Secondary Distributions > Registration Requirements > Registration of Securities

Securities Law > ... > Registration Requirements > Registration of Markets & Market Participants > Broker-Dealers

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

HN4 Postoffering & Secondary Distributions, Registration of Securities

The Securities Exchange Act of 1934 § 10(b), [15 U.S.C.S. § 78j](#), applies not only to any security registered on a national securities exchange, but also to any security not so registered. [15 U.S.C.S. § 78j\(b\)](#). The scope of [Rule 10b-5](#), [17 C.F.R. § 240.10b-5](#), does not exceed the scope of Rule 10(b), 17 C.F.R. § 240.10b, and a violation must involve some form of manipulative or deceptive device or contrivance.

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

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

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

HN5 Standards of Review, Clearly Erroneous Review

While the "clearly erroneous" standard of review is appropriate for the magistrate's rulings on non-dispositive matters, it is not the appropriate standard of review for dispositive motions, injunctions, and the like. [Fed. R. Civ. P. 72\(b\)](#); [28 U.S.C.S. §§ 636\(b\)\(1\)\(B\)](#) and [\(C\)](#). A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Warranty

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Business Torts > Unfair Business Practices > Defenses

Torts > Business Torts > Unfair Business Practices > Remedies

[HN6](#) [down] Deceptive & Unfair Trade Practices, State Regulation

A primary purpose of the enactment of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), [Tex. Bus. & Com. Code Ann. §§ 17.41-17.63](#), is to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit. The DTPA does away with any common-law requirement of contractual privity.

Commercial Law (UCC) > ... > Subject Matter > Definitions > General Overview

Contracts Law > Personal Property > Personality Leases > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

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

[HN7](#) [down] Subject Matter, Definitions

The definition of "consumer" under the Texas Deceptive Trade Practices-Consumer Protection Act, [Tex. Bus. & Com. Code Ann. §§ 17.41-17.63](#), is quite broad: an individual who seeks or acquires by purchase or lease, any goods or services. [Tex. Bus. & Com. Code Ann. § 17.45\(4\)](#) (1987).

Torts > Business Torts > Unfair Business Practices > General Overview

[HN8](#) [down] Business Torts, Unfair Business Practices

See [Tex. Bus. & Com. Code Ann. §§ 17.46\(a\)\(2\), \(3\), \(5\), \(7\), \(12\), and \(23\)](#), and [17.50\(a\)\(1\)](#) (1987 & Supp. 1995).

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

Torts > Business Torts > Unfair Business Practices > General Overview

[HN9](#) [down] Motions to Dismiss, Failure to State Claim

The Texas Deceptive Trade Practices-Consumer Protection Act, [Tex. Bus. & Com. Code Ann. §§ 17.41-17.63](#), 60-day demand letter requirement is never a ground for outright dismissal of a claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Investment Contracts

Securities Law > Blue Sky Laws > Types of Securities

[HN10](#) [down] Types of Contracts, Investment Contracts

A bare Name is not an "investment contract," as that term is defined in the controlling cases.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Investment Contracts

Securities Law > Blue Sky Laws > Types of Securities

HN11 [L] **Types of Contracts, Investment Contracts**

The test for an "investment contract" is whether the scheme involves an investment of money in a common enterprise with profits to come primarily from the efforts of others. The Howey/Forman test is to be applied in light of the substance, the economic realities of the transaction, rather than the names that may have been employed by the parties.

Securities Law > Blue Sky Laws > Types of Securities

HN12 [L] **Blue Sky Laws, Types of Securities**

The purchase of a participation involves the investment of money, delivery of a clean irrevocable letter of credit and assumption of unlimited several liability, in a common enterprise, with profits to come solely from the efforts of others.

Administrative Law > Separation of Powers > Legislative Controls > Explicit Delegation of Authority

Securities Law > ... > Exemptions > Exempt Transactions > Intrastate Offerings & Recapitalizations

Administrative Law > Judicial Review > Standards of Review > General Overview

HN13 [L] **Legislative Controls, Explicit Delegation of Authority**

The courts should grant significant deference to administrative decisions when an agency has regulatory authority over matters a court must address.

International Trade Law > General Overview

Securities Law > ... > Scope of Provisions > Covered Transactions > Foreign Transactions

Securities Law > ... > Elements of Proof > Materiality > Statements of Opinion

HN14 [L] **International Trade Law**

The Securities Exchange Act of 1934, [15 U.S.C.S. § 78j](#), and Rule 10-b-5, [17 C.F.R. § 240.10b-5](#), apply extraterritorially to certain transactions in foreign commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Securities Law > ... > Scope of Provisions > Definitions > General Overview

Transportation Law > Interstate Commerce > Definition of Commerce

HN15 [L] **Congressional Duties & Powers, Commerce Clause**

The term interstate commerce means trade, commerce, transportation, or communication among the several states, or between a foreign country and any State, or between any State or place or ship outside thereof under [15 U.S.C.S. §§ 78c\(a\)\(17\)](#) and [78aa](#).

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

[**HN16**](#) **Implied Private Rights of Action, Deceptive & Manipulative Devices**

See [*Tex. Bus. & Com. Code Ann. § 17.50\(a\)*](#) (Vernon 1987).

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Governments > Legislation > Effect & Operation > Retrospective Operation

Transportation Law > Air & Space Transportation > Airline Deregulation Act > Preemption

Banking Law > Consumer Protection > State Law > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Consumer Protection

[**HN17**](#) **Interstate Commerce, State Powers**

A state may not regulate aspects of interstate commerce if Congress has expressly preempted such regulation. However, when the pre-emptive effect of federal enactments is not explicit, courts sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.

Admiralty & Maritime Law > Practice & Procedure > Forum Selection

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

International Trade Law > Dispute Resolution > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

Contracts Law > Defenses > Public Policy Violations

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

[**HN18**](#) **Practice & Procedure, Forum Selection**

United States admiralty law treats forum selection clauses as presumptively enforceable: Such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances; the choice of that forum was made in an arm's length negotiation; there are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overreaching bargaining power should be given full effect. A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision. Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important policy of the forum, may nevertheless be "unreasonable" and unenforceable if the chosen forum is seriously inconvenient for the trial of the action.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

[**HN19**](#) [] **Contract Conditions & Provisions, Forum Selection Clauses**

The presumption that a forum-selection clause is reasonable may be overcome by a strong showing that a party's accession to the forum clause was obtained by fraud or overreaching.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Material Misrepresentations

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > General Overview

[**HN20**](#) [] **Fraud & Misrepresentation, Material Misrepresentations**

Texas law defines fraud as misrepresentation of a material fact with intention to induce action or inaction, and reliance on the misrepresentation by a person who, as a result of such reliance, suffers injury. A defendant's failure to disclose a material fact is fraudulent only if the defendant has a duty to disclose that fact. A duty to speak may arise by operation of law or by agreement of the parties. In the absence of an agreement, there must be some special relationship between the parties. The non-disclosing party must have knowledge of the facts it withheld.

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

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

[**HN21**](#) [] **Securities Fraud, Elements**

In dealing with federal securities, the general rule is that unknown or subsequently maturing causes of action may not be waived.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN22[] **Venue, Forum Non Conveniens**

A plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to the plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN23[] **Venue, Forum Non Conveniens**

The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Counsel: [*1] For CHARLES ROBERT LESLIE, plaintiff: Jacks C Nickens, Clements O'Neill Pierce & Nickens, Houston, TX.

For LLOYD'S OF LONDON aka The Corporation of Lloyd's aka Lloyd's aka The Committee of Lloyd's, defendant: J Clifford Gunter, III, Bracewell & Patterson, Houston, TX. For R W STURGE aka R W Sturge Ltd., defendant: Kenneth D Kuykendall, Royston Rayzor Vickery & Williams, Houston, TX. For CHEMICAL BANK INC., defendant: William R Burke, Jr, Cunningham Amann & Burke, Houston, TX.

Judges: JOHN D. RAINY, UNITED STATES DISTRICT JUDGE

Opinion by: JOHN D. RAINY

Opinion

ORDER AFFIRMING, AFTER RECONSIDERATION, MAGISTRATE'S MEMORANDUM & RECOMMENDATION

On May 11, 1991, Magistrate Frances H. Stacy delivered two documents, the first styled Memorandum & Recommendation Regarding Lloyd's of London's Motion to Dismiss (Docket entry #43), the second styled Memorandum & Recommendation Regarding R. W. Sturge & Co.'s Motion to Dismiss for Lack of Jurisdiction Under [Rule 12](#) and Forum Non Conveniens or Alternatively, Motion to Stay Proceedings Pending Arbitration. (Dkt. #44). On September 4, 1991, the Court, "after a thorough review of the motions[,] responses of [the Defendants] and the rulings of [*2] the magistrate," signed an order affirming the magistrate's memoranda and recommendations. (Dkt. #49). The Defendants subsequently moved for reconsideration of the Court's order, filing the following documents:¹

¹ This list of documents does not include any Lloyd's or Sturge documents filed in response to opposition documents that Plaintiff Robert Leslie filed. Cf. [Syndicate 420 at *Lloyd's of London v. Early Am. Ins. Co.*, 796 F.2d 821, 826 \(5th Cir. 1986\)](#) ("Much as Eurystheus imposed the twelve labors upon Hercules, so the E & O Underwriters imposed upon the Court below the Herculean task of resolving a number of exceedingly complex issues in their motions to dismiss.").

(1) [Defendant Lloyd's of London's] Motion for Reconsideration of the Court's Memorandum and Order Dated September 4, 1991; Motion for New Trial; Motion for Findings of Fact and Conclusions of Law; and Motion for Interlocutory Appeal in Accordance With [28 U.S.C. § 1292\(b\)](#). (Dkt. #50).

(2) Defendant R. W. Sturge & Co., Ltd.'s Motion for Reconsideration of Court's Memorandum and Order Dated September 4, 1991; Motion for New Trial; Motion for Findings of Facts and Conclusions of Law; and Motion for Interlocutory Appeal in Accordance With [28 U.S.C. § 1292\(b\)](#). (Dkt. #51).

(3) Lloyd's of London's Supplemental Motion to Dismiss and Supplemental Motion to Reconsider. (Dkt. #54).

(4) Defendant R. W. Sturge & Co., Ltd.'s Supplemental Memorandum in Support of its Motion for Reconsideration of Court's Memorandum and Order Dated September 4, 1991, Motion for New Trial, and Motion for Findings of Fact and Conclusions of Law. (Dkt. #57).

(5) Lloyd's of London's **[*3]** Supplemental Motion to Reconsider. (Dkt. #64).

(6) Lloyd's of London's Supplemental Motion to Dismiss. (Dkt. #65).

(7) Defendant Lloyd's of London's Supplemental Motion to Reconsider. (Dkt. #70).

(8) Defendant Lloyd's of London's Third Supplemental Motion to Reconsider. (Dkt. #83).

(9) Defendant R. W. Sturge & Co., Ltd's Second Supplemental Motion for Reconsideration of Court's Memorandum and Order Dated September 4, 1991, Motion for New Trial, and Motion for Findings of Fact and Conclusions of Law. (Dkt. #90).

Subsequently, Plaintiff Charles R. Leslie ("Leslie") notified the Court of his intent to dismiss Defendant R. W. Sturge & Co. ("Sturge") from this action voluntarily. (Dkt. nos. 85, ² **[*5]** 86, 108). All motions filed by Sturge still pending before the Court, therefore, should be terminated as MOOT. (Dkt. nos. 51, 57, 90, 105). Before the Court are the various motions and supplemental motions to reconsider and dismiss filed by Defendant Lloyd's of London. ("Lloyd's"). (Dkt. nos. 50, 54, 64, 65, 70, 83). After considering the motions,³ Plaintiff's responses thereto, all replies by Lloyd's, and the applicable law, the Court is of the opinion that Lloyd's **[*4]** motion to reconsider should be GRANTED, that the memorandum and recommendation of the magistrate should be AFFIRMED upon reconsideration, that Lloyd's motion and supplemental motions to dismiss should be DENIED, that Lloyd's motion for interlocutory appeal should be GRANTED, and that any other motions by Lloyd's should be DENIED.

I. ALLEGATIONS AND FACTUAL BACKGROUND

A. Insurance for long-tail risks -- general background on the industry.

Because of developments in liability for latent, long-term risks such as asbestos exposure or environmental pollution,⁴ **[*7]** the insurance industry in the last three decades has developed more than a passing interest in the subject. Other chapters in the saga of allocating responsibility for long-tail liability among insurers, insureds, brokers, reinsurers, retrocessionaires, and others include battles involving (1) the shift from occurrence-based liability coverage to claims-made⁵ policies,⁶ **[*8]** (2) the definition of "occurrence"⁷ **[*9]** and the possibility of

²The stipulation to dismiss claims against Sturge arising from two Outhwaite syndicates was filed pursuant to the settlement agreement in *Stockwell v. R.H.W. Outhwaite (Underwriting Agencies) Limited*, Nos. 89-2729, 91-1501 (Q.B. Comm'l Ct. filed Dec. 18, 1989) (Eng.). Leslie subsequently dismissed all claims against Sturge, apparently for reasons of litigation strategy.

³Some of the Lloyd's documents adopt Sturge's arguments by reference. Therefore, the Court will address, as necessary, any arguments adopted by reference.

⁴ See, e.g., [In re Joint E. & S. Dist. Asbestos Litig.](#), 982 F.2d 721 (2nd Cir. 1992), modified on reh'g sub nom. [In re Findley](#), 993 F.2d 7 (2nd Cir. 1993) (Johns-Manville bankruptcy); [Keene Corp. v. Insurance Co. of N. Am.](#), 215 U.S. App. D.C. 156, 667 F.2d 1034 (D.C. Cir. 1981) (developing "tripple trigger" analysis of insurance coverage for continuing occurrences), cert. denied, **455 U.S. 1007**, 102 S. Ct. 1644, 71 L. Ed. 2d 875, 102 S. Ct. 1645 (1982); [42 U.S.C. § 9607](#) (establishing widespread joint & several liability, with right of contribution, for "Superfund" response costs).

"stacking" liability policies⁸, (3) adoption of "sudden and accidental" pollution exclusion clauses,⁹ [*10] and (4) the subsequent adoption in 1985 of the "absolute" pollution exclusion.¹⁰ The present dispute is between what is by far

⁵ In contrast with a "claims-made" policy, an "occurrence" policy provides "long-tail" coverage. A claims-made policy covers only claims made during the policy period for occurrences within a coverage period extending back to a recited retroactive date. See *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 843 & nn.3-4 (Tex. 1994) (hereafter, "APIE"). While an "occurrence" policyholder need only buy one insurance policy to be covered for occurrences within a particular year, a "claims-made" policyholder ordinarily must purchase subsequent policies from year to year, or a separate "long-tail" policy, in order to obtain extended coverage. *Hartford Fire Ins. Co. v. California*, U.S. ___, 113 S.Ct. 2891, 2896, 125 L.Ed.2d 612, 61 U.S.L.W. 4855 (1993).

⁶ The United States Supreme Court in *Hartford Fire Ins. Co. v. California*, U.S. ___, 113 S.Ct. 2891, 2911-17, 125 L.Ed.2d 612, 61 U.S.L.W. 4855 (1993) (Insurance Antitrust Litigation), held that allegations by the attorneys general of nineteen states "that the defendants . . . conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States" from occurrence to claims-made policies, and to impose other changes in available policy terms, see *id.*, ___ U.S. at ___, 113 S.Ct. at 2895-96, 2897-99 ("As a consequence [of encouragement from American insurance companies], many London-based underwriters, syndicates, brokers, and reinsurance companies informed [the Insurance Services Office, Inc.] of their intention to withhold reinsurance. . . until ISO incorporated all four desired changes. . . into the ISO CCL forms."), stated a claim that fell within the § 3(b) "boycott or coercion" exception to the McCarran-Ferguson Act, 15 U.S.C. § 1011-1013, which otherwise exempts "the business insurance" from the antitrust laws. However, the Court's holding was limited to the extent that the only allegations supporting the "boycott" claim were allegations that "primary insurers who wrote on disfavored forms would be refused all reinsurance, even as to risks written on other forms," or of similar threats by reinsurers. ___ *Id.* ___ U.S. at ___, 113 S.Ct. at 2916-17 (emphasis in original); cf. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978) (agreement by insurers to force change from "occurrence" to "claims-made" policies constituted a "boycott"). The Supreme Court also rejected the London reinsurers' argument that the District Court should have "declined to exercise . . . jurisdiction over them under the principle of international comity." *Hartford Fire Ins. Co.*, U.S. at ___, 113 S.Ct. at 2908-11. The Insurance Antitrust Litigation has subsequently settled.

⁷ See *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 433-35 (9th Cir. 1994) (California law), petition for cert. filed, 63 U.S.L.W. 3598 (U.S. Feb. 2, 1994) (No. 94-1337); *Society of the Roman Catholic Church of the Diocese of Lafayette and Lake Charles v. Interstate Fire & Casualty Co.*, 26 F.3d 1359, 1363-67 (5th Cir.) (Louisiana law), reh'g, en banc, denied, 29 F.3d 626 (5th Cir. 1994); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 25 F.3d 177, 180-82 (3d Cir. 1994); *Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617, 624-28 (2d Cir.) (New York law), cert. denied, ___ U.S. ___, 115 S.Ct. 655, 130 L.Ed.2d 559, 63 U.S.L.W. 3438 (1994); *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 812 (7th Cir. 1992), cert. denied, 507 U.S. 1005, 113 S.Ct. 1646, 123 L.Ed.2d 267, 61 U.S.L.W. 3667 (1993); *Keene Corp. v. Insurance Co. of N. Am.*, 215 U.S.App. D.C. 156, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875, 102 S.Ct. 1645 (1982); *Commonwealth Lloyd's Ins. Co. v. Cullen/Frost Bank of Dallas*, 889 S.W.2d 266, 37 Tex. Sup. J. 799 (Tex. 1994) (per curiam); APIE, 876 S.W.2d at 853 n.20 (collecting cases); *Northern States Power Co. v. Fidelity & Casualty Co. of N.Y.*, 523 N.W.2d 657, 661-64 (Minn. 1994); *Sentinel Ins. Co. v. First Ins. Co. of Haw.*, 76 Haw. 277, 875 P.2d 894, modified, 76 Haw. 453, 879 P.2d 558 (1994); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502, 506-07 (Pa. 1993); *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 650-52, 609 N.E.2d 506, 510-12, 593 N.Y.S.2d 966 (N.Y. 1993); *United States Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 643 N.E.2d 1226, 1252-1257, 205 Ill. Dec. 619 (Ill. App. Ct. 1994); *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 126 Ore. App. 689, 870 P.2d 260 (Or. Ct. App.), modified, 128 Ore. App. 234, 875 P.2d 537 (Or. Ct. App. 1994); *Armstrong World Indus. v. Aetna Casualty & Sur. Co.*, 30 Cal. App. 4th 1117, 1167-1204, 26 Cal. Rptr. 2d 35, 49-74, 62 U.S.L.W. 2372 (Cal. Ct. App. 1993), review granted, 866 P.2d 1311, 27 Cal. Rptr. 2d 488 (Cal. 1994); *Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 30 Cal. App. 4th 1474, 1513-22, 5 Cal. Rptr. 2d 358 (Cal. Ct. App. 1992), review granted, 862 P.2d 661, 24 Cal. Rptr. 2d 661 (Cal. 1992).

⁸ Compare *Keene Corp.*, 667 F.2d at 1049-50, and APIE, 876 S.W.2d at 852-55 (majority rule), with *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992) (minority rule).

⁹ See *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 134 N.J. 1, 28-80, 629 A.2d 831, 847-76 (1992), cert. denied, ___ U.S. ___, 114 S.Ct. 2764, 129 L.Ed.2d 878, 62 U.S.L.W. 3861 (1994) ("If applied as written, although interpretative questions undoubtedly would require resolution, the ['sudden and accidental'] clause sharply and dramatically would restrict the coverage that previously had been provided under CGL policies for property damage caused by accidental pollution We are fully satisfied that if given literal effect, the standard clause's widespread inclusion in CGL policies would limit coverage for pollution

the largest and most influential [*6] collection of players in the London (re)insurance market,¹¹ [*11] the Society of Lloyd's, and an individual American retrocessional underwriter¹², or "Name," who is a member of the Society of Lloyd's. The Plaintiff, Leslie, alleges that he discovered in the late 1980s that he was the victim of a scheme whereby "insiders" in the Society of Lloyd's concentrated highly undesirable long-tail asbestos and pollution risks in syndicates underwritten primarily by recently recruited "outside" Names from the United States,¹³ Canada, Australia, and elsewhere,¹⁴ while the "inside" Names focused their own efforts upon more lucrative syndicates and lines of insurance.

B. Nature of the case

HN1 [↑] When ruling on a motion to dismiss for failure to state a claim, the Court is not concerned with the proof either side has offered, but solely with the plaintiff's allegations.¹⁵ [*13] All facts discussed below that are not expressly alleged by the Plaintiff are for the purpose of addressing [*12] the forum-selection, choice-of-law, comity,

damage to so great an extent that the industry's representation of the standard clause's effect, in its presentation to New Jersey and other state insurance regulatory agencies, would have been grossly misleading. Proffered to regulators merely as a clarification of existing coverage . . . the industry's understatement of the clause's actual effect on coverage for pollution damage is both apparent and unjustifiable. . . . Had full disclosure been made, we would not hesitate to enforce the pollution-exclusion clause as written, resolving nuances inherent in the meaning of "sudden" on a case-by-case basis. Not only did the insurance industry fail to disclose the intended effect of this significant exclusionary clause, it knowingly misstated its intended effect in the industry's submission of the clause to state Departments of Insurance. Having profited from that nondisclosure by maintaining preexisting rates for substantially-reduced coverage, the industry should be required to bear the burden of its omission. . . ."); see also [Union Pac. Resources Co. v. Aetna Casualty & Sur. Co., 894 S.W.2d 401 \(Tex. App. -- Fort Worth 1994\)](#), application for writ of error filed, [38 Tex. Sup. J. 637 \(May 17, 1995\)](#) (95-0473).

¹⁰ See [Hartford Fire Ins. Co. v. California, U.S. at , 113 S. Ct. at 2896, 2899; National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc., 38 Tex. Sup. J. 332, 1995 Tex. LEXIS 17 \(Tex. Mar. 2, 1995\)](#) (D-4353) (unanimous opinion), motion for rehearing filed April 3, 1995.

¹¹ In a 1992 report prepared with assistance from McKinsey & Co., Lloyd's reports, "Lloyd's underwriters underwrite just over half [53%] of all London market business, but more importantly lead more than two thirds [66%] of this business." LLOYD'S OF LONDON, LLOYD'S: A ROUTE FORWARD 46 & Ex. 23 (1992). Based on net reinsurance premiums, Lloyd's reports it was the third-largest reinsurer in the world in 1990; the second-largest if inter-syndicate reinsurance is included. *Id.* at 48 Ex. 25. In 1989, 31,329 individuals worldwide were Names, or members of the Society of Lloyd's, engaged in active underwriting, up from 6,020 in 1971. See *id.* at 26 Ex. 6.; LLOYD'S OF LONDON, 1993 ANNUAL REPORT AND ACCOUNTS 47. In 1993, Lloyd's reported 32,015 total active and inactive Names, down from 34,218 in 1989; the number of active names in 1993 was 19,537, down from 32,433 in 1988. LLOYD'S OF LONDON, A GUIDE TO CORPORATE MEMBERSHIP App. 1, at 47 (1993).

¹² See ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 683-84 (Matthew Bender ed. 1987) (explaining the terms "primary insurer," "ceding insurer," "reinsurance," "retrocession," and "retrocessionnaire").

¹³ Notably, what the Supreme Court caned domestic [American] retrocessional reinsurers were not among the defendants from whom the attorneys general sought relief in [Hartford Fire Ins. Co., U.S. at , 113 S. Ct. at 2899](#) & n.5.

¹⁴ See Steve Boggan, *Foreigners fared worst in Lloyd's losses*, THE INDEPENDENT, Apr. 27, 1992, at A2; Julian Barnes, *The Deficit Millionaires*, THE NEW YORKER, Sept. 20, 1993 at 74, 84 (noting statistical correlation between geographic distance from 1 Lime Street and losses in Lloyd's syndicates).

¹⁵ **HN2** [↑] A complaint is subject to dismissal 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. [Lujan v. Defenders of Wildlife, 504 U.S. 555, , 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 \(1992\); Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 \(1984\)](#). The Court must accept all well-pleaded allegations as true, [Hartford Fire Ins. Co. v. California, U.S. , 113 S. Ct. 2891, 2895, 125 L. Ed. 2d 612 \(1993\); Albright v. Oliver, U.S. , 114 S. Ct. 807, 810, 127 L. Ed. 2d 114 \(1992\)](#), and view them in the light most favorable to the plaintiff. [Schultea v. Wood, 27 F.3d 1112, 1115 \(5th Cir. 1994\)](#), modified on reh'g en banc, [47 F.3d 1427 \(5th Cir. 1995\)](#) (en banc).

and forum non conveniens issues.¹⁶ Because a lengthy discussion of the Plaintiff's allegations or the Court's prior findings would be superfluous, see *Leslie v. Lloyd's of London, No. 90-1907, 1994 U.S. Dist. LEXIS 18565 (S.D. Tex. Nov. 2, 1994)* (findings of fact and conclusions of law) (Dkt. #122), this order will provide only a brief description of the structure of Lloyd's and the nature of Leslie's claims against it.

[*14] The Society of Lloyd's is a private entity created by statute, whose members underwrite insurance.¹⁷ [*16] Its organization bears little similarity to the corporations that sell insurance in the United States.¹⁸ But see *Crum & Forster, Inc. v. Monsanto Co., 887 S.W.2d 103, 148-49 (Tex. App. -- Texarkana 1994)*, application for writ of error filed, *38 Tex. Sup. J. 46 (Oct. 27, 1994)* (No. 94-1088). Only a member of the Society of Lloyd's, a Name, may participate in underwriting Lloyd's policies. Only individuals, not corporations or limited partnerships, may become Names.¹⁹ Names do not generally underwrite insurance alone; rather, they combine into syndicates, which collectively underwrite risks and take advantage of greater risk-spreading than individual Names could achieve alone. To become a Name, one must pledge to undertake unlimited personal liability for his or her share of any losses. Every Name also pays an initial entrance fee of # 1900 and annual subscription fees of # 365 to the Society of Lloyd's in exchange for various services that are necessary for the operation of the Lloyd's insurance market. In addition, Names pay fees and commissions to their Members' and [*15] Managing Agents. Although Names are

¹⁶ The parties have subsequently submitted affidavits and live proof in the course of this proceeding. *Rule 12(b)* does provide, "if, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as a motion for summary judgment" *FED. R. CIV. P. 12(b)*. However, the Court currently has before it a motion to reconsider an order adopting a magistrate's recommendation to deny the Defendants' 12(b)(6) motions. It would be extraordinarily awkward, to say the least, at this juncture to convert the motion to reconsider into a motion for summary judgment. Moreover, the Court is of the opinion that the Plaintiff would be entitled to further discovery before the Court could appropriately rule on a motion for summary judgment. *FED. R. CIV. P. 56(f)*. Therefore, the Court shall confine its 12(b)(6) analysis to the Plaintiff's allegations in the various pleadings filed in this consolidated action, without deciding whether the Plaintiff has introduced legally sufficient evidence to support the allegations.

¹⁷ See generally *Edinburgh Assurance Co. v. R. L. Burris Corp.* 479 F. Supp. 138, 144-46 (C.D. Cal. 1979) (describing the customary practices of the Lloyd's insurance market).

The Court considers unpersuasive any characterization of Lloyd's as roughly similar to the New York Stock Exchange ("NYSE"), because this analogy ignores dramatic differences between the two institutions. See contra *Bonny v. Society of Lloyd's*, 3 F.3d 156, 158 n.2 (7th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1057, 127 L. Ed. 2d 378, 62 U.S.L.W. 3551 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1357 (2d Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 385, 126 L. Ed. 2d 333, 62 U.S.L.W. 3319 (1993). First, Lloyd's has greater similarity to a private club than it does to a public stock exchange. Virtually anyone in the world may buy and sell securities listed on the NYSE, except, for example, certain nationals of foreign states subject to sanctions under the International Emergency Economic Powers Act or the Trading With The Enemy Act. In contrast, the opportunity to participate in Lloyd's underwriting syndicates is strictly limited to approximately 30,000 individuals who have applied for and qualified as "Names." More importantly, business conducted on the NYSE, whether by United States citizens or by foreign nationals, is subject to comprehensive regulation by an independent government agency with extensive enforcement authority. In contrast, the government of England has elected not to regulate the Lloyd's insurance market. See *Lloyd's Act, 1982* (Eng.). Except to the extent Lloyd's or its syndicates issue or sell securities, insurance, and services abroad, the Lloyd's insurance market, at least in theory, is largely self-regulating.

¹⁸ Applying Texas law to a "Lloyd's plan" organization, which "is not a corporation but is controlled by its own underwriters and maintains its own directors, officers, bylaws, books and records, and assets and liabilities, the *Crum & Forster* court held for purposes of "disregarding the corporate fiction," that "such organizations have a legal status that is much more in the nature of corporate entities and should be regarded as insurance corporations." *Crum & Forster, Inc., 887 S.W.2d at 149*.

¹⁹ This statement is only true for the time period in which Leslie participated in underwriting at Lloyd's. Lloyd's 1993 Annual Report states, "The business plan, published in April 1993, set out a programme of profound change for all sectors of the Society. In essence, the plan promoted three significant structural changes: strong central direction of the market; a widening of the capital base to include corporate membership; and reinsuring the 1985 and prior liabilities of members into a new vehicle, NewCo." *LLOYD'S OF LONDON, 1993 ANNUAL REPORT AND ACCOUNTS* 7-8 (emphasis added) (NewCo is now called Equitas). In the last year, Lloyd's has started admitting corporate (i.e. limited liability) members.

liable for their proportional share of the risks underwritten by the syndicates they have joined, they are not liable for the share of risks borne by other Names, or by other syndicates. Lloyd's has historically observed a policy of several, not joint, liability for losses -- "each for his own part and none for the other." Policy premiums collected as a result of each syndicate's underwriting activities, after losses and loss reserves, generate profits which are distributed to Names in proportion to the share of any syndicate each Name has underwritten.

[*17] In the usual course of events, accounting for Lloyd's syndicates takes place in three-year cycles. An account year commences every year and each account year concludes three years later. At the end of a three-year cycle, a syndicate may still have policies with outstanding risks. Generally, the syndicate will close an account year through a process called "reinsurance to close." The outstanding risks are then borne by the Names of the reinsuring syndicate, who accepted the reinsurance premium, while any ceding Names who closed their account year (and therefore paid a loss in the amount of the reinsurance premium) are free from the liability they have ceded and may continue to underwrite future account years of the ceding syndicate, or to resign and underwrite elsewhere. Rarely are the risks of a Lloyd's syndicate ceded to entities outside the Society of Lloyd's.²⁰

[*18] Lloyd's syndicates are not democratic. Rather, a syndicate is underwritten primarily by passive names, while an Active Underwriter will generally employ, or act as, a Managing Agent. The Managing Agent of a syndicate, subject to the supervision of the Active Underwriter, directs the syndicate's underwriting activity. The Managing Agent for some of Leslie's syndicates, Sturge, also happened to be Leslie's Members' Agent. Members' Agents introduce new Names to Lloyd's and assist Names in joining syndicates.

As Lloyd's states in materials filed with the Court, "The underwriting member is a completely passive participant in the underwriting activity of the syndicates. . . . Members, as passive participants in the underwriting process, put their faith and assets behind the efforts of their members' agents and the underwriting decisions of the active underwriter. The members, therefore, are not permitted an active role in the day-to-day business of insuring risks or handling claims." See Dkt. #5, at 10-11 (emphasis added).

Through the collective efforts of Names' organizations, some comparative information has become available in recent years²¹ concerning the periodic profits [*19] or losses generated by various Lloyd's syndicates. However, during the 1970s and 1980s, the Lloyd's syndicates did not employ any public disclosure or reporting practices even remotely approaching the requirements imposed upon public companies, investment advisors, or mutual funds in the United States. As a general matter, passive names such as Leslie relied almost completely upon the underwriting experience and training of syndicates' Managing Agents, without themselves having much involvement in or knowledge of syndicate underwriting practices.

Leslie alleges that Charles Parnell, acting on behalf [*20] of the Society of Lloyd's came to Texas and recruited him to become a Name in 1977. Parnell was a director for Sturge, both a Members' Agent and the Managing Agent for several syndicates.²² At the time Parnell contacted Leslie, Lloyd's insiders were already well aware of the mounting

²⁰ However, Lloyd's has created a limited-liability corporate entity within Lloyd's, Equitas, to reinsure pre-1986 pollution and asbestos policies. While the entity was under consideration, it was called NewCo. In the Lloyd's 1993 Annual Report, Chairman Peter Rowland states:

We set ourselves to creating, by the end of 1995, the largest reinsurance / run-off company the world has ever seen. . . . I am very confident that NewCo will succeed in offering Names an exit route from Lloyd's in respect of their pre-1986 liabilities.

LLOYD'S OF LONDON, 1993 ANNUAL REPORT AND ACCOUNTS at 8-9.

²¹ At the time Leslie applied, Lloyd's did not even publish a list of underwriting agents:

Whilst a list of Underwriting Agents is not published, the Membership Department at Lloyd's can confirm to potential candidates whether a specific person, firm or company is on the list of agents.

potential for losses from asbestos and pollution liability insurance.²³ Representations made to Leslie in Texas before he joined Lloyd's included the claims that membership in Lloyd's was a safe and attractive investment, that Leslie's underwriting involvement would be focused on low-risk insurance, and that his exposure was limited because after he had participated as an underwriting member in an account year of a particular syndicate for a period of three years, he would be able to resign his underwriting membership in that syndicate at any time by following the notice procedure. See Dkt. #89, at 5-6. Leslie was also led to believe that the maximum annual loss he could ever expect from a syndicate was approximately equivalent to the long-term average of annual profits, around 10% of his undertaking, and that gains would far exceed losses in the long run, as they have for Lloyd's Names for 300 [*21] years.

In 1982, the English Parliament passed the Lloyd's Act, which altered the regulatory structure of Lloyd's and included a provision granting Lloyd's qualified immunity to civil liability from suits by Names in English courts. Lloyd's Act, 1982, ch. 14 (Eng.).

Leslie alleges that several syndicates closed the 1979 accounting year in 1982, despite [*22] a letter from auditor Neville Russel, unknown to the passive names, recommending that many syndicates should not close that year because of unquantifiable liability from asbestos. Subsequently, in 1986, Leslie alleges Lloyd's induced him to sign a new General Undertaking containing forum-selection and choice-of-law clauses. These clauses, if enforced, require claims "arising out of or related to" Leslie's membership in Lloyd's to be resolved in England, under English law. In March and June 1986, Sturge informed Leslie that the Lloyd's Act and subsequent regulatory changes by the Council of Lloyd's had "required us, in common with all Lloyd's agents to reformalise (and in some cases may require us to modify)²⁴ all your underwriting arrangements at Lloyd's over the next few months."²⁵ While the letters indicated that documents Leslie would sign contained "few variations of substance," any mention of the forum-selection and choice-of-law clauses was conspicuously absent from the notices Leslie received. Lloyd's and its agents never undertook to explain to Leslie the intended effect of these clauses on lawsuits that Lloyd's anticipated its American Names would soon file against it. [*23] The notices emphasized that "all Names are required to enter into [the revised General Undertaking] as a condition of continuing membership . . ."²⁶ [*24] Because Leslie was involved in ongoing underwriting syndicates, he further believed that Lloyd's would call an irrevocable letter of credit that he had posted with Texas Commerce Bank if he terminated his participation as an underwriting member by failing to sign the General Undertaking.²⁷

Not long after Leslie executed the 1986 General Undertaking, he learned he would have been better off if he had stopped underwriting. Initially, Leslie learned that several syndicates he had underwritten would not close as

²² As mentioned above, Names are generally introduced to Lloyd's through Members' Agents.

²³ Insiders at Lloyd's had been cognizant of asbestos risks at least as early as 1969, see Dkt. #122, at P 11, yet did not disclose the Cromer Report to outside Names until October 1986, after Leslie had executed the General Undertaking containing the contested forum selection clause. Incidentally, about this time, entities participating in the American insurance industry were actively misrepresenting the intended effect of "sudden and accidental" pollution-exclusion clauses to insurance regulators. *Morton Int'l, Inc.*, 134 N.J. at 3243, 629 A.2d at 849-55.

²⁴ The Court has not discovered in the Lloyd's Act any requirement that claims by or against Names related to their membership in the Society of Lloyd's must be brought in English courts, solely under English law.

²⁵ Letter from Peter Rawlins, Managing Director, R. W. Sturge & Co., to Charles Leslie 1 (Mar. 10, 1986).

²⁶ Letter from K. J. Leonard, R. W. Sturge & Co., to Charles Leslie 2 (June 23, 1986); see also Letter from Peter Rawlins, Managing Director, R. W. Sturge & Co., to Charles Leslie 4 (Mar. 10, 1986) ("The Council [of Lloyd's] approved modifications in the terms of [the revised Premiums Trust Deed and General Undertaking] and all Names are now required to accede to them in their revised form as a condition of their continuing underwriting membership.

²⁷ Cf. Letter from Peter Rawlins, Managing Director, R. W. Sturge & Co., to Charles Leslie 3 (Mar. 10, 1986) ("The Council of Lloyd's has advised agents . . . that all names will be required to come into line with the current requirements for means and deposits . . .").

planned. Although four account years for syndicates he had underwritten had not closed properly at the time he signed the General Undertaking, and he had incurred some losses,²⁸ he was not at that time remotely aware of the scope of Lloyd's problems, or of the likelihood that his liabilities on those syndicates would continue in perpetuity. In 1989, Leslie learned that he could not limit his liability for these open syndicates' losses by resigning from them. Leslie also alleges he learned after 1986 that asbestos and pollution risks had been concentrated in syndicates underwritten by himself and [*25] other passive outside Names.²⁹ [*26] As the Court understands his allegations, these syndicates had taken on long-tail risks in the early- and mid- 1980s from profitable "inside" syndicates, and/or underwritten new long-tail risks that the "inside" syndicates did not, without collecting (re)insurance premiums sufficient to cover the risks. In short, Leslie discovered he was on the receiving end of a high-stakes game of hot-potato.³⁰ By the time he learned what had happened it was not feasible to cede the unquantifiable risk back to the insiders.

Leslie makes three claims against Lloyd's: ³¹ breach of fiduciary duties, deceptive acts or practices in violation of the Texas Deceptive Trade Practices - Consumer Protection Act, [TEX. BUS. & COM. CODE ANN. §§ 17.41 - 17.63](#) (Vernon 1987 & Supp. 1995) ("DTPA"), and securities fraud, in violation of § 10(b) of the Securities Exchange Act of 1934, [15 U.S.C. § 78j](#), and [Rule 10b-5](#) promulgated thereunder.³² [*Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 \[27\] U.S. 6, 9-12*](#) & n.9, [*92 S. Ct. 165, 167-69*](#) & n.9, [*30 L. Ed. 2d 128 \(1971\)*](#). Leslie has not pleaded a claim for sale of an unregistered security, or sale of a security by means of a false or incomplete prospectus, under [section 12\(1\)](#) or [12\(2\)](#) of the 1933 Securities Act. [15 U.S.C. § 77j](#); see generally [*Gustafson v. Alloyd Co., Inc., U.S. , 115 S. Ct. 1061, 1079-83, 131 L. Ed. 2d 1, 63 U.S.L.W. 4165 \(1995\)*](#) (Ginsberg, J., dissenting) (addressing recent change in scope of the [section 12\(2\)](#) rescission remedy). Nor does he allege a civil

²⁸ See Dkt. #89, at P16. Leslie's pleadings also indicate that most of his syndicates and account years continued to pay profits up to the time he signed the General Undertaking. In other papers Leslie has filed with the Court, Leslie claims that appropriate underwriting and accounting practices would have required these syndicates to accumulate significantly greater reserves to cover future losses, rather than paying temporary "profits" which would be called back later as losses on open or reopened accounting years. See Dkt. #117, at 20, P 35.

²⁹ See Dkt. #81, at P 23; Dkt. #89, at PP 15, 27.

³⁰ The four apparent options available to a Name in the position Leslie alleges he was in were: (1) paying the losses and, in the event of insolvency, declaring bankruptcy, (2) if possible, buying reinsurance from "insiders" or existing Lloyd's syndicates, for a premium equal to or greater than the discounted present value of expected future losses, (3) recruiting new "outsiders" with sufficient capacity to reinsure his risks, and reinsuring to them, or (4) if possible, reinsuring to NewCo / Equitas (i.e. paying a similar premium as would be paid to "insiders", or treating policyholders as "outsiders," as the case may be).

³¹ The Court has not at this time granted Leslie's motion for leave to file his second amended complaint.

³² [*HN3*](#) It shall unlawful for any person, directly or indirectly . . .

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances . . . not misleading, or
- (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

[17 C.F.R. part 240.10b-5](#) (emphasis added). [*HN4*](#) Section 10(b) applies not only to "any security registered on a national securities exchange," but also to "any security not so registered." [15 U.S.C. § 78j\(b\)](#). The scope of [Rule 10b-5](#) does not exceed the scope of Rule 10(b), and a violation must involve some form of manipulative or deceptive device or contrivance. [*Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473-74, 97 S. Ct. 1292, 1301, 51 L. Ed. 2d 480 \(1977\)*](#).

racketeering claim under Title XI of the Organized Crime Control Act of 1970, commonly known as the Racketeer Influenced and Corrupt Organizations Act.³³ [18 U.S.C. § 1964\(c\)](#) ("RICO").

[*28] ³³

II. SUPPLEMENTAL MOTIONS TO DISMISS

At the outset, the Court notes that Lloyd's has filed a series of motions potentially [*29] dispositive of Leslie's section 10(b) / [Rule 10b-5](#) securities fraud claim. Lloyd's position is based upon the watershed case of [Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson](#), 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). According to a case the Supreme Court decided on June 20, 1991, the same day as [Lampf, James B. Beam Distilling Co. v. Georgia](#), 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), *Lampf* applied retroactively to time-bar all securities fraud claims based on the implied 10b-5 cause of action that were filed within applicable borrowed state limitations periods, but not within the newly announced uniform federal limitations period.

Lloyd's argument that Leslie's claim is time-barred is mistaken. The *Lampf* decision does not bar Leslie's claim because Congress subsequently decided *Lampf* does not apply to lawsuits, such as this one, filed before *Lampf* was handed down. [15 U.S.C § 78aa-1\(a\)](#). Although Lloyd's directs the Court to a multitude of cases suggesting that section 27A of the 1934 Act, [15 U.S.C. § 78aa-1](#), is unconstitutional, the Supreme Court recently affirmed the decision of the Fifth Circuit that section 27A(b) [*30] is *not* unconstitutional. [Pacific Mut. Life Ins. Co. v. First Republicbank Corp.](#), 997 F.2d 39 (5th Cir. 1993), aff'd sub nom. [Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.](#), U.S. ___, 114 S. Ct. 1827, 128 L. Ed. 2d 654, 62 U.S.L.W. 4396 (1994) (per curiam) (evenly divided court), reh'g denied, 114 S. Ct. 2774, 129 L. Ed. 2d 887, 62 U.S.L.W. 3862 (1994); but see [BDO Seidman v. Simmons](#), ___ U.S. ___, 115 S. Ct. 1789, 131 L. Ed. 2d 718, 63 U.S.L.W. 3771 (1995) (connected case); [Pacific Mut. Life Ins. Co. v. First Republicbank Corp.](#), 53 F.3d 1409 (5th Cir. 1995) (per curiam). Although the Supreme Court has subsequently held that section 27A(b) violates the separation of powers between Congress and the Judiciary insofar as it purports to require the courts to reopen judgments that have become final, [Plaut v. Spendthrift Farm, Inc.](#), 514 U.S. ___, 115 S. Ct. 1447, 1456-58, 1463, 131 L. Ed. 2d 328, 63 U.S.L.W. 4243 (1995), this case has remained pending throughout the *Lampf* controversy and has never been dismissed on limitations grounds. The circuit courts of appeal have uniformly upheld the constitutionality of section [*31] 27A(a), which is applicable in this case. See *Plaut*, 514 U.S. at ___ 114 S. Ct. at 1469 n.6 (Stevens, J., dissenting) (collecting cases).

Nor does section 27A(a) represent a mere codification of the uniform limitations period announced in *Lampf*. The term "laws applicable in the jurisdiction," used in section 27A, refers to borrowed state limitations periods, without regard to the fact that *Lampf* technically, announced not only what the law was in every jurisdiction but what the law had been previously. As Justice Scalia recognized:

But respondents' argument confuses the question of what the law *in fact* was on June 19, 1991, with the distinct question of what § 27A means by its reference to what the law was. We think it entirely clear that it does not mean the law enunciated in *Lampf* for two independent reasons. . . . [First,] if the statute referred to [*Lampf*] its reference to the "laws applicable *in the jurisdiction*" (emphasis added) would be quite inexplicable. Second, if the statute refers to the law enunciated in *Lampf* it is utterly without effect, a result to be avoided if possible.

³³ See generally [Alfadda v. Fenn](#), 935 F.2d 475, 479-80 (2d Cir. 1991), cert. denied, [502 U.S. 1005](#), 116 L. Ed. 2d 656, 112 S. Ct. 638, (1991); [United States v. Noriega](#), 746 F. Supp. 1506, 1516-19 (S.D. Fla. 1990) ("Section 1962(c) makes it unlawful for 'any person associated with any enterprise engaged in, or the activities of which affect, interstate, or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .' [18 U.S.C. § 1962\(c\)](#) (emphasis added). . . . These prohibitions are on their face all-inclusive Indeed, if any statute reaches far and wide, it is RICO."); Kristen Neller, Note, *Extraterritorial Application of RICO: Protecting U.S. Markets in a Global Economy*, 14 MICH. J. INT'L L. 357, 377-82 (1993); Jonathan Turley, "When in Rome:" *Multinational Misconduct and the Presumption Against Extraterritoriality*, [84 Nw. U. L. Rev.](#) 598, 601 (1990).

Plaut, 514 U.S. at [*321], 115 S. Ct. at 1451-52. Therefore, the Court must eschew a too-literal application of the statutory language and apply section 27A(a) as Congress evidently *meant* it to apply. *Id.* Leslie's securities fraud claims should not be dismissed on limitations grounds.

III. MOTION FOR REHEARING

Lloyd's has moved for a rehearing of the previous order affirming the magistrate's memoranda and recommendations. In its motion, Lloyd's correctly points out that the previous order recited that it would apply a "clearly erroneous" standard of review to "the Magistrate's actions." HN5[While this standard of review is appropriate for the magistrate's rulings on nondispositive matters, it is not the appropriate standard of review for dispositive motions, injunctions, and the like.³⁴ FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1)(B), (C) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Although the Court in fact conducted a thorough, *de novo* review of the magistrate's recommendations concerning the Defendants' dispositive motions, see generally United States v. Wilson, 864 F.2d 1219, 1221-22 (5th Cir. 1989) (citing Aluminum Co. of Am. v. E.P.A., 663 F.2d 502 (4th Cir. 1981)), the order it signed employed standard language concerning district court review of magistrates' routine pretrial decisions, see 42 U.S.C. § 636(b)(1)(A), and inadvertently omitted any mention of the distinction between dispositive and nondispositive motions.

Nevertheless, the Court is of the opinion that reconsideration of the magistrate's memorandum [*34] and recommendation is in order. This is particularly so in light of opinions Lloyd's has brought to the Court's attention, which have elected to enforce forum-selection and choice-of-law clauses against Lloyd's Names residing in the United States.³⁵ Lloyd's motion for rehearing is therefore GRANTED.

[*35] IV. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Lloyd's initial criticism of the magistrate's memorandum and recommendation is that the magistrate "ignored the voluminous documentation, as well as affidavit testimony, provided by [the Defendants] in support of their motions to dismiss," and "merely adopted the Plaintiff's pleadings as true." Dkt. #45, at 2. Because the magistrate only recited this standard as she ruled on Lloyd's Rule 12(b)(6) motion to dismiss for failure to state a claim, perhaps

³⁴ The magistrate's recommendation concerning Sturge's motion for referral to arbitration was subject to *de novo* review by this Court and would have been reviewed under the same standard by the court of appeals. In re Hornbeck Offshore Corp., 981 F.2d 752, 754 (5th Cir. 1993); Neal v. Hardee's Food Sys., Inc., 918 F.2d 34, 37 (5th Cir. 1990). Of course, the Court is not required to reconsider the magistrate's recommendation not to refer this matter to arbitration because Sturge is no longer a party to this lawsuit.

³⁵ The Court is therefore cognizant of the following decisions: Hirsch v. Oakley Vaughn Underwriting, Ltd., C.A. No. H-87-3727 (S.D. Tex. Dec. 14, 1988) (decided on forum non conveniens grounds; does not address any forum-selection or choice-of law issue), aff'd, 904 F.2d 704 (5th Cir. May 31, 1990) (No. 89-2563), cert. denied, 498 U.S. 981, 111 S. Ct. 511, 112 L. Ed. 2d 523 (1990); Riley v. Kingsley Underwriting Agencies, Ltd., 1991 U.S. Dist. LEXIS 21174, No. 91-C-1411 (D. Colo. Aug. 30, 1991), aff'd, 969 F.2d 953 (10th Cir. 1992), cert. denied, 506 U.S. 1021, 113 S. Ct. 658, 121 L. Ed. 2d 584 (1992); Bonny v. The Society of Lloyd's, 784 F. Supp. 1350 (N.D. Ill. May 29, 1992), aff'd, 3 F.3d 156 (7th Cir. 1993), cert. denied, — U.S. —, 114 S. Ct. 1057, 127 L. Ed. 2d 378, 62 U.S.L.W. 3551 (1994); Roby v. Corporation of Lloyd's, 824 F. Supp. 336 (S.D.N.Y. 1992), aff'd, 996 F.2d 1353, 1362 (2d Cir. 1993), cert. denied, — U.S. —, 114 S. Ct. 385, 126 L. Ed. 2d 333, 62 U.S.L.W. 3319 (1993); Shell v. R.W. Sturge, Ltd., 850 F. Supp. 620 (S.D. Ohio 1993), aff'd, 55 F.3d 1227 (6th Cir. 1995); Richards v. Lloyd's of London, C.A. No. 94-1211- IEG (POR), 1995 U.S. Dist. LEXIS 6888 (S.D. Cal. Apr. 28, 1995); McDade v. NationsBank of Texas, N.A., C.A. No. H-94-3714 (S.D. Tex. June 26, 1995). Lloyd's also cites Ash v. Corporation of Lloyd's, Nos. C12100 & C9113 (Ont. Ct. App. July 28, 1992) (Can.).

The Court is also aware of reports that some Names have litigated these issues successfully in other jurisdictions, such as Australia and Canada. See Steve Boggan, *Foreigners fared worst in Lloyd's losses*, THE INDEPENDENT, Apr. 27, 1992, at A2.

Lloyd's can forgive the magistrate for following the law. See *supra* note 15; *Hartford Fire Ins. Co., U.S. at __, 113 S. Ct. at 2895; Albright, U.S. at __, 114 S. Ct. at 810* (court accepts well-pleaded allegations as true); *Lujan*, 504 U.S. at __, 112 S. Ct. at 2137; *Hishon*, 467 U.S. at 73, 104 S. Ct. at 2232 (claim is subject to dismissal only if it appears beyond doubt that plaintiff can prove no set of facts in support of claims that would entitle him to relief). The Court shall therefore consider *de novo* whether Leslie has slated a claim under *Rule 10b-5* or the DTPA.

A. Deceptive Trade Practices Act

[*36] Texas consumers are entitled to rely upon a novel statute that has revolutionized tort law in their state and expanded the available remedies.³⁶ [*38] "The DTPA does not represent a codification of the common law. **HN6** [↑] A primary purpose of the enactment of the DTPA is to provide consumers a cause of action for deceptive trade practices *without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit.*"³⁷ *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 28 (5th Cir. 1992); *Eagle Properties Ltd. v. Scharbauer*, 807 S.W.2d 714, 724 (Tex. 1990); *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988); *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (emphasis added). Most important to this case, the DTPA does away with any common-law requirement of contractual privity. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352 (Tex. 1987); *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex. 1985); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 541, 24 Tex. Sup. J. 265 (Tex. 1981) ("The Act is designed to protect consumers [*37] from any deceptive trade practice made in connection with any purchase or sale of any goods or services."); *Barrett v. U.S. Brass Corp.*, 864 S.W.2d 606, 620-21 (Tex. App. -- Houston [1st Dist.] 1993, writ granted); *Knowlton v. U.S. Brass Corp.*, 864 S.W.2d 585, 592-94 (Tex. App. -- Houston [1st Dist.] 1993, writ granted) ("To recover under the DTPA, a plaintiff must establish [1] that he is a 'consumer,' [2] that there were false, misleading, or deceptive acts or an unconscionable act, and [3] that the act or acts constituted the producing cause of damage."); cf. *Melody Home Mfg. Co.*, 741 S.W.2d at 352 ("The absence of a cash transfer is not determinative because DTPA plaintiffs establish their standing as consumers by their relationship to a transaction, not by their contractual relationship with the defendant.").

HN7 [↑]

The definition of "consumer" under the DTPA is quite broad: "an individual . . . who seeks or acquires by purchase or lease, any goods or services." *TEX. BUS. & COM. CODE ANN. § 17.45(4)* (Vernon 1987) (emphasis added).

³⁶ See, e.g., *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241-42 (Tex. 1994) (recognizing claims against a physician for breast augmentation surgery, based upon knowing misrepresentation and breach of an express warranty, while leaving open the issue of an "implied warranty to perform [medical] services in a good and workmanlike manner."); *Archibald v. Act III Arabians*, 755 S.W.2d 84, 86 (Tex. 1988) (converting negligence claim into a treble-damages-and-attorneys'-fees DTPA claim by recognizing an "implied warranty of good and workmanlike performance that applies to horse training services"); *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 131-37 (Tex. 1987) (insurance law); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987) (holding "that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA"); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 706-08 (Tex. 1983) (lender liability for wrongful foreclosure); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983) (liability for builders); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539-41 (Tex. 1981); *Segura v. Abbott Labs., Inc.*, 873 S.W.2d 399 (Tex. App. -- Austin 1994) (recognizing a DTPA cause of action by indirect purchasers for cartel behavior, which federal antitrust laws will not permit after *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)), writ granted, 38 Tex. Sup. J. 49-50 (Nov. 3, 1994) (94-0514); *Rickey v. Houston Health Club, Inc.*, 863 S.W.2d 148 (Tex. App. -- Texarkana, 1993) (recognizing a warranty or misrepresentation cause of action under the DTPA for a slip-and-fall injury in a health club), writ denied, 888 S.W.2d 812 (Tex. 1994); *Berry Property Management Co. v. Bliskey*, 850 S.W.2d 644 (Tex. App. -- Corpus Christi 1993, writ dism'd) (DTPA claim against apartment manager by rape victim); *Prudential Ins. Co. of Am. v. Jefferson Assoc.*, 839 S.W.2d 866 (Tex. App. -- Austin 1992), rev'd, 896 S.W.2d 156, 38 Tex. Sup. J. 366 (Mar. 16, 1995) (D-3906).

³⁷ The principles applicable to construing the DTPA place primary emphasis on the intent of the legislature, "keeping in view 'the old law, the evil, and the remedy.'" *Pennington v. Singleton*, 606 S.W.2d 682, 686 (Tex. 1980) (citing *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977)).

Lloyd's does not contend that Leslie is a "business consumer with personal assets of \$ 25 million or more, or "owned or controlled by a corporation or entity" that is similarly capitalized. See *id.* Leslie alleges, and Lloyd's does not contest, that he paid Lloyd's a one-time joining fee and annual membership fees, in exchange for services. Leslie alleges that these included the services necessary to provide an operating insurance market and that Lloyd's represented on several occasions that it provided regulatory and oversight services for its members with respect to the activities of [*39] Active Underwriters, Managing Agents, and Members' Agents. Without question, Leslie alleges a transfer of consideration for services. *Kennedy*, 698 S.W.2d at 892. Moreover, the services Leslie purchased, or the absence thereof, "form the basis" of Leslie's complaint. *Knowlton*, 864 S.W.2d at 592.

Leslie alleges that Lloyd's, either directly or through the actual or apparent authority vested in Parnell and Sturge, made the following misrepresentations, among others:

- (1) that an underwriting member becomes a member of Lloyd's, not some unknown underwriting agency, and the member can rely upon all of the representations made by Lloyd's or its various agents;
- (2) that a member's risk, despite nominally unlimited liability, is minimal because Lloyd's tightly regulates its insurance market and oversees all risks to assure that risks are spread throughout the Lloyd's membership, not concentrated in particular syndicates;
- (3) that an underwriting member of Lloyd's can expect to earn approximately ten percent (10%) of his or her total underwriting undertaking in profits each year.

Moreover, the allegations in the pleadings indicate that Lloyd's knew about, but [*40] failed to disclose, both the risks associated with long-tail asbestos and pollution policies and the Lloyd's insiders' practice of concentrating these risks in "outside" syndicates. Leslie further alleges that these misrepresentations and nondisclosures, including representations concerning regulation and oversight services, constituted deceptive acts or practices which were the producing cause of damages to him and violated one or more of the provisions of the DTPA "laundry list," including the following:

- (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of . . . services;
- (3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (5) representing that . . . services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection he does not;
- (7) representing that . . . services are of a particular standard, quality, or grade . . . if they are of another;
- (12) representing that an agreement confers or involves rights, [*41] remedies, or obligations which it does not have or involve, or which are prohibited by law;
- (23) the failure to disclose information concerning . . . services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

HN8 [↑] [TEX. BUS. & COM. CODE ANN. §§ 17.46\(a\)\(2\), \(3\), \(5\), \(7\), \(12\), \(23\), 17.50\(a\)\(1\)](#) (Vernon 1987 & Supp. 1995). The allegations would also seem to support a claim for "an act or practice which, to a person's detriment:

- (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 transfer involving transfer of consideration."

Id. [§§ 17.45\(5\), 17.50\(a\)\(3\)](#) (definition of "unconscionable action or course of action"). A consumer's DTPA rights, of course, may not be waived except under very limited circumstances. *Id.* [§ 17.42](#) (waiver enforceable only if defendant pleads and proves (1) no significant difference in bargaining [*42] position, (2) consumer is represented by legal counsel (3) in a transaction for a consideration in excess of \$ 500,000, (4) waiver is made in an express provision, (5) in a written contract, and (6) signed by both the consumer and the consumer's counsel). The Court has no difficulty deciding that Leslie's allegations are sufficient to survive [Rule 12\(b\)\(6\)](#).

HN9[] The DTPA 60-day demand letter requirement is never a ground for outright dismissal of a claim. *Hines v. Hash*, 843 S.W.2d 464, 468-69 (Tex. 1993) (The purpose of the statute "is better served by abating an action filed without notice for the duration of the [60-day] statutory notice period . . . than by dismissing the action altogether;" "defendant must request an abatement with the filing of an answer or very soon thereafter."). Abatement of this action to facilitate settlement will be most appropriate after the Fifth Circuit has ruled on an interlocutory appeal of this order.

B. Securities fraud

Upon *de novo* review of the magistrate's recommendation, the Court is of the opinion that Leslie has stated a claim for securities fraud and done so with sufficient particularity to survive a motion to dismiss. Lloyd's [*43] primary objection to Leslie's securities fraud claim is not that Leslie has failed to allege either (1) misrepresentations or failures to disclose material information, (2) "[a] device, scheme or artifice to defraud," or (3) "an act, practice, or course of business which operates as a fraud or deceit," in connection with a transaction in securities. 17 C.F.R. part 240. 10b-5. Rather, Lloyd's objects that the transactions of which Leslie complains never involved the purchase or sale of any security. See Dkt. #5, at 51-55. Lloyd's also argues that Leslie has failed to allege both loss and transaction causation. Reviewing Leslie's pleadings, it is apparent they sufficiently allege both forms of causation -- that Leslie would not have entered into transactions but for the fraud, and that the fraud caused damage to Leslie.

Although Lloyd's appears to concede that "Leslie's allegations tend to show that he sought and acquired his position as an underwriting member as a prerequisite to his participation in an investment," *id. at 48-49*, the Court agrees with Lloyd's that Leslie has not alleged that he purchased a security solely by purchasing a Lloyd's Name. Leslie alleges that [*44] he purchased securities when he purchased participations in Lloyd's syndicates, see Dkt. #89 at P 31, and that Lloyd's represented to him that the only way to qualify for purchasing these securities was to purchase a Name. While it may be debatable whether Leslie's overall transaction with Lloyd's insiders constituted an "investment contract" ³⁸ or other security, the Court elects to hold that **HN10**[] a bare Name is not an "investment contract," as that term is defined in the controlling cases. *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 99 S. Ct. 790, 796, 58 L. Ed. 2d 808 (1979); *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 851-52, 95 S. Ct. 2051, 2060, 44 L. Ed. 2d 621 (1975); *Securities & Exch. Comm'n v. W. J. Howey Co.*, 328 U.S. 293, 301, 66 S. Ct. 1100, 1104, 90 L. Ed. 1244 (1946); *Securities & Exch. Comm'n v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974).

[*45] While a Name, by itself, may not be a security, Leslie certainly has purchased securities in the form of participations in Lloyd's syndicates. The Court finds instructive the position of the Securities and Exchange Commission ("SEC") on the subject:

The staff of the Commission's Division of Corporate Finance has had discussions with Lloyd's concerning the applicability of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") to the solicitation of U.S. Citizens to participate in Lloyd's. *It is the Division's position that the solicitation of participations involves the sale of a security, with the issuer of that security being the particular Members' Agent involved. Accordingly, such U.S. sales would be subject to all of the provisions of the Securities Act and the Exchange Act, including the anti-fraud provisions.* At the time of those prior discussions,

³⁸ **HN11**[] The test for an "investment contract" is whether the scheme involves an investment of money in a common enterprise with profits to come primarily from the efforts of others. *Securities & Exch. Comm'n v. W. J. Howey Co.*, 328 U.S. 293, 301, 66 S. Ct. 1100, 1104, 90 L. Ed. 1244 (1946); *Securities & Exch. Comm'n v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974). "The [Howey/Forman] test is to be applied in light of 'the substance -- the economic realities of the transaction -- rather than the names that may have been employed by the parties.'" *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558, 99 S. Ct. 790, 796, 58 L. Ed. 2d 808 (1979). The *Howey* economic reality test was designed to determine whether a particular investment is an investment contract," not whether it fits within any of the examples listed in the statutory definition of "security." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691, 105 S. Ct. 2297, 2304, 85 L. Ed. 2d 692 (1985) (emphasis in original).

it was determined that if the Members' Agents solicited participations *in accordance with* the procedures proposed by Lloyd's counsel (an offering structure intended to comply with *the Commission's Regulation D*), *registration* under the Securities Act would [*46] not be required. However, in light of the issues raised by Mr. Roby and others, the staff may consider . . . whether further action is appropriate.

....

While Lloyd's participations do more closely resemble general partnership interests than they do other securities, such as shares of common stock, they are quite unique investments There is no existing precedent as to whether Lloyd's participations are securities but, as we pointed out above, the Division of Corporate Finance believes they are securities and as such are subject to the provisions of the Federal securities laws *in the same manner and to the same extent as more conventional securities*. . . . Subject to certain limitations and conditions, *the provisions of the Federal securities laws generally are as applicable to the sales of foreign securities (including participations in Lloyd's) in the United States as they are to the sales of domestic securities*.

Letter from Mary E. T. Beach, Senior Associate Director of the Division of Corporate Finance, United States Securities and Exchange Commission, to Hon. Donald J. Pease, Member, United States House of Representatives 2-3 (Aug. 5, 1991) (emphasis [*47] added), reprinted in Respondent's Brief in Opposition at App. A, *Riley v. Kingsley Underwriting Agencies, Ltd.*, 506 U.S. 1021 113 S. Ct. 658, 121 L. Ed. 2d 584 (Dec. 7, 1992) (No. 92-664). The position of the Securities and Exchange Commission -- that participations in a Lloyd's syndicate are securities -- is correct. [HN12](#)[¹²] The purchase of a participation involves the investment of money -- delivery of a clean irrevocable letter of credit and assumption of unlimited several liability³⁹ -- in a common enterprise, Lloyd's and/or a Lloyd's syndicate, with profits to come solely⁴⁰ from the efforts of others -- such as brokers at Lloyd's and the syndicate's Managing Agent. [United Housing Found., Inc.](#), 421 U.S. at 851-52, 95 S. Ct. at 2060; [Securities & Exch. Comm'n v. W. J. Howey Co.](#), 328 U.S. at 301, 66 S. Ct. at 1104; see also [Reves v. Ernst & Young](#), 494 U.S. 56, 60, 110 S. Ct. 945, 949, 108 L. Ed. 2d 47 (1990) (in enacting the securities laws, Congress "recognized the virtually limitless scope of human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek [to] use . . . the money of others on the promise of [*48] profits.'") (quoting *Howey*); [Landreth Timber Co. v. Landreth](#), 471 U.S. 681, 691, 105 S. Ct. 2297, 2304, 85 L. Ed. 2d 692 (1985) (transaction may be a "security" even though it does not satisfy the *Howey* economic reality test); [Securities & Exch. Comm'n v. Koscot Interplanetary, Inc.](#), 497 F.2d 473 (5th Cir. 1974) ("solely from the efforts of others" criterion "would be easy to evade" if applied too literally; "the admitted salutary purposes of the Acts can only be safeguarded by a functional approach to the *Howey* test.").

Congress has expressly granted the SEC regulatory authority [*49] under the 1933 and 1934 Acts. See [15 U.S.C. §§ 77c\(b\), \(c\), 77f\(d\), 77i, 77s\(a\), 78u, 78u-2, 78w\(a\)\(1\), 78y](#); see also [17 C.F.R. part 230.100\(b\)](#). Relevant precedent indicates [HN13](#)[¹³] the courts should grant significant deference to administrative decisions when an agency has regulatory authority over matters a court must address. See, e.g., [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); [Stinson v. United States](#), 508 U.S. 36, 113 S. Ct. 1913, 1919, 123 L. Ed. 2d 598 (1993) ("Provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with [*50] the regulation.'") (quoting [Bowles v. Seminole Rock & Sand Co.](#), 325 U.S. 410, 414, 65 S. Ct. 1215, 1217, 89 L. Ed. 1700 (1945)). In this case, the position of the SEC Division of Corporate Finance that participations in Lloyd's

³⁹ As a Name increases the number of syndicates he or she underwrites or increases his or her share of the underwriting business of a particular syndicate, Lloyd's requires the Name to increase the face value of the clean, irrevocable letter of credit.

⁴⁰ Passive Names "are not permitted an active role in the day-to-day business of insuring risks or handling claims." See Dkt. #5, at 10-11 (emphasis added).

syndicates are regulated securities is based upon a permissible construction of the 1933 and 1934 Acts, and is not plainly erroneous or inconsistent with agency regulations. The Court holds these participations are securities as that term is defined in the 1933 and 1934 Acts.

The SEC also takes the position that Lloyd's program of soliciting Names in the United States, as Lloyd's described its activities to the SEC, is exempt from the *registration* requirement of the 1933 Securities Act under the SEC's Regulation D. See [17 C.F.R. §§ 230.501 - 230.508](#). ("Reg D"). It bears mentioning that the Reg D "private offering" exemption is not to be confused with an exemption from the *anti-fraud* provisions of the 1933 and 1934 Acts. See [Landreth Timber Co., 471 U.S. at 692](#) & n.6, [105 S. Ct. at 2305](#) & n.6 (quoting Louis Loss favorably for the proposition that "saying . . . the fraud provisions do not apply to private transactions" is "heresy"); [Adena \[*51\] Exploration Co. v. Sylvan, 860 F.2d 1242, 1251 & n.42 \(5th Cir. 1988\)](#); [17 C.F.R. § 230.501 et seq.](#) preliminary note 1 ("Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers are reminded of their obligation to provide such further material information . . . as may be necessary to make the information required under this regulation, in light of the circumstances . . . not misleading.").⁴¹

[*52] Even though the bare sale of a Name is not an "investment contract," and therefore Lloyd's itself is not necessarily an "issuer" of securities, the Court is of the opinion that Leslie has alleged sufficient facts to support a cause of action against Lloyd's under [Rule 10b-5](#), which prohibits "any device, scheme, or artifice to defraud," any material misrepresentation or failure to disclose, or "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . *in connection with* the purchase or sale of any security." The cases establish beyond peradventure that [Rule 10b-5](#) actions are not strictly limited to claims against the "issuer" of the securities in question.⁴²

⁴¹ But see Respondent's Brief in Opposition at 1-2, [Riley v. Kingsley Underwriting Agencies, Ltd., 506 U.S. 1021, 113 S. Ct. 658, 121 L. Ed. 2d 584 \(Dec. 7, 1992\)](#) (No. 92-664) (confusing the Reg D registration exemption with an exemption from the anti-fraud provisions of the 1933 and 1934 Acts):

Petitioner errs in suggesting that the decision below deprives him of a right available to him under the U.S. securities laws. When the [SEC] in 1987 and 1988 reviewed the whole issue of offering membership in Lloyd's to United States persons, it concluded that if the Members' Agents solicited participation in Lloyd's in compliance with . . . the Commission's Regulation D, registration under the Securities Act was *not* required.

Id. (emphasis in original). While this action has been pending, the Supreme Court handed down [Gustafson, U.S. , 115 S. Ct. 1061, 131 L. Ed. 2d 1](#), which holds that the rescission anti-fraud remedy provided in [section 12\(2\)](#) of the 1933 Act applies only to initial offerings of securities to the public, and not to secondary or private transactions in securities. However, Leslie has never relied upon [section 12\(2\)](#), and *Gustafson* contains no indication whatsoever that the 10b-5 remedy would or should ever be subject to similar limitations.

⁴² See [Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315-19, 105 S. Ct. 2622, 2631-33, 86 L. Ed. 2d 215 \(1985\)](#) (recognizing cause of action by "tippee" against securities broker "tipper" who supplies tippee with purported inside information later discovered to be false); [Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 150-54, 92 S. Ct. 1456, 1470-72, 31 L. Ed. 2d 741 \(1972\)](#) (recognizing claim for trader's failure to disclose material information about market conditions); [Securities & Exch. Comm'n v. Capital Gains Research Bureau, 375 U.S. 180, 186, 84 S. Ct. 275, 280, 11 L. Ed. 2d 237 \(1963\)](#) (providing cause of action for "scalping" practices of investment adviser); [Jolley v. Welch, 904 F.2d 988, 993 \(5th Cir. 1990\)](#) (discussing the "churning" cause of action), cert. denied, [498 U.S. 1050, 111 S. Ct. 762, 112 L. Ed. 2d 781 \(1981\)](#); [Laird v. Integrated Resources, Inc., 897 F.2d 826, 838 \(5th Cir. 1990\)](#) (recognizing that 10b-5 "churning" violation may constitute a RICO predicate offense); [United States v. Winans, 612 F. Supp. 827, 838-48 \(S.D.N.Y. 1985\)](#), aff'd sub nom. [United States v. Carpenter, 791 F.2d 1024, 1028-34 \(2d Cir. 1986\)](#) (affirming conviction of Wall Street Journal "Heard on the Street" columnist for trading on column contents in advance of publication), aff'd, [484 U.S. 19, 24, 108 S. Ct. 316, 320, 98 L. Ed. 2d 275 \(1987\)](#) (equally divided court); [Miley v. Oppenheimer & Co., 637 F.2d 318, 324-25 \(5th Cir. Unit A 1981\)](#) (recognizing 10b-5 "churning" cause of action, which "occurs when a securities broker enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of his client's interests"); [Mihara v. Dean Witter & Co., Inc., 619 F.2d 814 \(9th Cir. 1980\)](#); [Zweig v. Hearst Corp., 594 F.2d 1261 \(9th Cir. 1979\)](#) (recognizing 10b-5 cause of action against financial columnist for failure to disclose conflict of interest); see also [Basic, Inc. v. Levinson, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194 \(1988\)](#) (approving "fraud on the market" presumption of reliance on material misrepresentations); [Dirks v. Securities & Exch. Comm'n,](#)

[*53] **V. EXTRATERRITORIAL APPLICATION OF UNITED STATES LAWS****A. Securities Exchange Act of 1934**

Relying primarily upon [Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274, 59 U.S.L.W. 4225 \(1991\)](#) (hereafter, "EEOC"), Lloyd's argues that the 1934 Securities Exchange Act does not apply extraterritorially.⁴³ It is well-settled that [HN14](#)[↑] the 1934 Act, and [Rule 10b-5](#), apply extraterritorially to certain transactions in foreign commerce, and the Court is of the opinion that the securities laws apply extraterritorially in this case.

[*54] In *EEOC*, 499 U.S. at __, 111 S. Ct. at 1229, 1236, the Supreme Court decided that Title VII of the Civil Rights Act of 1964, as amended, does not apply extraterritorially to regulate "the employment practices of United States employers who employ United States citizens abroad." In so ruling, the Court affirmed, and arguably strengthened, the presumption" against extraterritorial application of federal statutes, "unless a contrary [legislative] intent appears."⁴⁴ [Id. at 1230](#) (citing [Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85, 69 S. Ct. 575, 577, 93 L. Ed. 680 \(1949\)](#)). Before the year was out, Congress clearly expressed its contrary legislative intent. See [42 U.S.C. § 2000e\(f\)](#); [Landgraf v. USI Film Prods., U.S. , 114 S. Ct. 1483, 1489-90, 128 L. Ed. 2d 229, 62 U.S.L.W. 4255 \(1994\)](#).

[*55] The *EEOC* court determined that the definition of "Commerce" in Title VII, which included "trade, traffic, commerce . . . or communication among the several states; or between a State and *any place outside thereof*," "is ambiguous, and does not speak directly to the question presented here." *EEOC*, 499 U.S. at __, 111 S. Ct. at 1231 (emphasis added). In contrast, the 1934 Securities Exchange Act is not at all ambiguous: "[HN15](#)[↑] The term interstate commerce means trade, commerce, transportation, or communication among the several states, or *between a foreign country and any State, or between any State or place or ship outside thereof.*" [15 U.S.C. § 78c\(a\)\(17\)](#) (emphasis added); see also [15 U.S.C. § 78aa](#).

Moreover, legal developments subsequent to *EEOC* provide strong indications that *EEOC* did nothing to alter the longstanding rule that the 1934 Act may apply extraterritorially to some securities transactions. In an appeal from a

[463 U.S. 646, 103 S. Ct. 3255, 77 L. Ed. 2d 911 \(1983\)](#) (qualifying *Chiarella* with requirement of personal gain motivation); [Chiarella v. United States, 445 U.S. 222, 226-30, 100 S. Ct. 1108, 1113-15, 63 L. Ed. 2d 348 \(1980\)](#) (in a 10b-5 action against a "markup man" in a financial printing operation, holding that failure to disclose material information "may constitute a manipulative or deceptive device" if the jury is properly instructed on whether the party charged with the failure to disclose, such as "an insider [or] a fiduciary,' is under a duty to disclose it"); *id.* [445 U.S. at 230 n.12, 100 S. Ct. at 1116 n.12](#) (distinguishing [Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith, 495 F.2d 228, 237-38 \(2d Cir. 1974\)](#)); [Securities & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833 \(2d Cir. 1968\)](#), cert. denied, [404 U.S. 1005, 92 S. Ct. 561, 30 L. Ed. 2d 558 \(1972\)](#).

⁴³ Lloyd's does not argue that section 27 of the 1934 Act, [15 U.S.C. § 78aa](#), does not authorize service of process upon it. Cf. [Omni Capital Int'l v. Rudolf, Wolff & Co., 484 U.S. 97, 105-07, 108 S. Ct. 404, 98 L. Ed. 2d 415 \(1987\)](#) (addressing service of process under § 22 of the Commodity Exchange Act). Unlike § 22 of the Commodity Exchange Act, § 27 of the Securities Exchange Act of 1934 "authorizes service of process 'wherever the defendant may be found.'" [Securities & Exch. Comm'n v. Unifund SAL, 910 F.2d 1028, 1033-34 \(2d Cir.\)](#) (quoting [15 U.S.C. § 78aa](#)), reh'g denied, [917 F.2d 98 \(2d Cir. 1990\)](#).

⁴⁴ This approach has not gone without comment. See GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 585-90 (2d ed. 1992); Scott A. Burns, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of International Comity*, [15 U. PA. J. INT'L BUS. L. 221, 249-52 \(1994\)](#); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, [67 N.Y.U. L. REV. 921, 959](#) & n.195 (1992); Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, [70 TEX. L. REV. 1799, 1822 \(1992\)](#) (Weintraub argues in favor of rejecting a "choice-" or "conflict-of-law" approach to international securities and antitrust cases, and adopting instead a rebuttable presumption that the relevant statutes apply extraterritorially).

Second Circuit decision involving plaintiffs who were neither United States residents nor citizens, which not only reaffirmed both traditional tests for the extraterritorial application of [Rule 10b-5](#), but held as well that RICO may [*56] apply extraterritorially, the Supreme Court denied certiorari. [*Alfadda v. Fenn*, 935 F.2d 475, 479-80 \(2d Cir. 1991\)](#) (decided June 5, 1991; EEOC was decided March 26, 1991) ("Under our decisions, two tests have emerged for determining whether a federal court has subject matter jurisdiction over a foreign plaintiff's claim under the antifraud provisions of the securities laws[.]. . . the 'conduct' test, [and]. . . the 'effects' test."), cert. denied, 502 U.S. 1004, 112 S. Ct. 638, 116 L. Ed. 2d 656, 60 U.S.L.W. 3418 (1991). Second, the United States Court of Appeals for the District of Columbia Circuit held that the National Environmental Policy Act of 1969 required a federal agency to prepare an environmental impact statement in advance of implementing a waste incineration program at a base in Antarctica. [*Environmental Defense Fund, Inc. v. Massey*, 300 U.S. App. D.C. 65, 986 F.2d 528 \(D.C. Cir. 1993\)](#). Third, the Supreme Court held that the Sherman Act would apply extraterritorially in a lawsuit against London reinsurers, and that international comity would not require the United States to decline to enforce the Sherman Act unless "there is in fact a true conflict [*57] between domestic and foreign law." ⁴⁵ [*Hartford Fire Ins. Co., U.S. at , 113 S. Ct. at 2908-10*](#); see also [*id. at 2917-19*](#) (Scalia, J., dissenting) (citing EEOC); [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6, 106 S. Ct. 1348, 1354 n.6, 89 L. Ed. 2d 538 \(1986\)](#).

[*58] If the EEOC Court's election to re-emphasize the [*Foley Bros.*, 336 U.S. at 284-85, 69 S. Ct. at 577](#), presumption against extraterritoriality did not warrant the Supreme Court's revisiting extraterritorial application of the [*Sherman Act*](#)⁴⁶ [*in Hartford Fire Ins. Co., U.S. at , 113 S. Ct. at 2908-10*](#), then this Court is not aware of any reason to view EEOC as a mechanism for revisiting the multitude of post-*Foley Bros.* cases holding that the United States securities laws can apply extraterritorially, either to foreign defendants who have allegedly defrauded United States investors, see [*Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985-87 \(2d Cir.\)](#), cert. denied sub nom. *Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018, 96 S. Ct. 453, 46 L. Ed. 2d 389 (1975); [*Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333-35 \(2d Cir. 1972\)](#) (involving an American corporation and a British subsidiary as plaintiffs); [*Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-08 \(2d Cir.\)](#), rev'd in part on other grounds, [*405 F.2d 215 \(2d Cir. 1968\)*](#) (en banc), cert. denied sub nom. *Manley v. Schoenbaum*, 395 U.S. 906, 89 S. Ct. 1747, 23 [*59] L. Ed. 2d 219 (1969), or in favor of foreign plaintiffs alleging fraud in a foreign securities transaction, in a 10b-5 claim based either upon conduct in the United States or upon a transaction's substantial effect on United States securities markets. See [*Alfadda*, 935 F.2d at 479-80 \(2d Cir. 1991\)](#), cert. denied, __ U.S. __, 112 S. Ct. 638 (1991); [*MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170 \(5th Cir. 1990\)](#); [*Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 \(2d Cir.\)](#), modified, 890 F.2d 569 (2d Cir.), cert. dism'd, 492 U.S. 939, 110 S. Ct. 29, 106 L. Ed. 2d 639 (1989); [*Zoelsch v. Arthur Andersen & Co.*, 262 U.S. App. D.C. 300, 824 F.2d 27, 31-33 \(D.C. Cir.](#)

⁴⁵ Incidentally, the English Parliament in 1980 passed The Protection of Trading Interests Act, 1980, ch. 11 (Eng.), which was primarily responsive to extraterritorial application of the Sherman Act by the United States. This legislation includes a "clawback" provision creating a cause of action in England for recovery as damages any monies awarded in a foreign jurisdiction (i.e. the United States), and actually collected, in excess of compensatory damages (i.e. Sherman Act treble damages). Of course, this statute does not indicate there is any "true conflict" between the requirements of English law and the prohibitions contained in United States antitrust, racketeering, or consumer protection laws. However, the Protection of Trading Interests Act is an indication that English and American policies differ considerably insofar as the remedies each country provides for wrongdoing.

⁴⁶ Like Rule 10b-5 violations, Sherman Act violations by foreign defendants with a direct and substantial effect on United States commerce have long been held actionable in United States courts, despite the presumption stated in [*Foley Bros.* *Matsushita Elec. Indus. Co.*, 475 U.S. 582-83, 106 S. Ct. at 1351-54](#); [*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S. Ct. 1404, 1413, 8 L. Ed. 2d 777 \(1962\)](#); [*Timberlane Lumber Co. v. Bank of Am.*, 749 F.2d 1378, 1386 \(9th Cir. 1984\)](#), cert. denied, 472 U.S. 1032, 105 S. Ct. 3514, 87 L. Ed. 2d 643 (1985); [*Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 235 U.S. App. D.C. 207, 731 F.2d 909, 921-26 \(D.C. Cir. 1984\)](#); see also [*United States v. Aluminum Co. of Am.*, 148 F.2d 416 \(1945\)](#); cf. [*Steele v. Bulova Watch Co.*, 344 U.S. 280, 288, 73 S. Ct. 252, 256, 97 L. Ed. 319 \(1952\)](#) (Lanham Act) (cited in EEOC, 111 S. Ct. at 1232-1233). Congress recently attempted to clarify the standard for extraterritorial application of the Sherman Act when it passed the Foreign Antitrust Improvements Act. 15 U.S.C. § 6a ("Section 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect [on interstate commerce, import commerce, or export commerce by United States exporter.]").

1987) (limiting extraterritorial application of 10b-5 in favor of foreign plaintiffs to the "conduct" test); Bersch, 519 F.2d at 985-87. Nor would EEOC appear to require courts to revisit issues concerning the extraterritorial application of other commercial statutes. See, e.g., Steele v. Bulova Watch Co., 344 U.S. 280, 286, 73 S. Ct. 252, 97 L. Ed. 319 (1952) (Lanham Act). Unless and until the Supreme Court or the Fifth Circuit directs otherwise, this Court [*60] will consider itself bound by the standard announced in MCG, Inc., 896 F.2d at 173-75 ("The first predicate for extending jurisdiction involves conduct occurring in the United States that has an effect on [U.S.] securities markets or [U.S.] investors."), and United States v. Cook, 573 F.2d 281, 283-84 (5th Cir.), cert. denied, 439 U.S. 836, 99 S. Ct. 119, 58 L. Ed. 2d 132 (1978).

[*61] Lloyd's also argues that MCG requires this Court to hold that Rule 10b-5 does not apply extraterritorially in this case. Obviously, MCG does not stand for the proposition that the presumption against extraterritoriality precludes application of Rule 10b-5 to a transaction involving the offering and sale of a security in the United States to a United States investor merely because the issuer happened to be headquartered in England, see MCG, 896 F.2d at 174 -- even if that security happened to be a participation in a Lloyd's syndicate. The reason the MCG court declined to recognize Rule 10b-5 subject matter jurisdiction under the particular facts of that case was the extraordinary length to which the American plaintiffs had gone to circumvent the United States securities laws:

Our analysis begins and ends with the district court's finding that MCG sought, through extensive machinations, to avoid the application of the federal securities laws and their attendant obligations in order to facilitate their investment in a foreign offering from which they were disqualified, doing so without the knowledge of the defendants The policy concerns that have resulted [*62] in the extension of subject matter jurisdiction are not implicated where, as here, the "foreign" purchaser seeking protection is a mere "shell" created to avoid the securities laws. Having gone to such lengths to structure a transaction not burdened by the securities laws, plaintiffs cannot expect to wrap themselves in their protective mantle when the deal sours.

MCG, 896 F.2d at 175. Lloyd's has not presented the Court with any evidence that Leslie ever attempted to structure his transaction with Lloyd's in an effort to circumvent the securities laws of the United States.

It is true that Lloyd's requires all Names to take part in a ritual ceremony in London at which certain closing documents are executed. However, this alone cannot be sufficient evidence to establish that Leslie's transaction was wholly foreign.⁴⁷ To adopt such a rule would elevate mere formalism over the economic realities of today's global financial markets. The Court is of the opinion that Lloyd's repeated emphasis on the formal closing ceremony in London is a substantial indication that Lloyd's, not Leslie, with full knowledge of the probable application of the United States securities laws to any [*63] sales of syndicate participations to United States Names,⁴⁸ attempted to circumvent the U.S. securities laws through the structure of its transactions. Further evidence of such an effort on Lloyd's part is Lloyd's take-it-or-leave-it offer in 1986 that Leslie either sign the revised General Undertaking or discontinue his underwriting activities.

[*64] Both the allegations and the evidence support the conclusion that Lloyd's transaction with Leslie was predominantly a domestic securities transaction in the United States, not a wholly foreign transaction. Lloyd's

⁴⁷ Lloyd's might have more success making this argument if the facts in this case were more similar to the facts in *Hirsch v. Oakley Vaughn Underwriting, Ltd.*, No. H-87-3727 (S.D. Tex., Dec. 14, 1988), aff'd, **904 F.2d 704 (5th Cir., May 31, 1990)** (No. 89-2563), cert. denied, **498 U.S. 981, 111 S. Ct. 511 (1990)**. The plaintiff in *Hirsch* initially contacted his underwriter through his English cousin and conducted the bulk of the transaction in England. The only meeting in Houston, the trial court said, was "to discuss a matter unrelated to this case." Slip op. at 3. The trial court concluded it was "unable to find substantial contacts with this Defendant" in the United States. *Id.*

⁴⁸ "See Letter from Mary E. T. Beach, Senior Associate Director of the Division of Corporate Finance, United States Securities and Exchange Commission, to Hon. Donald J. Pease, Member, United States House of Representatives 2-3 (Aug. 5, 1991) (emphasis added), reprinted in Respondent's Brief in Opposition at App. A, *Riley v. Kingsley Underwriting Agencies, Ltd., 506 U.S. 1021, 113 S. Ct. 658, 121 L. Ed. 2d 584 (Dec. 7, 1992)* (No. 92-664).

initially contacted Leslie in the United States and Parnell recruited Leslie by visiting him in Houston. Most of the alleged misrepresentations took place either in the United States or through postal or electronic communications in foreign commerce between the United States and England. Leslie signed the revised General Undertaking in the United States and returned it by mail to England. Leslie maintained a clean, irrevocable, letter of credit, which represented the extent of his undertaking at Lloyd's, with Texas Commerce Bank in Houston.

Moreover, this transaction was by no means an isolated event with a negligible effect upon United States citizens and securities markets.⁴⁹ [*66] Cf. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S. Ct. 2160, 2167-69, 119 L. Ed. 2d 394 (1992). During the late 1970s and early to mid 1980s, evidence indicates that Lloyd's conducted a widespread and systematic campaign to recruit new Names in the United States and elsewhere. [*65] Documents published by Lloyd's show that no fewer than 2,000 United States citizens have pledged their entire personal estates to become Lloyd's Names in the last two decades.⁵⁰ Lloyd's admits that, as of December 1990, no fewer than sixty-four of these Names resided in Texas. Dkt. #21, at 2. The Court is of the opinion that Lloyd's and the registered syndicates at Lloyd's were directly involved in the distribution of securities throughout the United States, and by entering this market have elected to subject themselves to the anti-fraud and disclosure requirements of the United States securities laws.⁵¹ See *Leasco Data Processing Equip. Corp.*, 468 F.2d at 1334 n.3.

Although much of Lloyd's business -- the (re)insurance underwriting [*67] process and most of the regulatory activity Lloyd's promised to perform -- took place in England, the focus of this lawsuit is upon the actions of Lloyd's and its agents as Lloyd's sought access to investment capital in the United States. The securities laws "recognize

⁴⁹ The Supreme Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992), held that a foreign sovereign was not immune from a suit brought in United States courts, solely by non-U.S. plaintiffs, for breach of contract, involving Argentina's unilateral restructuring of some debt securities it had issued in foreign markets. The Court not only held that issuing such debt was "commercial activity," as that term is used in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), but that the Argentine government's breach of contract with foreign investors had a "direct effect" in the United States. *Id.*, __ U.S. at __, 112 S. Ct. at 2168-69. In determining that the restructuring had a "direct effect," the Court looked to the *Due Process Clause of the Fifth Amendment* and the *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945) "minimum contacts" requirements for personal jurisdiction, but "only as an aid in interpreting the direct effect requirement of the [FSIA]." *Republic of Argentina*, __ U.S. at __, 112 S. Ct. 2169 & n.2. "By issuing negotiable debt instruments denominated in U.S. dollars and payable in New York," the Court held, "Argentina purposefully availed itself of the privilege of conducting [commercial] activities within the United States." *Id. at 2169* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528 (1985)), and by virtue of this activity, Argentina was subject to being haled into a federal court in the United States. *Id.*; see also *Burger King Corp.*, 471 U.S. at 473, 105 S. Ct. at 2182 ("We have emphasized that parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities."); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 482-83, 103 S. Ct. 1962, 1965-66, 76 L. Ed. 2d 81 (1983) (action against foreign government by foreign plaintiff, based upon Nigeria's unilateral amendment of an unconfirmed letter of credit it had established with a United States bank, is not beyond the Article III power of federal courts).

⁵⁰ The 1992 report of the Lloyd's Task Force, LLOYD'S OF LONDON, LLOYD'S: A ROUTE FORWARD 26, at Ex. 6 (1992), reports that United States Names in 1991 constituted 7.7% of the total membership base of Lloyds, or roughly 2044 out of 26,539 Names. United States Names in 1981 accounted for 6.6% of the membership base, or roughly 1263 out of 19,137 Names. In contrast, Names anywhere outside the United Kingdom in 1971 accounted for only one percent of the total membership base, or roughly sixty out of 6,020 total names.

⁵¹ MCG provides a fine example of how an issuer of securities in a foreign market can avoid the application of the United States securities laws:

As reflected in the prospectus prepared by Brown, the Great Western Shares, as foreign securities, were not registered with the Securities and Exchange Commission. Accordingly, they had to be offered exclusively to investors who were neither citizens, residents, nationals, nor chartered residents of the United States.

the virtually limitless scope of human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek to use the money of others on the promise of profits.'" [Reves, 494 U.S. at 60, 110 S. Ct. at 949](#) (quoting *Howey*). Under the circumstances, the Court concludes that neither the location of Lloyd's headquarters nor the location of Lloyd's mandatory closing ceremony was a legal factor sufficient to entitle Lloyd's "purposefully [to] avail itself of the privilege" of access to United States investors and capital markets, see *supra* note 49 (quoting *Republic of Argentina*, __ U.S. at __, 112 S. Ct. at 2169), "on the promise of profits," [Reves, 494 U.S. at 60, 110 S. Ct. at 949](#), without fulfilling the corresponding responsibilities that our laws require.

B. Deceptive Trade Practices Act

Lloyd's underwriters voluntarily subject themselves to the [*68] possibility of DTPA remedies for false, deceptive, or unconscionable trade practices when they sell insurance policies to Texas consumers.⁵² [TEX. INS. CODE. ANN. arts. 18.23\(b\)](#), 12.21, § 16(a) (Vernon 1981 & Supp. 1995); see, e.g., [Hull & Co. v. Chandler](#), 889 S.W.2d 513 (Tex. App. -- Houston [14th Dist.] 1994, writ denied); [Lloyd's of London v. Walker](#), 716 S.W.2d 99, 102-03 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.); [American Ins. Cos. v. Reed](#), 626 S.W.2d 898 (Tex. App. -- Eastland 1982, no writ); [Union Indem. Ins. Co. v. Certain Underwriters at Lloyd's](#), 614 F. Supp. 1015 (S.D. Tex. 1985); see also [Bellefonte Underwriters Ins. Co. v. Brown](#), 704 S.W.2d 742, 745 (Tex. 1986); [Union Pac. Resources Co. v. Aetna Casualty & Sur. Co.](#), 894 S.W.2d 401 (Tex. App. -- Fort Worth 1994), application for writ of error filed, 38 Tex. Sup. J. 637 (May 17, 1995 (95-0473); [Warrior v. Norrell](#), 791 S.W.2d 515 (Tex. App. -- Corpus Christi 1989, writ denied). It should hardly be surprising that the DTPA applies to transactions in interstate or foreign commerce involving the purchase of services by Texas consumers, including any "Names" Lloyd's of London sells in [*69] Texas.

By its terms, the DTPA provides that "a consumer may maintain an action where any of the following [specified deceptive acts or practices] constitute a producing cause of actual damages," [HN16](#) [TEX. BUS. & COM. CODE ANN. § 17.50\(a\)](#) (Vernon 1987), without limiting, in geographic terms, the range of possible defendants. See generally [Dowling v. NADW Marketing, Inc.](#), 578 S.W.2d 475, 476 (Tex. Civ. App. -- Eastland 1979, writ ref'd n.r.e.) (despite contractual clause specifying Louisiana forum, reversing Texas trial court's dismissal of DTPA action against Louisiana corporation not registered to do business in Texas). The DTPA must be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices" *Id.* [§ 17.44](#). Any interpretation of the DTPA that imposes geographic limitations upon the possible range of DTPA defendants would plainly violate this basic principle of construction.

Of course, [HN17](#) a state may not regulate aspects of interstate commerce if Congress has expressly preempted such regulation. See, e.g., [American Airlines, Inc. v. Wolens](#), __ U.S. __, [115 S. Ct. 817, 130 L. Ed. 2d 715, 63 U.S.L.W. 4066 \(1995\)](#) (Airline Deregulation Act of 1978 preempts application of the Illinois Consumer Fraud and Deceptive Business Practices Act to airline's retroactive [*71] changes in frequent flier program). However, when the pre-emptive effect of federal enactments is not explicit, courts sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states. [Metropolitan Life Ins. Co. v. Massachusetts](#), 471 U.S. 724, 747-48, 105 S. Ct. 2380, 2393, 85 L. Ed. 2d 728 (1985) (citations omitted). This Court is unaware of any federal regulation that would preempt the application of Texas consumer protection legislation to a transaction in foreign commerce involving services such as those Lloyd's promises its Names. The Court must presume that

⁵² Lloyd's conducts a considerable portion of its underwriting business with United States customers. A 1992 report by Lloyds indicates that, excluding inter-syndicate reinsurance, the United States market accounted for thirty-two percent (32%) of Lloyd's underwriting business in 1990. LLOYD'S OF LONDON, LLOYD'S: A ROUTE FORWARD 49 & Ex. 28 (1992). Only the U.K. market, which accounted for 36% of Lloyd's overall business in 1990, is more important to Lloyd's. *Id.* In 1989, the U.S. market was the source of twenty-eight percent (28%) of Lloyd's direct insurance premiums, but accounted for over thirty-eight percent (38.3%) of Lloyd's reinsurance premiums excluding inter-syndicate reinsurance -- more than the 31.3% share of reinsurance premiums associated with the U.K. market. [Id. at 185](#) & Ex. 96.

Congress did not intend to preempt areas of traditional state regulation. *Id. at 740, 105 S. Ct. at 2389* (citing *Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977)*).

Nor does this appear to be a case in which the "negative" aspect of the *commerce clause*, which "denies the states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," applies. *Oregon [*72] Waste Sys. v. Department of Envtl. Quality of Or., U.S. , 114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994); C & A Carbone, Inc. v. Town of Clarkstown, N.Y., U.S. , 114 S. Ct. 1677, 1682, 128 L. Ed. 2d 399 (1994)*. It is no "unjustifiable burden" on interstate commerce to require both Texans and non-Texans, supplying goods or services to Texas consumers, to refrain from "false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty." *TEX. BUS. & COM. CODE. § 17.44*. Application of the DTPA to defendants located outside Texas or outside the United States, far from fostering discrimination against interstate and foreign commerce, promotes uniform application of consumer protection legislation. In this increasingly interdependent world, it would be small consolation indeed for Texas consumers if the DTPA provides a remedy only for Texas manufacturers' deceptive practices and breaches of warranty, but none for the actions of manufacturers beyond Texas's borders or on the far side of the globe. Nor should the DTPA be limited, for example, to provide certain remedies for a Houston attorney's [*73] misbehavior while rendering services to a Houston resident, but no remedy at all to Houston residents seeking services from lawyers located in London or New York.

This case would be more difficult, perhaps, if the only transactions and deceptive practices described in Leslie's pleadings occurred entirely outside this state. However, virtually all the alleged deceptive trade practices took place in Texas. The Court is of the opinion the DTPA should apply extraterritorially under the facts presented in this case.

VI. FORUM-SELECTION AND CHOICE-OF-LAW CLAUSES

In 1986, Lloyd's required Leslie to sign a revised General Undertaking. Although Lloyd's had apparently managed, for the previous three hundred years of its history, without any forum-selection or choice-of-law clauses in the agreements it required members to sign, the revised 1986 General Undertaking contained clauses which, if enforced, required Leslie to bring any claims he might have in England, for resolution according to English law.⁵³ It is undisputed that Lloyd's offered Leslie, as an alternative to signing the document, the opportunity to discontinue his underwriting activity with Lloyd's. Although other courts [*74] have elected to enforce identical clauses against other Lloyd's Names, see note 35, *supra*, the Court concludes that the facts of this case are sufficiently different from previous cases that the forum-selection and choice-of-law ("FS/COL") clauses should not be enforced against Robert Leslie. Because Leslie has not raised the issue, the Court will assume, if necessary for present purposes, that the FS/COL agreement was supported by adequate consideration. The Court will also assume, without deciding, that a contractual choice-of-law provision can have the effect of determining which jurisdiction's legal standards apply in all disputes between the contracting parties, including disputes not based upon the contract itself.

[*75] A. Retroactivity

Unlike all prior United States cases involving Lloyd's Names, this case presents an issue concerning the retroactive application of the Lloyd's boilerplate FS/COL clauses. Leslie commenced his underwriting activity with Lloyd's in 1977. He did not sign the revised General Undertaking until 1986. Arguably, a fair portion of his claim is based upon

⁵³ The forum-selection / choice-of-law ("FS/COL") clauses, in substance, are the 1986 General Undertaking. The remainder of the revised General Undertaking consists of (1) an agreement "to comply with the provisions of [the] Lloyds Acts," subordinate legislation, and decisions of designated Lloyd's officials, (2) a clause continuing the FS/COL clauses in effect "notwithstanding that the member ceases, for any reason, to be a Member of . . . Lloyd's," and (3) a savings clause, in the event "any term of this Undertaking shall to any extent be invalid or unenforceable."

conduct and transactions that took place many years before 1986. Other allegations Leslie makes, however, clearly involve conduct by Lloyd's or Lloyd's agents that took place after 1986.

In contrast, the plaintiff in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 1991 U.S. Dist. LEXIS 21174, No. 91-C-1411 (D. Colo. Aug. 30, 1991), aff'd, 969 F.2d 953 (10th Cir. 1992), cert. denied, 506 U.S. 1021, 113 S. Ct. 658, 121 L. Ed. 2d 584, 61 U.S.L.W. 3418 (1992), signed only one General Undertaking, before beginning any underwriting activity, which "provided that the courts of England would have exclusive jurisdiction over any dispute and that the laws of England would apply." *Riley*, 969 F.2d at 955. Likewise, the court in *Roby v. Corporation of Lloyd's*, 824 F. Supp. 336 (S.D.N.Y. 1992), aff'd, 996 F.2d 1353, 1362 (2d Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 385, 126 L. Ed. 2d 333, 62 U.S.L.W. 3319 (1993), pointed out that "at most five of the 109 appellants" in that case would be affected by "[a] slightly different structure [that] existed prior to 1990." *Roby*, 996 F.2d at 1357 n. 1. It is not clear whether any of the five exceptional *Roby* plaintiffs was an underwriting Name under a General Undertaking that did not contain the FS/COL clauses. The *Roby* court's analysis was premised upon mandatory, pre-underwriting acceptance of the FS/COL terms: "Names are required to enter directly into two agreements The 'General Undertaking' is between a Name and the Lloyd's governing bodies and contains choice of forum (England) and choice of law (English) clauses." *Id. at 1357-58*. In *Bonny v. The Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. May 29, 1992), 3 F.3d 156 (7th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1057, 127 L. Ed. 2d 378, 62 U.S.L.W. 3544 (1994), the plaintiffs, before underwriting, "traveled to England and executed a General Undertaking for Membership that included both forum selection [*77] and choice of law clauses." *Id. 3 F.3d at 158*. One prior case, *Shell v. R.W. Sturge, Ltd.*, 850 F. Supp. 620 (S.D. Ohio 1993), aff'd, 55 F.3d 1227 (6th Cir. 1995), may have had the potential to raise this issue. See *id.*, 850 F. Supp. at 627-28 & n.4. However, neither the *Shell* court nor the magistrate judge in *Shell* addressed the issue. *Id. at 622-23, 629-30*. Recently decided cases in Texas and California were filed in 1994, too recently for retroactive application of the FS/COL clauses to be an issue. See *Richards v. Lloyd's of London*, No. 94-1211- IEG (POR), 1995 U.S. Dist. LEXIS 6888 (S.D. Cal. Apr. 28, 1995); *McDade v. NationsBank of Texas*, N.A., No. H-94-3714 (S.D. Tex. June 26, 1995). Finally, *Hirsch v. Oakely Vaughn Underwriting, Ltd.*, No. H-87-3727 (S.D. Tex., Dec. 14, 1988), aff'd, 904 F.2d 704 (5th Cir., May 31, 1990) (No. 89-2563), cert. denied, 498 U.S. 981, 111 S. Ct. 511 (1990) did not address any FS/COL issue; *Hirsch* was decided on forum non conveniens grounds.

Therefore, the Court has little guidance in determining whether the FS/COL clauses Leslie signed in 1986 would apply only to claims arising after 1986, or whether [*78] they would also apply to claims existing before 1986 that Leslie could have filed, had he known about them. The language of the forum selection clause, which covers "any dispute and/or controversy of whatsoever nature," while not expressly retroactive, is broad and may indicate Lloyd's contemplated its retroactive application. However, the choice-of-law clause is not so sweeping in its terms:

The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in *this Undertaking* shall be governed by and construed in accordance with the laws of England.

(emphasis added). Whether this clause applies retroactively to Leslie's case is an issue subsidiary to the determination whether it is enforceable. If it must be enforced, then its interpretation necessarily depends upon English law.⁵⁴ On the other hand, if the clause is unenforceable, then it is unnecessary for this Court to determine

⁵⁴ The further possibility remains that "the laws of England," as the term is used in the General Undertaking, include English choice-of-law principles. These choice-of-law principles could potentially refer back to United States or Texas law as governing interpretation of the General Undertaking in this case, a phenomenon known as "renvoi." See *Nailen v. Ford Motor Co.*, 873 F.2d 94, 96-97 & n.1 (5th Cir. 1989); *Schexnider v. McDermott Int'l, Inc.*, 688 F. Supp. 234, 238-39 (W.D. La. 1988), aff'd, 868 F.2d 717, 718-19 (5th Cir.), cert. denied, 493 U.S. 851, 110 S. Ct. 150, 107 L. Ed. 2d 108 (1989); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. Rev. 979 (1991); see also Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277 (1990); cf. *Klaxon v Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) (practice of federal diversity courts to look to the choice-of-law rules of the state in which they sit, and from there to the law of another jurisdiction, resembles a form of renvoi called "transmission"). Of course, the tricky question of what law provides the substantive rule of decision concerning the retroactivity issue is largely irrelevant if the substantive rule is the same in both England and the United States. See Kramer,

whether it is retroactive. Because the Court is not necessarily required to reach and decide the retroactivity issue, it is proper for the Court to focus first on [*79] whether the FS/COL clauses are enforceable against Leslie.

[*80] B. What law governs?

Although it may seem surprising, the enforceability of the Lloyd's FS/COL clauses is a matter of United States maritime law, and this Court considers itself so bound. Until the Sixth Circuit expressly identified, but elected not to address, this choice-of-law issue, see *Shell*, 55 F.3d at 1229, every federal court confronting the Lloyd's FS/COL clauses,⁵⁵ *Bonny*, 3 F.3d at 159-60; *Roby*, 996 F.2d at 1363; *Riley*, 969 F.2d at 957-58; *Shell*, 850 F. Supp. at 621-22, has relied upon two admiralty cases by the United States Supreme Court in determining whether the clauses are enforceable. See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 1525, 113 L. Ed. 2d 622 (1991) (forum-selection clause) ("We begin by noting the boundaries of our inquiry. First, this is a case *in admiralty* and federal law governs the forum-selection clause we scrutinize.") (emphasis added); *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 10, 92 S. Ct. 1907, 1913, 32 L. Ed. 2d 513 (1972) (forum-selection and exculpatory clauses) ("Courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view, advanced [*81] in the well-reasoned dissenting opinion in the instant case, is that such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances. We believe this is the correct doctrine to be followed by *federal district courts sitting in admiralty*.") (emphasis added). This Court will do the same. But see *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, U.S. , , 114 S. Ct. 2048, 2054-56, 129 L. Ed. 2d 67, 62 U.S.L.W. 4487 (1994); *Texas Indus., Inc. v. Radcliff Minerals*,

Return of the Renvoi, 66 N.Y.U. L. Rev. at 1012 ("First, the court must determine whether there is in fact a conflict of laws, since the mere fact that the parties disagree about the principle of law does not mean that these laws actually conflict."). However, the Court need not answer these questions unless the forum-selection clause is enforceable against Leslie.

⁵⁵ Perhaps these courts all decided, *sub silentio*, that the enforceability of such clauses is and should be a matter of federal common law -- something proposed in academic circles for some time. Cf. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28-29, 108 S. Ct. 2239, 2243, 101 L. Ed. 2d 22 (1988) (cited in *Carnival Cruise Lines, Inc.*, 499 U.S. at 589, 111 S. Ct. at 1522); *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 127 & n.3 (5th Cir. 1994) (recognizing, but not deciding, this question); *Kevlin Servs., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir. 1995) (per curiam) (not addressing this question). However, none of them said so expressly or dealt with any *Erie* or *Klaxon* problems this might create. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Klaxon*, 313 U.S. 487, 61 S. Ct. 1020, 28 U.S.C. 1652, 85 L. Ed. 1477 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in the courts of the United States, in cases where they apply."); see also *Lampf*, 501 U.S. at 355, 111 S. Ct. at 2778 (citing 28 U.S.C. § 1652). The other cases cited by the *Bonny*, *Roby*, *Riley*, and *Shell* courts, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974), involve the enforceability of arbitration agreements under authority of the Federal Arbitration Act, 9 U.S.C. § 1, see *Scherk*, 417 U.S. at 510, 94 S. Ct. at 2453 (the Act "reversed centuries of judicial hostility to arbitration agreements"), an issue this case no longer presents. See also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, U.S. , , 115 S. Ct. 1212, 1215-16, 1219, 131 L. Ed. 2d 76, 63 U.S.L.W. 4195 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. , , 115 S. Ct. 834, 838-39, 843, 130 L. Ed. 2d 753, 63 U.S.L.W. 4079 (1995). Of course, the *Scherk* exception to the rule in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953), is no longer of any moment because *Wilko* has been squarely overruled. *Rodriguez de Quijas Shearson/American Express*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921, 104 L. Ed. 2d 526 (1989). Moreover, one commentator has argued:

A final issue not adequately addressed by the Seventh Circuit in *Bonny* is the possibility that the solicitation of the plaintiffs in the United States to invest in Lloyd's would constitute sufficient contacts to overcome the presumptive validity of the forum selection and choice-of-law clauses. The majority in *Scherk v. Alberto-Culver Co.* conceded that there may be some situations where the foreign contacts are so insignificant or attenuated that the principles of *Wilko* should still apply. This concession was in response to the dissent's concern in *Scherk* that the majority's analysis could result in American investors being forced to arbitrate their claims in a foreign country despite the fact that material misrepresentations inducing them to invest in a foreign corporation were made in the United States; a fact pattern very similar to *Bonny*.

[451 U.S. 630, 640-43, 101 S. Ct. 2061, 2067-68, 68 L. Ed. 2d 500 \(1981\)](#). If this approach is in error, the Court is confident that the error will be corrected promptly, either on interlocutory appeal or on petition for writ of certiorari. The Court will review the magistrate's recommendations *de novo*.

[*82] C. Analysis

This Court has no doubt that the courts of England can be every bit as impartial, learned and fair as federal and state courts located in Texas. See [Roby, 996 F.2d at 1363](#); [Riley, 969 F.2d at 958](#). Even though it may be true, at least as a sweeping generalization, that fair trials are available on either side of the Atlantic, the choice of forum in this case is by no means inconsequential; if it were, the issue would not be so hotly contested. The issue the Court must decide is whether it is required dismiss Leslie's action so he may refile it in England. Therefore, the Court will only address the enforceability of the Lloyd's choice-of-law clause insofar as it operates in tandem with the forum selection clause.⁵⁶ See [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637](#) & n.19, [105 S. Ct. 3346, 3359](#) & n.19, [87 L. Ed. 2d 444 \(1985\)](#) ("We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.") (citing [Redel's, Inc. v. General Elec. Co., 498 F.2d 95, 98-99 \(5th Cir. 1974\)](#)). The scope and effect of the Lloyd's choice-of-law clause, as it applies to the adjudication of Leslie's substantive rights in a United States court, is not an issue that requires immediate resolution. At this juncture, any such decision would be purely advisory.

[*84] [HN18](#) [↑]

United States admiralty law treats forum selection clauses as presumptively enforceable:⁵⁷ [*87]

⁵⁶ Both parties and all U.S. courts that have examined the matter appear to agree that enforcement of the Lloyd's forum-selection clause will operate "in tandem" with the Lloyd's choice-of-law clause to render any 10b-5, [section 12\(2\)](#), or RICO cause of action unenforceable in England. See [Bonny, 3 F.3d at 160-61](#); [Roby, 996 F.2d at 13645](#); [Riley, 969 F.2d at 958](#); [Shell, 850 F. Supp. at 622-23](#); see also Jennifer M. Eck, Note, *Turning Back the Clock: A Judicial Return to Caveat Emptor for U.S. Investors in Foreign Markets*, 19 N.C. J. Int'l L. & Comm. Reg. 313 (1994) (criticizing *Bonny v. Society of Lloyd's*) ("The Seventh Circuit still failed . . . adequately [to] address the issue of whether plaintiffs were prospectively waiving their Securities Act remedies because the court's analysis ignored the fact that remedies available in England are not substantially similar to U.S. statutory remedies."). The possibility is intriguing that English courts might recognize that "modern approaches assume that . . . legislative jurisdictions of different states overlap," and conclude that it is not inconsistent with English law to enforce rights based upon certain United States statutes, see Larry Kramer, *Return of the Renvoi*, [66 N.Y.U. L. Rev. 979, 990, 991](#) ("The traditional theory purports to find a complete scheme for determining the parties' rights in the principle of territoriality. . . . But the territorial principle does not resolve cases that involve transactions or occurrences connected to several states, because applying the law of any (and none) of these states is consistent with its premise."); see also [Laker Airways Ltd. v. Sabena, Belgian World Airlines, 235 U.S. App. D.C. 207, 731 F.2d 909, 921-26 \(D.C. Cir. 1984\)](#) (discussing overlapping bases for national legislative jurisdiction), or even that English courts might conclude that choice-of-law or comity principles require them, in appropriate cases, to enforce legal rights grounded upon United States statutes so long as those statutory rights are not inconsistent with English public policy. Cf. [K.D.F. v. Rex, 878 S.W.2d 589, 593-96 \(Tex. 1994\)](#) (discussing principles of comity concerning the enforcement of another sovereign's laws in the interstate context). However, *Riley*, *Roby*, *Bonny*, and *Shell* reinforce the conclusion that enforcement of the FS/COL clauses necessarily precludes Leslie's enforcement in England of any right arising under the 1934 Securities Exchange Act or the DTPA.

⁵⁷ English law, apparently, is not far different. See [The Bremen, 407 U.S. at 11 n.12, 92 S. Ct. at 1914 n. 12](#); Ted. L. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, [78 AM. J. INT'L. L. 1, 21-22 \(1984\)](#) (comparing United States and English law). In Texas, courts are not "bound by forum selection clauses if the interests of. . . public policy strongly favor jurisdiction in a forum other than the one consented to in the contract," particularly when a claim arises under the DTPA. See [Greenwood v. Tillamook Country Smoker, 857 S.W.2d 654, 656 \(Tex. App. -- Houston \[1st Dist.\] 1993, no writ\)](#); [Pozero v. Alfa Travel, Inc., 856 S.W.2d 243, 244-45 \(Tex. App. -- San Antonio 1993, no writ\)](#); [Dowling v. NADW Marketing, Inc., 578 S.W.2d 475, 476 \(Tex. Civ. App. -- Eastland 1979, writ ref'd n.r.e.\)](#); see also [De Santis v. Wackenhut Corp., 793 S.W.2d 670, 677-78 \(Tex. 1990\)](#), cert. denied, [498 U.S. 1048, 111 S. Ct. 755, 112 L. Ed. 2d 775 \(1991\)](#);

Such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances. . . . The choice of that forum was made in an arm's length negotiation There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect. . . . A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision. . . . Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important policy of the forum, may nevertheless be "unreasonable" and unenforceable if the chosen forum is *seriously* inconvenient for the trial of the action. . . .

The Bremen, 407 U.S. at 11-16, 92 S. Ct. at 1913-16. Although the magistrate considered it important that the 1986 General Undertaking is an adhesion contract, that [*85] fact alone is not determinative.⁵⁸ *Carnival Cruise Lines*, 499 U.S. at __, 111 S. Ct. at 1527 ("We do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."). The Supreme Court in *Carnival Cruise Lines* recognized three policies supporting such clauses:

First, a cruise line has an interest in limiting the fora in which it could be subject to suit. . . . It is not unlikely that a mishap on a cruise could subject a cruise line to litigation in several different fora. . . . Additionally, [such] a clause . . . has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended. . . . Finally, it stands to reason that passengers who purchase tickets containing a forum selection clause benefit in the form of reduced fares. . . .

Id. 499 U.S. at __ 111 S. Ct. at 1527. There is no evidence in the record that Leslie obtained any benefit in the form of reduced or refunded membership or transaction fees after executing the 1986 General Undertaking. Nor can Lloyd's [*86] make as clear a case for an interest in limiting potential fora for lawsuits. First, Lloyd's employs lawyers throughout the world in connection with its insurance business and litigates frequently outside England. Second, Lloyd's has been in operation for over three hundred years, yet Lloyd's only started using forum clauses around 1980 and only required them in 1986.

While it can be argued that few Lloyd's Names were citizens of any country other than England prior to 1970, the fact remains that the introduction of the forum-selection clause did not coincide with Lloyd's initial efforts to recruit Names outside England. Rather, Names started signing agreements containing the clauses around 1980, see *Riley*, 969 F.2d at 955, at which time Lloyd's had already recruited heavily outside England. See *supra* note 50. Therefore, the clause coincides more closely with Lloyd's efforts in Parliament to seek passage of the 1982 Lloyd's Act. Nor does it appear Lloyd's realized the need for uniformity in 1980 and promptly sought [*88] to have all foreign Names sign the revised General Undertaking. Rather, Lloyd's mandated the revised General Undertaking in 1986, just as reports started to surface that American Names planned to sue Lloyd's, and shortly before it became impossible for Lloyd's to continue concealing the extent of its problems.

The situation of Lloyd's Names differs from the situation of cruise line passengers in another important respect. In *Carnival Cruise Lines*, 499 U.S. at __, 111 S. Ct. at 1524, the Schuttles lived in Washington and took a cruise to Mexico. Other injured passengers could have come from Nebraska, North Dakota, Asia, or Australia. Carnival did not necessarily conduct cruise operations in all of these locations. In contrast, Lloyd's purposely came into the United States to recruit Names, and recruited Leslie in the state of his domicile. Lloyd's Names like Leslie have a much stronger interest in litigating in their domicile state than would cruise passengers like the Schuttles, injured during a cruise in a foreign land, distant from both their own domicile and Carnival's headquarters.

Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 431 (Tex. 1984), cert. denied, 498 U.S. 1058, 111 S. Ct. 755, 112 L. Ed. 2d 775 (1991); First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 807-08 (Tex. Civ. App. -- Houston [14th Dist.] 1981, writ ref'd n.r.e.).

⁵⁸ Lloyd's of course objects that the 1986 General Undertaking is not an adhesion contract. As a standard-form contract without negotiable terms, drafted by Lloyd's, and offered to Leslie on a take-it-or-leave-it basis, the revised General Undertaking is by definition an adhesion contract. See *Carnival Cruise Lines*, 499 U.S. at __, 111 S. Ct. at 1527; *id.* at __, 111 S. Ct. at 1530-31 (Stevens, J., dissenting).

The only salutary effect of the Lloyd's clause, therefore, is the possibility of "dispelling [*89] confusion about where suits . . . must be brought." This effect must, of course, be balanced against the effect the clause might have on Names' substantive rights. Notably, both the *Roby* court and the *Bonny* court expressed "serious concerns that Lloyd's clauses operate as a prospective waiver of statutory remedies for securities violations." *Bonny, 3 F.3d at 160*; *Roby*, 996 F.2d at 1363 ("We depart somewhat from the *Riley* court with respect to the fourth factor. We believe that there is a serious question whether United States public policy has been subverted by the Lloyd's clauses."). This Court finds no reason to believe this effect on Names' substantive rights was inadvertent or accidental.

1. Fraud

The 1986 General Undertaking is generally understood to operate in tandem with the 1982 Lloyd's Act to deprive Names of any common law cause of action against Lloyd's not based upon Lloyd's "bad faith," and any claim based upon United States statutory rights. See *Bonny, 3 F.3d at 161*. The *Bonny* court permitted dismissal of a lawsuit in favor of an English forum only after Lloyd's "stipulated that it would not raise the [Lloyd's Act qualified immunity] [*90] defense." *Id. at 162-63*. Lloyd's has not offered to make any such stipulation in this case. Even if the FS/COL clauses, in tandem with the Lloyd's Act, do not in fact operate to deprive American Names of important remedies, the federal securities laws among them, substantial evidence exists that Lloyd's did its level best to make it so. Moreover, neither Lloyd's nor Sturge disclosed important information, available to Lloyd's insiders, about asbestos and pollution risks and the "loading" of outside syndicates, before Lloyd's insisted that Leslie and other Names sign the 1986 General Undertaking. Lloyd's and Sturge never informed Leslie of the probable or intended effect of the 1986 General Undertaking on his legal rights. Rather, Sturge represented to Leslie shortly before Lloyd's issued the document that the 1982 Lloyd's Act had a beneficial effect on Names' rights and regulatory protections. In a letter discussing the 1986 documents Leslie had to sign, Sturge represented that documents contained "few variations of substance." None of the notices Leslie received even mentioned the FS/COL clauses.

HN19 [↑] The presumption that a forum-selection clause is reasonable may be overcome by a [*91] strong showing that "[Leslie's] accession to the forum clause" was obtained "by fraud or overreaching." *Carnival Cruise Lines*, 499 U.S. at __, 111 S. Ct. at 1528; *The Bremen, 407 U.S. at 12, 92 S. Ct. at 1914* ("fraud, undue influence, or overweening bargaining power"). The Court concludes that Leslie's accession to the forum selection clause was the product of fraud on the part of Lloyd's and Sturge. Although Leslie has dropped Sturge as a defendant, that is irrelevant in determining whether this clause is enforceable.

The Fifth Circuit recently stated:

HN20 [↑] Texas law defines fraud as misrepresentation of a material fact with intention to induce action or inaction, [and] reliance on the misrepresentation by a person who, as a result of such reliance, suffers injury. A defendant's failure to disclose a material fact is fraudulent only if the defendant has a duty to disclose that fact. A duty to speak may arise by operation of law or by agreement of the parties. In the absence of an agreement, there must be some special relationship between the parties The nondisclosing party must have knowledge of the facts it withheld.

Trustees of the Northwest Laundry and Dry Cleaners Health & Welfare Trust Fund v. Burzynski, 27 F.3d 153, 157 (5th Cir.), reh'g denied, 38 F.3d 571 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1110, 130 L. Ed. 2d 1075, 63 U.S.L.W. 3625 (1995). The evidence is sufficient to support a finding that, at the time Leslie signed the revised General Undertaking, Lloyd's and Sturge both had a duty to disclose material facts to Leslie, either by agreement or due to a special relationship. Lloyd's and Sturge engaged in misrepresentations, misleading partial disclosures, and nondisclosures of material facts in conjunction with Lloyd's announcement that Leslie was required to sign the 1986 General Undertaking. Moreover, Lloyd's directed Sturge and other Members' Agents to instruct Members, such as Leslie, that their failure to sign the 1986 General Undertaking would result in termination of their underwriting memberships. At Lloyd's behest, Sturge so informed Leslie on two occasions. If any reasonable outside Name had known what insiders at Lloyd's knew in the summer of 1986, that Name most certainly would

have preferred to terminate or suspend his or her underwriting activity with Lloyd's. [*93] Nevertheless, Leslie signed the General Undertaking, as Lloyd's intended, in reliance upon representations and reassurances by Lloyd's and its agent, Sturge. Leslie has suffered injury because the 1986 General Undertaking, if enforced, limits his substantive rights to sue for deceptive trade practices and securities fraud.

Leslie's reliance on Lloyd's representations was not reasonable. Leslie was a graduate of the University of Texas Law School and a sophisticated businessman. A cursory reading of the 1986 General Undertaking would have revealed that it contained the FS/COL clauses. Leslie certainly was capable of investigating the provisions of the Lloyd's Act. However, Texas law does not require proof that Leslie's reliance on representations and nondisclosures by Lloyd's and Sturge was reasonable. *Martin v. MBank El Paso, N.A.*, 947 F.2d 1278, 1281 (5th Cir. 1991); *Koral Indus. v. Security-Connecticut Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990) (per curiam) ("Failure to use due diligence to suspect or discover someone's fraud will not act to bar the defense of fraud to the contract."). Therefore, Lloyd's and Sturge obtained Leslie's accession to the forum selection clause [*94] by fraud.

2. Overreaching

Even if the forum selection clause was not obtained by fraud, it was the product of overreaching. The plaintiffs in *Carnival Cruise Lines*, 499 U.S. at __, 111 S. Ct. at 1528 (emphasis added) "were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity." Likewise, every other Lloyd's Name who has sued in the United States signed a General Undertaking containing the FS/COL clauses "in an arm's length negotiation," *The Bremen*, 407 U.S. at 12, 92 S. Ct. at 1914, because they signed before becoming Names -- not when they had already been Names for nearly a decade.

Lloyd's was the named beneficiary of a clean, irrevocable letter of credit Leslie had posted with Texas Commerce Bank, with a face amount exceeding \$ 100,000. Lloyd's clearly instructed Leslie that the 1986 General Undertaking was a take-it-or-leave-it offer: He had the choice of signing it or terminating his underwriting membership. Leslie's accession to the 1986 General Undertaking was certainly not an "arm's length" transaction which Leslie had the option of rejecting with impunity.

3. Public policy

[*95] Other courts examining the public policy issue have reasoned that the waiver effect of the 1986 General Undertaking does not violate United States public policy because United States Names can sue in England for common-law fraud, relief under the Misrepresentation Act, or for breach of contractual duties. However, the 1986 General Undertaking violates public policy in *this case* because it effectively waives Leslie's rights under the Texas Deceptive Trade Practices -- Consumer Protection Act. Moreover, this Court would argue that *Riley*, *Roby*, *Bonny*, and *Shell* are wrongly reasoned. Because the General Undertaking operates as both a prospective waiver of the United States securities laws and a waiver of unknown securities fraud claims, it violates public policy.

The *Roby* and *Bonny* courts reasoned that English law provides remedies that are good enough to serve the goal of deterring fraud and misleading nondisclosures in securities transactions, even though United States securities fraud remedies are unavailable in England. However, the *Rule 10b-5* remedy is significantly more powerful, and reaches a broader range of manipulative or deceptive devices "in connection [*96] with the purchase or sale of a security," than common-law fraud -- including, for example, "churning," "scalping," and trading on pre-publication knowledge of the contents of newspaper reports. See *supra* note 42. It is not at all apparent that common-law remedies alone are equivalent to *Rule 10b-5* for the purpose of addressing the "loading" of insurance syndicates; nor is it evident that English law provides a fully adequate remedy. Congress has expressly legislated against waivers involving securities fraud remedies. *15 U.S.C. §§ 77n, 78cc.* **HN21**¹⁵ In dealing with federal securities, the general rule is that unknown or subsequently maturing causes of action *may not be waived*.¹⁶ *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340-42 (5th Cir. 1992) (emphasis added).

Notwithstanding the provisions of the securities laws expressly voiding any private agreement waiving compliance with provisions of the laws, settlements of claims arising from acts which are violations of the

securities laws are not void as a matter of law, at least where such settlement agreements do not themselves continue the precise conduct which violates the laws. But judicial hostility toward waivers [*97] of statutory rights requires that the right to private suit extended by the securities laws for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment. . . . *Waiver by subsequent conduct that does not take the form of a settlement, is against the policy of the securities laws.*

[MBank Fort Worth, N.A. v. Trans Meridian, Inc., 820 F.2d 716, 725-26 \(5th Cir.\)](#) (emphasis added) (quoting [Murtagh v. University Computing Co., 490 F.2d 810 \(5th Cir. 1974\)](#), cert. denied, 419 U.S. 835, 42 L. Ed. 2d 62, 95 S. Ct. 62 (1974)), reh'g denied, [826 F.2d 391 \(5th Cir. 1987\)](#). The public policy against waivers of securities law remedies is not satisfied merely by the availability of some remotely similar common law or statutory misrepresentation remedy; subject to limited exceptions, such as voluntary settlements, the 1933 and 1934 Acts require that all such waivers are void.

Even if public policy is satisfied by the availability of a common law "bad faith" or fraud remedy for securities violations, the 1986 General Undertaking violates public policy because it operates as a waiver of Leslie's DTPA rights. "The DTPA does not represent [*98] a codification of the common law. A primary purpose of the DTPA is to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." [Bank One, Texas, N.A., 970 F.2d at 28](#); [Eagle Properties Ltd., 807 S.W.2d at 724](#); [Alvarado, 749 S.W.2d at 48](#); [Smith, 611 S.W.2d at 616](#) (emphasis added). A waiver of Leslie's DTPA rights may not be enforced unless Lloyd's pleads and proves (1) Leslie was not in a significantly disparate bargaining position, (2) Leslie was represented by legal counsel, (3) the transaction involved consideration in excess of \$ 500,000, (4) the waiver was made in an express provision, (5) in a written contract, and (6) signed by both Leslie and Leslie's counsel. [TEX. BUS. & COM. CODE ANN. § 17.42](#) (Vernon 1987 & Supp. 1995). Anything less is "contrary to public policy and is unenforceable and void." *Id.* Therefore, the Court is not required to enforce the forum selection clause in Lloyd's 1986 General Undertaking as it applies to Robert Leslie.

VII. COMITY

Lloyd's argues that principles of international comity "require this Court [*99] to stay its hand to require Leslie to resolve this dispute in England." Dkt. #5, at 19-21. Reviewing the magistrate's recommendation *de novo*, the Court is of the opinion that international comity neither requires it to refrain from exercising personal jurisdiction over Lloyd's nor requires it to refrain from exercising subject-matter jurisdiction under the 1934 Securities Exchange Act and the DTPA. The magistrate's recommendation should therefore be affirmed.

Concerning personal jurisdiction, *Lloyd's* interest in having disputes concerning its transactions with American Names resolved in English courts is apparent -- but the Court cannot fathom what interest *English courts* might have in adjudicating claims concerning an English defendant's activities in the United States. Aside from a rather peculiar internal structure Lloyd's is no different from any other English business entity and should reasonably anticipate subjecting itself to personal jurisdiction in foreign courts when it does business abroad. Even if Lloyd's U.S. transactions had been conducted by the English sovereign, there would still in all probability be a basis for personal jurisdiction under the principle [*100] of restrictive sovereign immunity. See *Republic of Argentina*, __ U.S. at, 112 S. Ct. at 2167-69. Surely English business entities are not entitled to treatment more favorable than their own sovereign. Thus, comity provides no basis for this Court to decline to exercise personal jurisdiction.

Concerning subject matter jurisdiction, the Court finds instructive the recent discussion in [Hartford Fire Ins. Co., U.S. , 113 S. Ct. 2891](#):

Finally, we take up the question whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct. . . . At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. . . . According to the London reinsurers, the District Court should have declined to exercise such

[subject-matter] jurisdiction under the principle of international comity. The Court of Appeals agreed that courts should look to that principle . . . This availed the London reinsurers nothing, however. . . .

When it enacted the Foreign Trade Antitrust Improvements Act of 1982 [^{*101}] Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. . . . We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct . . . international comity would not counsel against exercising jurisdiction here.

The only substantial question is whether "there is in fact a true conflict between domestic and foreign law." . . . The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as amicus curiae concurs. They assert that . . . the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign State has a strong policy to permit or encourage such conduct. . . . Since the London reinsurers *do not argue the British law requires them to act in some* [^{*102}] *fashion prohibited by the law of the United States* . . . or claim that their compliance with the laws of *both countries* is otherwise impossible, we see no conflict with British law.

Id. [U.S. at __, 113 S. Ct. at 2909-11](#) (emphasis added). ⁵⁹ English law, by permitting Lloyd's to self-regulate, may or may not permit Lloyd's to engage in manipulative or deceptive practices and nondisclosures in its dealings with Names. However, the Court is unaware of any provision of English law which *requires* Lloyd's and its Members' Agents to do so. Nor does it appear that permission for Lloyd's to engage in deceptive business practices and securities fraud, if Lloyd's in fact has such permission, furthers any legitimate interest or policy of the English government. Indeed, the analysis in [Bonny, 3 F.3d at 159-62](#), and [Roby, 996 F.2d at 1363-1366](#), indicates that English law treats fraudulent and deceptive business practices with disfavor. Thus, enforcement by United States courts of the United States securities and consumer protection laws against English defendants doing business with United States citizens in the United States, far from generating [^{*103}] an irreconcilable conflict with the requirements and prohibitions of English law, tends to promote the underlying policies reflected in English law, as well as United States policies and interests. Lloyd's compliance with both English and American law, in its transactions with United States Names, is by no means "impossible," see [Hartford, at __, 113 S. Ct. at 2911](#), and certainly does not create a "true conflict," *id.* at __, [113 S. Ct. at 2910](#), such that international comity would require this court to decline to exercise subject matter jurisdiction under the 1934 Act and the DTPA.

[*104] VIII. FORUM NON CONVENIENS

Finally, Lloyd's contends that Houston is an inconvenient forum for this litigation, compared with London. After considering the relevant factors, the magistrate concluded that Leslie's action should not be dismissed on forum non conveniens grounds.

HN22 [A] plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to the plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case.

⁵⁹ As mentioned above, see *supra* note 45, the English Parliament has passed a specific act to counter extraterritorial application of the Sherman Act, including a "clawback" provision to counter treble damage awards. The Supreme Court in *Hartford Fire Ins. Co.* nevertheless held that international comity would not require United States courts to refrain from exercising Sherman Act jurisdiction. Lloyd's has not directed the Court's attention to any comparable English legislation intended to counter application of United States securities and consumer protection laws to English businesses conducting transactions in the United States.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 242, 102 S. Ct. 252, 258, 70 L. Ed. 2d 419 (1981) (quoting from *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524, 67 S. Ct. 828, 833, 91 L. Ed. 1067 (1947)); cf. *id. at 249*, 102 S. Ct. at 262 ("Similarly in *Koster*, the Court rejected the contention that where a trial would involve inquiry into the internal affairs of a foreign [*105] corporation, dismissal was always appropriate."); see also *TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b)* (Vernon Supp. 1995). In this case, unlike *Piper Aircraft Co.*, the plaintiff is a United States citizen, who resides in the state and district of the court in which he filed suit. *Piper Aircraft Co.*, 454 U.S. at 255-56, 102 S. Ct. at 266; see also *TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(f)(1), (2)* (Vernon Supp. 1995).⁶⁰ Therefore, the Court is precluded from weakening the presumption in Leslie's favor.

HN23 [↑]

The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, [*106] its decision deserves substantial deference. *Piper Aircraft Co.*, 454 U.S. at 257, 102 S. Ct. at 266. The standard of review that applies when a trial court reviews the determinations of a magistrate is unclear; out of an abundance of caution, however, the Court shall review the magistrate's ruling *de novo*. Dkt. #43, at 15-17. The magistrate considered: (1) the applicable law, (2) sources of proof, (3) access to witnesses, (4) relative ease to the parties of conducting litigation in a foreign country, (5) potential conflict of laws problems, (6) likelihood that the defendant's misconduct in the United States will be repeated, and (7) access to a forum providing full and complete redress of wrongs.

The Court is of the opinion that the magistrate's reasoning was largely correct, and adopts as its own all but one of her findings. It is not true that a United States court trying this case can avoid difficult issues concerning choice-of-law and the substantive standards of English law. However, an English court would necessarily face difficult problems involving comity, choice-of-law, and the potential application of complex and unfamiliar United States statutes -- problems it could [*107] only avoid by ignoring altogether both United States law and the legal rights of a United States citizen to the extent his rights depend upon the securities and consumer protection statutes. Moreover, a court sitting in the United States should not be overwhelmed by the possibility of referring to English common law, or even to the English statutes likely to apply in the present dispute. The relevant factor is "the avoidance of unnecessary problems in the conflict of laws," see *Piper Aircraft Co.*, 454 U.S. at 241 n.6, 102 S. Ct. at 258 n.6, and the Court is of the opinion that such problems, if any, necessarily arise in this case, and cannot in fairness be avoided simply by dismissing this action in favor of an English forum. This Court is willing, and duty bound, to address and resolve such issues as they arise. Considering the totality of circumstances, this ground is not sufficient to warrant denying Leslie access to his chosen forum.

A more difficult administrative problem the magistrate did not address is Leslie's ability to collect a judgment in the event he prevails with his claim in a United States court. England and the United States are not parties to any treaty [*108] providing for the reciprocal enforcement of judgments. However, it would appear that Lloyd's does a considerable volume of business in the United States, see *supra* note 52, and that Lloyd's maintains accounts in the United States. Continued unimpeded access to the income stream from United States premiums would appear to be an asset of significant value to Lloyd's. Because the judgments of the United States District Courts are entitled to full faith and credit throughout the United States, *U.S. CONST., art. 4, § 1; 28 U.S.C. § 1738; In re Humphreys*, 880 S.W.2d 402, 405 (Tex.), cert. denied, ___ U.S. ___, 115 S. Ct. 427, 130 L. Ed. 2d 340 (1994); see also *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 80-82, 104 S. Ct. 892, 896, 79 L. Ed. 2d 56 (1984); *Daniels v. Equitable Life Assurance Soc'y of the U.S.*, 35 F.3d 210, 213 (5th Cir. 1994) (discussing 28 U.S.C. § 1738 in context of issue preclusive effect of state court judgments in federal court), the Court anticipates Leslie could collect any judgment in his favor without intervention from English courts.

One final factor the Court must consider is the length of time this action has been [*109] pending in Houston, Texas. The Court has already conducted extensive evidentiary hearings and developed considerable familiarity with

⁶⁰ The Texas forum non conveniens statute applies only to personal injury or death actions filed in state court after September 1, 1993. Therefore, it is not controlling in this case.

both the legal issues and the facts in this case. While dismissal would probably serve the administrative convenience of an individual judge, it would promote neither justice nor the collective administrative efficiency of English and American judicial systems. Nor would it advance the combined interest of the litigants in prompt and fair resolution of their dispute. Forcing the parties to start again in England, and transferring the burden of this litigation to the docket of some judge in England, would seem counterproductive from the standpoint of the public and private factors listed in *Piper*.

After weighing the public and private factors listed above, and all remaining factors listed in *Piper Aircraft Co., 454 U.S. at 241 n.6, 102 S. Ct. at 258 n.6*, the Court in its discretion declines to dismiss this litigation on *forum non conveniens* grounds.

IX. INTERLOCUTORY APPEAL

In the event this Court affirms the magistrate's recommendations on rehearing, Lloyd's has requested interlocutory review by the Fifth Circuit. *28 U.S.C. § 1292(b)*. This order involves several controlling questions of law. Because the Second, Seventh, and Tenth Circuits have either approached or resolved one or more of these issues differently, it would appear there exists a substantial ground for difference of opinion. The Court is of the opinion that an immediate appeal will materially advance the ultimate termination of this litigation -- if it remains in the United States, by narrowing and clarifying crucial legal issues, some of which are issues of first impression. The Court therefore deems it appropriate to certify this order for appeal under the authority of *28 U.S.C. § 1292(b)*. Lloyd's motion for new trial and its motion for findings of fact and conclusions of law are not appropriate at this juncture and should be DENIED.

X. CONCLUSION

For the reasons stated above, Lloyd's motion to reconsider (Dkt. #50, *et seq.*) is GRANTED; the memorandum and recommendation of the magistrate (Dkt. #43), upon reconsideration, is hereby AFFIRMED; Lloyd's motion and supplemental motions to dismiss (Dkt. nos. 54, 65, *et seq.*) are hereby DENIED; Lloyd's motion for interlocutory appeal (Dkt. #50) is GRANTED; and any other motions [*111] by Lloyd's, including Lloyd's motion for new trial and Lloyd's motion for findings of fact and conclusions of law (Dkt. #50), are DENIED. It is so ORDERED.

SIGNED this 25th day of August, 1995.

JOHN D. RAINES

UNITED STATES DISTRICT JUDGE



Leonard v. J.C. Pro Wear

United States Court of Appeals for the Fourth Circuit

April 5, 1995, Argued ; August 29, 1995, Decided

No. 94-1498

Reporter

1995 U.S. App. LEXIS 24340 *; 1995-2 Trade Cas. (CCH) P71,108

JEANNINE Z. LEONARD; J. GILBERT LEONARD; DANIEL J. LEONARD, Plaintiffs-Appellants, and JOHN E. LEONARD, Plaintiff, v. J.C. PRO WEAR, INCORPORATED, d/b/a Pro Jersey; CRAIG KATCHEN; JAMES L. O'LAUGHLIN; MONTGOMERY WARD & COMPANY, Defendants-Appellees.

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: 64 F.3d 657, 1995 U.S. App. LEXIS 29888.

Prior History: Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Senior District Judge. (CA-93-545-A).

Disposition: AFFIRMED.

Core Terms

district court, sublicensees, plaintiffs', conspiracy, license agreement, kiosk, advertising, no evidence, commissions, grant of summary judgment, contractual, discounts, fixtures, motive, resale, summary judgment, antitrust, grant summary judgment, suppliers

LexisNexis® Headnotes

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

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

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Waiver & Preservation of Defenses

HN1[Subject Matter Jurisdiction, Jurisdiction Over Actions

A challenge to the federal courts' subject matter jurisdiction on the basis of standing to sue cannot be waived. [Fed. R. Civ. P. 12\(h\)\(3\)](#).

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

HN2 Standards of Review, De Novo Review

The Court of Appeals for the Fourth Circuit's review of a grant of a motion for summary judgment is de novo.

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

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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 > Appropriateness

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

HN3 Summary Judgment, Opposing Materials

Summary judgment is justified if, from the totality of the evidence presented, including pleadings, depositions, answers to interrogatories, and affidavits, the court is satisfied that there is no genuine factual issue for trial and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In addition, this court must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion, but the non-moving party must do more than present a "scintilla" of evidence in its favor. It must present sufficient evidence that reasonable jurors could find by a preponderance of the evidence for the non-movant. If the evidence is "merely colorable" or "not significantly probative," a motion for summary judgment may be granted.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

HN4 Causes of Action, Fraud & Misrepresentation

For a pattern of racketeering activity to exist, there must be a threat of continued criminal activity and a showing that ongoing unlawful activities pose a special threat to social well-being.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

HN5 Causes of Action, Fraud & Misrepresentation

A seven-month period of time is insufficient to constitute a RICO pattern in those circuits that have addressed the issue.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN6 [down] **Sherman Act, Claims**

Concerted activity is an essential element of a [15 U.S.C.S. § 1](#) claim.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN7 [down] **Antitrust & Trade Law, Sherman Act**

To survive a motion for summary judgment in an antitrust conspiracy case, a plaintiff must establish that there is a genuine issue of fact whether the defendant enters into an illegal conspiracy.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN8 [down] **Concerted Action, Civil Conspiracy**

It is possible to establish an illegal business conspiracy by proving that lawful acts are committed with the motive to willfully and maliciously injure another in his trade or business. [Va. Code Ann §§ 18.2-499 to 500](#).

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN9 [down] **Concerted Action, Civil Conspiracy**

Virginia Business Conspiracy statutes do not require proof of actual malice but only legal malice, i.e. that a defendant acts intentionally, purposely, and without lawful justification, and because it is not necessary for a plaintiff to show that defendant's primary and overriding purpose is to injure plaintiff's trade or business, in a case where all of defendant's motives are illegitimate.

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Defects of Form

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN10 [down] **Defenses, Demurrs & Objections, Defects of Form**

There can be no conspiracy to do an act which the law allows. Thus, to survive demurrer, an allegation of conspiracy must at least allege an unlawful act or an unlawful purpose.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN11 [blue icon] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

Section 2(c) of the Robinson-Patman Act, [15 U.S.C.S. § 13\(c\)](#), proscribes the payment or receipt of anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, whether the payment of such compensation is made to a party to the transaction or to an agent, representative, or other intermediary of a party other than the party making the payment.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN12 [blue icon] **Statute of Limitations, Time Limitations**

The two-year statute of limitations is applicable to fraud claims. [Va. Code Ann. § 8.01-243\(A\)](#).

Counsel: ARGUED: David Thomas Ralston, Jr., LEONARD, RALSTON, STANTON & DANKS, Washington, D.C., for Appellants.

William Judah Shieber, COVINGTON & BURLING, Washington, D.C., for Appellee Montgomery Ward; John A. C. Keith, David John Gogal, BLANKINGSHIP & KEITH, P.A., Fairfax, Virginia, for Appellees Pro Wear, et al.

ON BRIEF: Thomas J. Stanton, Mary Gayle Holden, Seanan B. Murphy, LEONARD, RALSTON, STANTON & DANKS, Washington, D.C., for Appellants.

Robert D. Wick, COVINGTON & BURLING, Washington, D.C., for Appellee Montgomery Ward; Elizabeth V.C. Morrogh, BLANKINGSHIP & KEITH, P.A., Fairfax, Virginia, for Appellees Pro Wear, et al.

Judges: Before WIDENER and MICHAEL, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Opinion

OPINION

PER CURIAM:

Appellants Jeannine, Gilbert, and Daniel Leonard (plaintiffs)¹ appeal from the district court's [*2] grant of summary judgment on numerous counts of a complaint alleging RICO activity, [18 U.S.C. §§ 1961-1968](#), several antitrust violations, [15 U.S.C. § 1](#) (Sherman Act), [15 U.S.C. § 13\(c\)](#) (Robinson-Patman Act), a state-law illegal business conspiracy, [Va. Code §§ 18.2-499](#) to -500, state-law false advertising, [Va. Code § 18.2-216](#), and breach of contract on the part of J.C. Pro Wear, Inc., Montgomery Ward & Co., Inc., James O'Laughlin, and Craig Katchen. For the reasons stated below, we affirm the district court's grant of summary judgment.

[*3] [HN2](#) Our review of the grant of a motion for summary judgment is *de novo*. [Sylvia Development Corp. v. Calvert County](#), [48 F.3d 810, 817 \(4th Cir. 1995\)](#). [HN3](#) "Summary judgment is justified if, from the totality of the evidence presented, including pleadings, depositions, answers to interrogatories, and affidavits, the court is satisfied that there is no genuine factual issue for trial and the moving party is entitled to judgment as a matter of law." [Sylvia Development](#), [48 F.3d at 817](#); see [Fed. R. Civ. P. 56\(c\)](#). In addition, this court must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion," [Sylvia Development](#), [48 F.3d at 817](#) (quotation omitted), but "the non-moving party must do more than present a 'scintilla' of evidence in its favor. . . . [It] must present sufficient evidence . . . that 'reasonable jurors could find by a preponderance of the evidence' for the non-movant If the evidence is 'merely colorable' or 'not significantly probative,' a motion for summary judgment may be granted." [Sylvia Development](#), [48 F.3d at 818](#) (quotations omitted).

Taking all facts and reasonable inferences in the [*4] light most favorable to plaintiffs, the facts of this case are as follows. Pro Wear, controlled by Katchen and O'Laughlin and Karen, O'Laughlin's wife, entered into a Sidetrips Licensing Agreement with Montgomery Ward in February 1988, by which Pro Wear would lease space (kiosks) in Montgomery Ward's stores to sell licensed athletic clothing and related items. The Sidetrips Agreement was superseded by a Master Licensing Agreement in November 1989. Under both agreements, Montgomery Ward would receive a fee of 12-13% of gross sales from each Pro Jersey kiosk, and the Master Agreement included a provision for minimum rent as well. Pro Wear would then solicit and procure sublicensees to operate the Pro Jersey kiosks in certain Montgomery Ward stores.

In August 1988, Pro Wear advertised in several Virginia newspapers regarding the opportunity to "own your own" sports apparel shop. The advertisement represented that there would be "no minimum rent," and that one could "net \$ 50-\$ 70,000 1st year" for a "\$ 39,500 investment." Plaintiffs responded to the advertisement and began discussions with Pro Wear regarding the purchase of Pro Jersey licenses. During these discussions, and in advertising [*5] and promotional documents mailed by Katchen and O'Laughlin on behalf of Pro Wear, a number of representations were made to the Leonards, including that they could net \$ 50 to \$ 70,000 annually per kiosk, that they needed no prior retail sales experience to operate a kiosk, and that they could build up equity in each kiosk and freely sell their ownership interest at a profit. In addition, the Pro Wear defendants omitted several facts during these negotiations, including that the defendants conducted no market analysis of the proposed kiosks, that

¹ The original plaintiffs were John, Jeannine, Gilbert, and Daniel Leonard. John Leonard has not appealed from the final order of the district court, and thus we need not decide the validity of the order of dismissal of John's claims with prejudice, which was entered after the notice of appeal was filed in this action. Defendants claim that because John Leonard's claims have been dismissed, his wife, Jeannine, has no interest in any sublicense and thus is not a proper party to this appeal. Because the complaint alleged that Mrs. Leonard did purchase interests in several of the sublicenses, Mrs. Leonard's claims do not depend upon the survival of her husband's. Thus, the defendants' suggestion that Mrs. Leonard is not a proper party to this appeal is a [HN1](#) challenge to the federal courts' subject matter jurisdiction on the basis of her standing to sue these defendants. Such a challenge cannot be waived. See [Smith v. County of Albemarle](#), [895 F.2d 953, 954](#) (4th Cir.), cert. denied, [498 U.S. 823](#) (1990); [Fed. R. Civ. P. 12\(h\)\(3\)](#).

However, the Pro Wear defendants admitted in their answer that Jeannine Leonard did purchase, with her husband, several interests in Pro Jersey kiosks, and the record evidence cited by the defendants to refute this jurisdictional fact does not establish that Mrs. Leonard owned no interest in any Pro Jersey location. Whether she owned an interest in each of them, as the complaint alleges, need not be decided here, because that is not a jurisdictional question but an issue to be proved on the merits of her claims. It is sufficient for purposes of determining jurisdiction that Mrs. Leonard has established without dispute that she owned some interest in the kiosks. We thus reject the challenge to Mrs. Leonard's standing to sue these defendants.

operation of a kiosk entailed financial risks, and that resales of Pro Jersey businesses were subject to approval by Montgomery Ward.

Plaintiffs entered into several sublicense contracts with Montgomery Ward by signing supplements to the licensing agreement stating their understanding that they were bound by the provisions of the licensing agreement.

Plaintiffs immediately began experiencing financial difficulties in operating their kiosks. As a result, in October 1992 O'Laughlin wrote a letter to Montgomery Ward suggesting that Montgomery Ward "shrink [Gilbert Leonard's store in] Springfield A.S.A.P." Montgomery Ward did so. In addition, [*6] Pro Wear refused to obtain or to guarantee payment for merchandise for several of John and Jeannine Leonard's kiosks, despite an alleged agreement to do so, upon learning that the Leonards owed Pro Wear a sum of money.

Moreover, beginning in April 1990, there was a dispute over the equity interest of sublicensees in the Montgomery Ward-Pro Wear licenses and the power of sublicensees to transfer or sell their interests. In July 1990, Montgomery Ward advised Pro Wear, in accordance with the Licensing Agreements, that sublicensees had no right to sell their sublicenses but that Montgomery Ward would permit such sales during a single 90-day period, after which it would enforce the transfer restrictions in the Master Agreement. Pro Wear notified sublicensees that, after the 90-day period, they could sell their fixtures and furnishings for a price not to exceed \$ 25,000 and their inventories as they wished, but that "you can not sell your lease," and that any party interested in assuming a Pro Jersey kiosk would have to be approved by Pro Wear and Montgomery Ward.

Finally, Pro Wear, acting as the plaintiffs' agent for the procurement of supplies, accepted commissions or discounts from [*7] several suppliers on the purchase of inventories by or for the plaintiffs. These commissions and discounts were undisclosed to the plaintiffs. In exchange for these commissions and discounts, Pro Wear guaranteed plaintiffs' payment of the purchase price for supplies, although plaintiffs claim that these guarantees were required by the contracts between Pro Wear and plaintiffs.

The plaintiffs' businesses failed, and they suffered significant financial losses. They brought suit against Pro Wear, Montgomery Ward, Katchen, and O'Laughlin on numerous legal theories. On cross-motions for summary judgment, the district court granted summary judgment to the defendants on all but one count of the complaint, which count was subsequently settled. The district court entered a final order and the plaintiffs appealed therefrom.

I. Breach of Contract

Plaintiffs allege that their contract with Pro Wear consisted of a composite of various oral and written agreements, the newspaper advertisements, and the abovementioned representations and omissions, among others. This argument is without merit. The Sidetrips and the Master Licensing Agreements, both of which were provided to, read by, and subscribed [*8] by plaintiffs, contained integration clauses, stating that no prior understandings were part of the agreement and no subsequent modifications could be made unless in writing and signed by all parties. There were several ancillary written agreements made between Pro Wear and the sublicensees, but none of them is relevant to the claims made by plaintiffs.

Moreover, all actions allegedly taken by the defendants after plaintiffs entered the Licensing Agreements were properly within the terms of those agreements. Even if the plaintiffs believe they were fraudulently induced to enter the Licensing Agreements, they did not raise that claim and we express no opinion as to it. We find no evidence in the record to support plaintiffs' claim of breach of contract by Pro Wear. Nothing in the licensing agreements or the ancillary contracts promised plaintiffs any return of capital, any equity interest, or any maximum investment. The district court so found, and we agree. We, like the district court, are unwilling and unable to release plaintiffs from the terms of their bargain because they claim that they did not understand the plain language of those terms. Accordingly, we affirm the decision [*9] of the district court that there was no valid claim of breach of contract against Pro Wear.

In this context, we will now address plaintiffs' remaining claims.

II. RICO

Plaintiffs allege that Katchen, O'Laughlin, and Montgomery Ward participated in Pro Wear's solicitation of potential investors for the purpose of defrauding plaintiffs and others, in violation of [18 U.S.C. § 1962\(c\)](#) (count one), and that Montgomery Ward collected and received income derived from a RICO enterprise, in violation of [18 U.S.C. § 1962\(a\)](#) (count two). We agree with the district court that plaintiffs' evidence of a pattern of racketeering activity is insufficient to sustain these claims.

Regarding Katchen and O'Laughlin, we agree with the district court that no pattern of racketeering activity has been established by the plaintiffs. [HN4](#) [↑] For such a pattern to exist, there must be "a threat of continued criminal activity," [H.J. Inc. v. Northwestern Bell](#), [492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 \(1989\)](#), and a showing that "ongoing unlawful activities . . . pose a special threat to social well-being." [Menasco, Inc. v. Wasserman](#), [886 F.2d 681, 684 \(4th Cir. 1989\)](#).

In contrast, the scheme allegedly engaged in by Katchen [*10] and O'Laughlin was narrowly focused, with the single purpose of procuring the Leonards' investment in sublicenses for the Montgomery Ward licenses. See [International Data Bank, Ltd. v. Zepkin](#), [812 F.2d 149, 155 \(4th Cir. 1987\)](#). There is no evidence in the record that anyone other than the Leonards was defrauded or was the subject of a scheme to defraud by Katchen and O'Laughlin. See [Myers v. Finkle](#), [950 F.2d 165, 169 \(4th Cir. 1991\)](#); [Menasco](#), [886 F.2d at 684](#); [Zepkin](#), [812 F.2d at 154](#) (prospectus defrauding ten investors does not constitute RICO pattern). Moreover, the Leonards have presented no evidence of fraud other than the advertisements, solicitation materials, representations, and omissions made by Pro Wear in inducing the Leonards to invest in the kiosks, all of which occurred over [HN5](#) [↑] a sevenmonth period. This period of time has been held to be insufficient to constitute a RICO pattern in those circuits that have addressed the issue. See [Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.](#), [986 F.2d 1208, 1215 \(7th Cir. 1993\)](#) (eleven-month scheme "insubstantial" under RICO); [Hughes v. Consol-Pennsylvania Coal Co.](#), [945 F.2d 594, 609-11 \(3d Cir. 1991\)](#) [*11] (twelve months insubstantial for RICO purposes), cert. denied, 60 U.S.L.W. 3600, 3812, 3815 (U.S. June 1, 1992); see also [H.J. Inc.](#), [492 U.S. at 242](#) ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement."); [Menasco](#), [886 F.2d at 684](#) (noting that the fraudulent transaction in that case "took place over approximately one year," and stating that "clearly, these acts do not constitute" a RICO pattern). While we do not hold that a seven-month scheme is *per se* insufficient to establish a RICO claim, we think it evident on these facts that the district court properly granted summary judgment to Katchen and O'Laughlin on count one.

Accordingly, we find insufficient evidence that Montgomery Ward was participating in RICO activity. We also note that there is almost no evidence in the record that Montgomery Ward knew of any of the alleged acts of fraud committed by Katchen and O'Laughlin. We thus affirm the grant of summary judgment as to Montgomery Ward on count one.

Because there was insufficient evidence of any RICO activity from which Montgomery Ward could have received proceeds, the [*12] district court was correct in granting summary judgment to Montgomery Ward on count two.

III. Antitrust

A. Sherman Act

The district court granted summary judgment to the defendants on plaintiffs' Sherman Act claims because there was no injury to competition and because defendants' actions with respect to these claims were permissible under both Licensing Agreements.

Initially, we agree with the district court that the defendants' restrictions on the resale or assignment of plaintiffs' sublicenses were permissible under the plain language of the Licensing Agreements. Plaintiffs allege in count three that these contract restrictions constitute an unlawful restraint of trade. This assertion is patently without merit. Contrary to plaintiffs' assertion, they did not bargain for the right to freely assign their interests. Plaintiffs have demonstrated no anticompetitive effects of the contractual no-assignment restrictions. We agree with the reasoning of [Clarke v. Amerada Hess Corp.](#), [500 F. Supp. 1067, 1072 \(S.D.N.Y. 1980\)](#), that "the problem with [plaintiff's] theory is that . . . these 'restraints' flow from one source: [Montgomery Ward's] retention of property rights [*13] in

the dealership." The contractual prohibition on assignment or resale in this case is not an antitrust violation, and we affirm the district court's grant of summary judgment on count three.

In count four, plaintiffs allege that the \$ 25,000 limit on the resale price of sublicensees' fixtures and furnishings constitutes illegal price-fixing and is a *per se* violation of the Sherman Act. Initially, there is no record evidence that Montgomery Ward was in any way involved in the establishment of this \$ 25,000 limit on furniture and fixtures resales, and count four was properly dismissed as to it. Thus, there is no evidence of any combination or conspiracy between Pro Wear and Montgomery Ward with respect to the \$ 25,000 limit. See,e.g., *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 994 (4th Cir. 1990) HN6¹⁵ ("Concerted activity is an essential element of a section 1 claim. . . . HN7¹⁶ To survive a motion for summary judgment in an antitrust conspiracy case, a plaintiff must establish that there is a genuine issue of fact whether the defendant entered into an illegal conspiracy."). So there is no liability of Montgomery Ward on that account.

To the extent that Pro Wear [*14] may unilaterally have purported to impose a vertical restraint on the resale price of its sublicensees' fixtures and furniture, it did so without any authority whatsoever, contractual or otherwise. Plaintiffs purchased their fixtures and furniture independently of the Licensing Agreements, and so far as this record shows remained free to remove their fixtures and furnishings and resell these items at whatever price they might obtain on the open market. Although Pro Wear's conduct may be in violation of its contract with plaintiffs or other law, we have no doubt that the unilateral and unauthorized imposition of a resale price maximum on plaintiffs' fixtures and furnishings does not constitute a contract, combination, or conspiracy in restraint of trade for purposes of the antitrust laws. Accordingly, the district court correctly granted summary judgment to defendants on count four.

Plaintiffs do not argue in their briefs any impropriety of the district court's grant of summary judgment on count five, which alleged an illegal price-fixing agreement between Pro Wear and one of the Pro Jersey suppliers, Starter, so we affirm the district court's grant of summary judgment on that count.

[*15] B. State-Law Business Conspiracy

Count eight alleges that Montgomery Ward and Pro Wear conspired to reduce the values of plaintiffs' businesses and force them out of business, in violation of the Virginia Business Conspiracy Act, *Va. Code §§ 18.2-499* to -500. It is apparent from the record that plaintiffs' businesses were not operating successfully from the outset, and thus that Montgomery Ward had a business justification for being concerned about the loss of profits from those businesses. The only evidence that Montgomery Ward actually interfered with the operation of any of plaintiffs' businesses, and thus that Montgomery Ward and Pro Wear conspired to do anything at all, is the letter from O'Laughlin to a Montgomery Ward employee referring to GilbeLeonard as a "scum bag" and suggesting that the size of Leonard's store in Springfield, Virginia be reduced, followed nine days later by a letter from Montgomery Ward to O'Laughlin informing him that, in accordance with the terms of the license agreement, Montgomery Ward was reducing the size of the kiosk in Springfield. Montgomery Ward had a contractual right to make such a reduction in the leased space on seven days' notice, which [*16] notice was given. Thus, Montgomery Ward's decision to reduce the size of the Springfield location was a valid exercise of its contractual rights.

However, plaintiffs argue that the recent opinion in *Commercial Business Systems, Inc. v. BellSouth Services, Inc.*, 453 S.E.2d 261 (Va. 1995), lowers the standard of proof of a business conspiracy under Virginia law by making HN8¹⁷ it possible to establish an illegal business conspiracy by proving that lawful acts were committed with the motive to "willfully and maliciously injure another in his . . . trade [or] business." *Va. Code §§ 18.2-499*, 500. In the *Commercial Business* case, the court reversed and remanded the trial court's grant of summary judgment to defendants on the business-conspiracy claims because the HN9¹⁸ Virginia Business Conspiracy statutes do not require proof of actual malice but only legal malice, i.e. that a defendant "acted intentionally, purposely, and without lawful justification," 453 S.E.2d at 267, and because it is not necessary for a plaintiff to show that defendant's "primary and overriding purpose was to injure [plaintiff's] trade or business," (emphasis omitted) in a case where "all of [defendant's] [*17] motives were illegitimate." 453 S.E.2d at 267.

In contrast, in this case plaintiffs have presented no evidence of improper motive. Although the O'Laughlin letter clearly casts Gilbert Leonard in a derogatory light, the mere fact that O'Laughlin did not like Leonard, standing alone, cannot constitute evidence of an unlawful motive. Moreover, the letter also makes reference (albeit cryptic) to Leonard's poor business acumen, thus evidencing a legitimate motive for reducing the size of his Springfield operation. Plaintiffs present no other evidence of any unlawful motive, and thus no evidence that defendants acted in concert with malice, as required by the Business Conspiracy Act. See *Commercial Business*, 453 S.E.2d at 267.

The *Commercial Business* case did not change the requirement that in Virginia, [HN10](#) "there can be no conspiracy to do an act which the law allows. Thus, to survive demurrer, an allegation of conspiracy . . . must at least allege an unlawful act or an unlawful purpose." *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 337 S.E.2d 744, 748 (Va. 1985) (affirming lower court's sustaining of demurrer to conspiracy claim where franchisor legally terminated or refused [*18] to renew franchise with no unlawful purpose). Plaintiffs have simply failed to meet their burden of showing any unlawful motive or legal malice in defendants' performance of what was undoubtedly a legal act.

C. Robinson-Patman

Plaintiffs assert in count ten that Pro Wear violated [HN11](#) Section 2(c) of the Robinson-Patman Act, [15 U.S.C. § 13\(c\)](#), which proscribes the payment or receipt of "anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise," whether the payment of such compensation is made to a party to the transaction or to an "agent, representative, or other intermediary" of a party other than the party making the payment. The district court found that Pro Wear's acceptance of commissions and discounts from the sublicensees' suppliers was not price discrimination for purposes of Section 2(c) and that in any event the commissions and discounts were paid for services rendered by Pro Wear, namely the guarantee by Pro Wear of sublicensees' payment for the supplies. We agree with the district court that there was no antitrust [*19] injury alleged by plaintiffs in this case, see *Metrix Warehouse, Inc. v. Daimler-Benz AG*, 828 F.2d 1033, 1046-47 (4th Cir. 1987), cert. denied, 486 U.S. 1017 (1988); [15 U.S.C. § 15\(a\)](#), because there is no evidence that plaintiffs paid more than their competitors as the result of these discounts and commissions to Pro Wear. See *Metrix Warehouse*, 828 F.2d at 1046-47 ("It was MBNA's burden to demonstrate a causal connection between Metrix's unlawful program and its lost profits."). Moreover, plaintiffs argue that the evidence supports a claim for commercial bribery under Section 2(c). Assuming without deciding that such a claim exists, see *Stephen Jay Photography*, 903 F.2d at 993 (discussing the existence *vel non* of a commercial-bribery claim under Section 2(c)), we find no evidence to support it. There is no evidence that the commissions paid to Pro Wear were intended to or did unlawfully influence or corrupt Pro Wear's conduct. In fact, plaintiffs do not dispute that the commissions were paid in exchange for Pro Wear's guarantee of the sublicensees' payment for supplies goods, but argue instead that Pro Wear was contractually obligated to guarantee the sublicensees' [*20] purchases in any event.²

We do not think that a pre-existing contractual obligation is relevant to an analysis under Section 2(c), which states that such commissions are legal if given in exchange "for services rendered in connection with the sale or purchase of . . . merchandise." It seems clear that the sublicensees' suppliers paid Pro Wear in exchange for Pro Wear's guarantee, a service rendered in connection with the sale of the suppliers' merchandise. Some sublicensees had this service, some did not. The payments were in exchange for services rendered, whether Pro Wear's acceptance of them was proper under agency principles or not.

Thus, the plaintiffs have not shown any evidence of "actual injury of a type that Section 2(c) was designed to prevent." *Metrix*, 828 F.2d at 1046. The district court's grant [*21] of summary judgment to Pro Wear on count ten is accordingly affirmed.

IV. False Advertising

² The Appendix references relied upon by plaintiffs (J. A. 1120, 1127-35) do not support in fact that Pro Wear had otherwise contractually agreed to guarantee the plaintiffs' purchase of merchandise.

Plaintiffs assert in count nine that Pro Wear's advertisements in Virginia newspapers constituted false advertising under [Va. Code §§ 18.2-216](#) (making false advertising unlawful) and 59.1-68.5 (giving a private right of action under [Section 18.2-216](#)). The district court found that this claim was barred by [HN12](#)[] the two-year statute of limitations applicable to fraud claims, [Va. Code § 8.01-243\(A\)](#), and we agree.

V.

The plaintiffs' brief lists six principal assignments of error, three of which are subdivided into eleven sub-assignments of error. We have mentioned each with particularity where the assignment deserves mention. In all events, we are of opinion that none of the assignments of error, whether or not mentioned with particularity or otherwise, are meritorious.

The judgment of the district court is accordingly

AFFIRMED.

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Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Publications

United States Court of Appeals for the Tenth Circuit

August 29, 1995, Filed

No. 94-1148

Reporter

63 F.3d 1540 *; 1995 U.S. App. LEXIS 24405 **; 1995-2 Trade Cas. (CCH) P71,109

MULTISTATE LEGAL STUDIES, INC., a Delaware corporation, Plaintiff/Counter-Defendant/Appellant, v. HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC.; COLORADO PROFESSIONAL EDUCATION, INC., doing business as Colorado Bar Refresher, Inc., Defendants/Counter-Claimants/Appellees.

Prior History: [\[**1\]](#) APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. (D.C. NO. 92-Z-2330).

Core Terms

full-service, workshop, supplemental, percent, monopolize, pricing, predatory, Defendants', bundling, conflicts, markets, courses, competitor, customers, summary judgment, market share, anticompetitive, conspiracy, triable issue, Sherman Act, products, package, conspiracy to monopolize, district court, monopoly power, winter, tying arrangement, offer evidence, bar exam, conditioning

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**](#) **Standards of Review, De Novo Review**

The appellate court reviews the grant of summary judgment de novo, applying the same legal standard used by the district court under [Fed. R. Civ. P. 56\(c\)](#).

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

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

[**HN2**](#) **Summary Judgment, Entitlement as Matter of Law**

With the nonmoving party, its evidence is to be believed; all justifiable inferences are to be drawn in its favor; its nonconclusory version of any disputed issue of fact is assumed to be correct.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN3 Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1](#), focuses on the anticompetitive behavior of joint actors, prohibiting every contract, combination or conspiracy, in restraint of trade or commerce.

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

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

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

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

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

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

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

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

HN4 Tying Arrangements, Clayton Act

The Sherman Act [15, U.S.C.S. § 2](#), applies to unilateral as well as joint action, making it illegal for a person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce.

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

HN5 Price Fixing & Restraints of Trade, Tying Arrangements

A tying arrangement is an agreement by a party to sell one product the tying product only on condition that the buyer also purchase a second product the tied product or at least agree not to buy that product from another supplier.

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

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

HN6 Tying Arrangements, Clayton Act

A tie-in constitutes a per se [15 U.S.C.S. § 1](#) violation if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied product market.

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

[HN7](#) Price Fixing & Restraints of Trade, Tying Arrangements

The elements of a tie-in per se violation, are (1) two separate products, (2) a tie or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market.

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

[HN8](#) Price Fixing & Restraints of Trade, Tying Arrangements

The Supreme Court has made clear that the test for determining whether two components are separate products turns not on their function, but on the nature of any consumer demand for them. For two items at issue to be considered distinct products there must be sufficient consumer demand so that it is efficient for a firm to provide one separate from the other. Product improvements may be the cause and/or effect of changes in consumer demand, but the nature of that demand is what counts.

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

[HN9](#) Price Fixing & Restraints of Trade, Tying Arrangements

The final element of an illegal tying arrangement is conditioning. For an illegal tie-in to exist purchases of the tying product must be conditioned upon purchases of a distinct tied product.

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

Contracts Law > Personal Property > Personality Leases > General Overview

[HN10](#) Price Fixing & Restraints of Trade, Tying Arrangements

Where the price of a bundled product reflects any of the cost of the tied product, customers are purchasing the tied product, even if it is touted as being free. The tie may be obvious as in the classic form, or somewhat more subtle, as when a machine is sold or leased at a price that covers "free" servicing.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > Sherman Act > General Overview

[**HN11**](#) [L] **Sherman Act, Claims**

To establish a [15 U.S.C.S. § 1](#) violation, a plaintiff must show a conspiracy to engage in short-term price-cutting to secure long-term monopoly profits. To be predatory, prices must be set below an appropriate measure of costs.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

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

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [L] **Robinson-Patman Act, Claims**

Because of the time value of the money lost through price cuts and the uncertainty involved in predatory pricing schemes, the Supreme Court has said such a conspiracy is rational only if the conspirators have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.

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

[**HN13**](#) [L] **Monopolies & Monopolization, Attempts to Monopolize**

To succeed on an attempted monopolization claim, a plaintiff must show: (1) relevant geographic and product markets; (2) specific intent to monopolize; (3) anticompetitive conduct in furtherance of an attempt to monopolize; and (4) a dangerous probability of success.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN14**](#) [L] **Monopolies & Monopolization, Attempts to Monopolize**

Anticompetitive or exclusionary conduct under [15 U.S.C.S. § 2](#) is conduct constituting an abnormal response to market opportunities.

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

[**HN15**](#) [blue icon] Actual Monopolization, Anticompetitive & Predatory Practices

Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such competition if the conduct appears reasonably capable of contributing significantly to creating or maintaining monopoly power.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Sherman Act > General Overview

[**HN16**](#) [blue icon] Sherman Act, Defenses

A defendant may avoid liability under [15 U.S.C.S. § 2](#) by showing a legitimate business justification for the conduct.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

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

[**HN17**](#) [blue icon] Antitrust & Trade Law, Sherman Act

Illegal tie-ins and predatory pricing under [15 U.S.C.S. § 1](#) may also qualify as anticompetitive conduct for [15 U.S.C.S. § 2](#) purposes.

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

Antitrust & Trade Law > Clayton Act > Defenses

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

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

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

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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

Criminal Law & Procedure > Defenses > General Overview

[**HN18**](#) [blue icon] Tying Arrangements, Clayton Act

Product improvement can sometimes be a defense to a [15 U.S.C.S. § 2](#) claim. It may seem contradictory that a product improvement motivation at least without something more, such as demonstrated efficiencies will not save an otherwise illegal tying arrangement under [15 U.S.C.S. § 1](#) but it may still weigh in the balance in [§ 2](#) analysis. The two sections are distinct, however, and the [§ 2](#) balancing test is different from the analysis for per se offenses under [§ 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

[HN19](#) [L] Antitrust & Trade Law, Sherman Act

Both the purpose and results of a product change, including customers' reception of the change, are relevant to whether a claimed product improvement is pro- or anticompetitive.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[HN20](#) [L] Monopolies & Monopolization, Attempts to Monopolize

The relevant inquiry is whether the scheduling patterns were anticompetitive, i.e., an abnormal response to market opportunities impairing opportunities of rivals and not competition on the merits or more restrictive than reasonably necessary for such competition.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[HN21](#) [L] Actual Monopolization, Anticompetitive & Predatory Practices

To establish the dangerous probability of success element of an attempted monopolization claim the plaintiff must show that there was a dangerous probability the defendant would achieve monopoly status as the result of the predatory conduct alleged by the plaintiff.

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

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

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

[HN22](#) [L] Regulated Practices, Market Definition

Factors relevant to determining dangerous probability include, but are not limited to, a defendant's market share, whether the defendant is a multimarket firm, the number and strength of other competitors, market trends, and entry barriers. Where predatory pricing is alleged, the defendants' financial strength and ability to absorb losses are also relevant. Where predatory pricing is alleged, the defendants' financial strength and ability to absorb losses are also relevant.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] **Regulated Practices, Market Definition**

It is not necessary for a defendant to already possess monopoly power in the target market; indeed, if it did, the offense would be monopolization, not attempt. Of course, the higher the firm's initial market share, the greater the likelihood that it will eventually gain monopolistic control over the market.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Regulated Practices, Market Definition**

The market share that is relevant for determining whether the defendant can satisfy the dangerous probability of success requirement of attempted monopolization should be either that which he possesses at the time of litigation or the largest share he possessed during the period of the alleged offense. No specific minimum market share is universally accepted.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN25[] **Antitrust & Trade Law, Sherman Act**

To succeed on a claim of conspiracy to monopolize, plaintiffs must show: (1) the existence of a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN26[] **Antitrust & Trade Law, Sherman Act**

Ambiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under the Sherman Act, [15 U.S.C.S. § 1](#). A plaintiff must offer evidence tending to exclude the possibility that the alleged conspirators either acted independently or colluded in a way that could not have harmed the plaintiff.

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Judges: Before ANDERSON and McWILLIAMS, Circuit Judges, and BROWN, * District Judge.

Opinion by: ANDERSON

Opinion

[*1543] ANDERSON, Circuit Judge.

I. INTRODUCTION

The plaintiff in this antitrust action is Multistate Legal Studies, Inc. ("PMBR"), a commercial provider of bar examination preparation to [*2] would-be lawyers in Colorado and elsewhere. PMBR claims that anticompetitive actions by two other providers of bar review courses, defendants Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJL") and its Colorado licensee, Colorado Professional Education, Inc. d/b/a Colorado Bar Refresher, Inc. ("CBR"), were the reason PMBR's Colorado market share dropped from 84 percent in 1991 to 23 percent in 1993.

PMBR accuses HBJL and CBR of the following [antitrust law](#) violations: engaging in an illegal tying arrangement and conspiring to fix predatory prices, in violation of [section 1](#) of the Sherman Act; attempting and conspiring to monopolize the supplemental bar workshop market and monopolizing and conspiring to monopolize the full-service bar review course market, in violation of [section 2](#) of the Sherman Act. PMBR appeals the district court's grant of summary judgment against it on all claims.¹

[**3] We hold that PMBR has shown a genuine issue of material fact with respect to the Sherman Act [section 1](#) tying and predatory pricing claims, and the Sherman Act [section 2](#) claims of attempt and conspiracy to monopolize the supplemental course market, but not with respect to the claims of monopolization of and conspiracy to monopolize the full-service course market.

PMBR also appeals the district court's order overruling PMBR's objections to a magistrate judge's order concerning confidential record information. Because we are remanding the case for trial of other issues, the court's order on this issue becomes interlocutory, and we decline to review it at this time.

*The Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

¹ The complaint also contained a tying claim under section 3 of the Clayton Act, which was dismissed as well; because PMBR does not pursue it in its opening brief, we deem it waived. [State Farm Fire & Casualty Co. v. Mhoon](#), 31 F.3d 979, 984 n.7 (10th Cir. 1994) (citing [Headrick v. Rockwell Int'l Corp.](#), 24 F.3d 1272, 1277-78 (10th Cir. 1994)).

II. BACKGROUND

A. BAR EXAM PREPARATION

The Colorado bar exam consists of four components: the Multistate Bar Exam [***1544**] ("MBE"), the Multistate Professional Responsibility Exam ("MPRE"), essay questions, and a law practice simulation problem known as a "performance test."

Two types of bar review courses are relevant to this litigation: "full-service" courses, designed to prepare students for all components of a jurisdiction's bar examination, and "supplemental multistate workshops," which prepare students for only [****4**] the MBE portion of a jurisdiction's bar exam.

At the heart of this case is the 1992 decision by HBJL and CBR, who previously had offered their full-service course and their supplemental MBE course separately, to offer the full-service course only in a package with the supplemental workshop. HBJL is the country's largest provider of full-service bar review courses. Its exclusive Colorado licensee, CBR, is entitled to use HBJL's "BAR/BRI" course trade name, course materials and national lecturers. HBJL and CBR have stipulated for summary judgment purposes that they exercise monopoly power over the Colorado full-service course market; PMBR's evidence puts their market share at more than 80 percent. See Plaintiff-Appellant's App. at 191 (Summ. of Attach. to Pl.'s Mem. in Opp'n to Defs.' Mot. Summ. J. [hereinafter "Summary"]). Their only full-service competitor in Colorado is a company called SMH Bar Review.

The evidence indicates both sides have viewed PMBR as a potential competitor in the Colorado full-service course market. It invested three years and \$ 1 million in an effort to enter the California full-service market, but ultimately abandoned that effort. In conjunction with [****5**] a company called BRG, PMBR offers a full-service course in Georgia, Alabama, and Tennessee, and has expressed its plans to expand throughout the Southeast. PMBR claims that its plan to expand its full-service course from California to other states, including Colorado, has been stymied by the losses caused by the Defendants' alleged predatory acts. *Id.* at 360-61 (Feinberg Aff. P 30).

PMBR is the largest provider of supplemental MBE workshops nationally, and in Colorado it currently offers only supplemental MBE workshops. PMBR controlled 84 percent of the Colorado supplemental MBE market in 1991 but claims to have dropped to 23 percent by 1993. As discussed infra, HBJL and CBR contest these figures, but we accept them as true for summary judgment purposes. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992).

In addition to the full-service BAR/BRI course, HBJL and CBR also offer a supplemental MBE workshop that competes with PMBR's workshop. The Defendants' course was previously called the HBJ Multistate Workshop; now it is called "Gilbert." In 1991, the Defendants had 11 percent of the Colorado workshop market, but by 1993 their share had risen [****6**] to 76 percent. Other actual or potential competitors in that market include a company called APTS, with 1 percent of the market in 1993; Reed Law Group, which planned a 1993 workshop but cancelled it; and SMH Bar Review, which historically has bundled its MBE training into its full-service course but also offered a separate workshop in 1991.

B. ANTICOMPETITIVE ACTS

PMBR claims that HBJL and CBR engaged in various anticompetitive acts directly targeted at PMBR in the supplemental MBE market. PMBR also claims that HBJL and CBR illegally acquired their monopoly power in the full-service market through a secret market allocation agreement, and their monopoly power made it possible for their acts in the MBE workshop market to harm PMBR.

1. Acts Allegedly Directed at PMBR

PMBR claims that starting in 1992, HBJL and CBR began bundling together their supplemental MBE workshop, Gilbert, with their full-service BAR/BRI course and pricing the bundled Gilbert workshop below cost. PMBR also presents evidence of a substantial increase nationwide in the number of scheduling conflicts between the BAR/BRI course and the PMBR workshop starting in 1991. PMBR identifies three specific [****7**] conflicts in Colorado, in the

summer 1991, winter [*1545] 1991, and summer 1992 courses. And PMBR complains that HBJL and CBR advertised falsely that the BAR/BRI course would include the Gilbert workshop "for free" when actually, in 1993, Defendants raised the BAR/BRI course price by \$ 50.

PMBR contends that these acts had a twofold purpose: to achieve a monopoly in the supplemental MBE workshop market, and thereby to so weaken PMBR that it would be forced to abandon its efforts as a full-service competitor. PMBR alleges that the Defendants adopted this strategy after a prior attempt to avoid competition had failed. PMBR's president, Robert Feinberg, stated that in 1989, HBJL's chief executive officer, Richard Conviser, proposed an illegal market allocation agreement whereby HBJL would abandon the supplemental MBE workshop market nationwide if PMBR would refrain from pursuing future entry into the full-service market outside California. See Plaintiff-Appellant's App. at 193-94 (Summary); *id.* at 359 (Feinberg Aff. P 23). Mr. Feinberg said that when he refused, Mr. Conviser threatened to make him "sorry," and the bundling, predatory pricing, increase in scheduling conflicts, and false [*8] advertising then ensued.

2. Defendants' Acquisition of Monopoly Power

PMBR also argues that when HBJL and CBR, or their predecessors, signed their first licensing agreement, they secretly entered into an illegal agreement dividing up the Colorado, Wyoming, and other markets between them, and they have secretly renewed their noncompetition pact ever since. The companies were competitors in the Colorado full-service market before signing their first license agreement in 1974. Since then, although their original written agreement and subsequent written extensions have not prohibited competition, the two companies have not competed against each other. HBJL and CBR deny any secret agreement and say it simply would make no sense to compete and undermine the BAR/BRI trademark. The companies' latest written agreement, signed in 1989, was to expire in 1991 but remains in effect by oral extension.

To support its allegation that a secret agreement existed, PMBR offers evidence that HBJL officials previously proposed market allocation agreements to two other competitors, *id.* at 195-96 (Summary), as well as to PMBR itself, and that in one state HBJL entered an explicit market [*9] allocation agreement that was declared illegal per se by the Supreme Court. See [Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50, 112 L. Ed. 2d 349, 111 S. Ct. 401 \(1990\)](#) (per curiam). PMBR also points to evidence that CBR's founder, Jerry Kopel, once threatened to offer competing bar review courses outside Colorado if HBJL did not give him more favorable license terms, but he ultimately did not carry out his threat.

III. DISCUSSION

HN1[] We review the grant of summary judgment de novo, applying the same legal standard used by the district court under [Fed. R. Civ. P. 56\(c\)](#). [Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 \(10th Cir. 1990\)](#). **HN2**[] Because PMBR is the nonmoving party, its evidence is to be believed; all justifiable inferences are to be drawn in its favor; its nonconclusory version of any disputed issue of fact is assumed to be correct. See [Kodak, 504 U.S. at 456](#).

A. ANTITRUST CLAIMS

PMBR claims violations of both [section 1](#) and [section 2](#) of the Sherman Act. **HN3**[] [Section 1](#) of the Act focuses on the anticompetitive behavior of joint actors, prohibiting "every contract, combination ... or conspiracy, in restraint of trade or commerce." [15 U.S.C. 1](#). **HN4**[] [Section 2](#) applies [*10] to unilateral as well as joint action, making it illegal for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of ... trade or commerce." [15 U.S.C. 2](#).

1. [Section 1](#) Tying Arrangement Claim

PMBR claims that HBJL and CBR created an unlawful tying arrangement in violation of Sherman Act [section 1](#), by bundling the Gilbert workshop together with the BAR/BRI [*1546] course and requiring customers to purchase

Gilbert if they wanted BAR/BRI. The Defendants reply that all they did was to improve the curriculum of their full-service BAR/BRI course, a procompetitive act.

Since Colorado began requiring the MBE as part of its bar exam, the Defendants' full-service BAR/BRI course has included some level of MBE preparation. Since the 1970s, BAR/BRI's MBE component has included an in-class practice MBE exam with written answers that could be reviewed at home. In 1989, the label "HarBrace" was attached to this test and associated lectures and practice drills. The separately sold MBE workshop, now known as Gilbert, has consisted of another exam with written answers, plus two days of in-class answer review.

Starting [\[**11\]](#) in the 1980s, PMBR and the Defendants' full-service competitor, SMH, began pointing to the Defendants' dual course offerings in their advertising and saying that by selling a separate MBE workshop, the Defendants were admitting that BAR/BRI's internal MBE component was inadequate. At the same time that the ads denigrating the full-service course were appearing, enrollment in Gilbert (or the Defendants' supplemental MBE workshop under a previous name) was dropping precipitously, from 78 people in the winter 1986 course and 238 in the summer 1986 course to a single student in the winter of 1992.

The Defendants added one day of in-class review of the practice MBE exam to their BAR/BRI course in their winter 1992 session, then added a second day of review in the summer 1992 course, so that the full-service course contained the same three-day workshop format as the separate Gilbert course. They then advertised that students signing up for BAR/BRI would receive Gilbert "for free" or "at no extra charge."² The first time they offered the package, in summer 1992, they did not raise the \$ 795 Bankr.BRI course tuition. The next winter, however, they raised it by \$ 50, partly to cover some [\[**12\]](#) of the Gilbert costs. Customers could still buy Gilbert separately for \$ 325, but they could not get any discount from the package price if they wanted BAR/BRI without Gilbert. This change was made in Colorado and in some, but not all, other states where HBJL operated.

PMBR offers evidence that the bundling of Gilbert was intended as a temporary move only. In a September 11, 1992, letter written by CBR's president, Stephen P. Davis, to an HBJL official, Mike Connors, Mr. Davis referred to a future time when the Gilbert course would again be offered only for added tuition, as it was before the summer of 1992. Plaintiff-Appellant's App. at 199 (Summary); *id.* at 346 (Baseman Aff. Ex. 6). PMBR also offers evidence that the administration of the BAR/BRI course and the administration of the Gilbert course have never been combined; the courses [\[**13\]](#) have separate national administrators, campus representatives, registration forms and addresses, suggesting that administrative streamlining was not the reason for the bundling.

[HN5](#) A tying arrangement is an agreement by a party to sell one product--the "tying product"--only on condition that the buyer also purchase a second product--the "tied product"--or at least agree not to buy that product from another supplier. *Kodak, 504 U.S. at 461-62* (citing *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*). [HN6](#) A tie-in constitutes a per se [section 1](#) violation if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied product market. *504 U.S. at 462*.

[HN7](#) The elements, then, of a per se violation, are (1) two separate products, (2) a tie--or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market. Here, the parties stipulate to the third requirement, that HBJL and CBR have monopoly power in the full-service course market, and the Defendants have [\[**14\]](#) not raised the issue of [\[*1547\]](#) the fourth requirement, the volume of commerce affected. We examine, therefore, only the two-product and conditioning requirements.

a. The Two-Product Requirement

HBJL and CBR have stipulated that full-service courses and supplemental MBE workshops are in separate product markets for [antitrust law](#) purposes. They do not concede, however, that the existence of separate markets means

² The practice exam within the BAR/BRI course and the practice exam in the separate Gilbert workshop had previously covered the same ground but with different exam questions.

separate products were involved here. They argue that their actions involved nothing more than the improvement of a single product--their full-service course.

PMBR argues on appeal that the district court failed to apply the proper test to determine whether two products exist. We agree. The court focused on PMBR's stipulation that the purpose of a full-service course includes preparing bar applicants for the MBE as well as for the other parts of the bar exam. From this, the court appears to have concluded that any effort to improve the full-service course by adding elements to it could not possibly constitute the bundling of a second product, at least where those added elements related to the MBE. In this the court erred.³

[**15] [HN8](#)⁴ The Supreme Court has made clear that the test for determining whether two components are separate products turns not on their function, but on the nature of any consumer demand for them.⁴ For two items at issue to be considered distinct products, "there must be sufficient consumer demand so that it is efficient for a firm to provide [one] separate from [the other]." [Kodak, 504 U.S. 451 at 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072](#); [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). See also [Service & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 684-85 \(4th Cir. 1992\)](#) (district court erred in reasoning that since customers' only legitimate purpose for using defendant's diagnostic software was to repair computers, defendant was providing only a single integrated product of computer servicing, rather than a package of service and diagnostic software).

The Defendants argue that a different [**16] analysis is required in this case because it involves "overlap markets." They define "overlap markets" as a multicomponent package being sold in one market and one of those components being sold in a second market, and they contend that in such situations, courts have universally held that the package was a single product. We disagree that courts universally have so held. See, e.g., [Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 720 \(7th Cir. 1987\)](#); [Mozart Co. v. Mercedes-Benz of N. Am., Inc., 593 F. Supp. 1506, 1515 \(N.D. Cal. 1984\)](#), aff'd, [833 F.2d 1342 \(9th Cir. 1987\)](#), cert. denied, 488 U.S. 870, 102 L. Ed. 2d 148, 109 S. Ct. 179 (1988); [Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, No. N-79-2066, 1982-2 Trade Cas. \(CCH\) P64,861, 1982 WL 1870](#), at * 6-9 (D. Md. June 4, 1982), reinstated, No. Civ. A.N. 79-2066, [1984-2 Trade Cas. \(CCH\) P66,226, 1984 WL 1105](#) (D. Md. June 11, 1984). Moreover, we are not persuaded either that the "overlap markets" characterization does anything more than restate the problem, or that, if it does, the Supreme Court's *Kodak/Jefferson Parish* test is somehow less controlling in such cases than in any others.

PMBR maintains that by incorporating BAR/BRI and Gilbert into a package, the Defendants [**17] have "linked two distinct markets for products that were distinguishable in the eyes of buyers." [Jefferson Parish, 466 U.S. at 19](#).

PMBR's evidence includes the following:

- 1) Defendants stipulated that full-service courses and supplemental MBE workshops are in separate product markets.
 - 2) Defendants have marketed their full-service course and their supplemental workshop as separate products, for separate fees, for over a decade and still offer Gilbert separately.
- [*1548] 3) In Kansas, Ohio and Hawaii, HB JL and/or its licensees still offer the full-service course unbundled from Gilbert.
- 4) Prior to Defendants' bundling, not every full-service course customer chose to purchase a supplemental workshop; in Colorado, only one-third to one-half did so.

³The district court also erred by relying, for its analysis of this [section 1](#) issue, on [Telex Corp. v. IBM Corp., 510 F.2d 894](#) (10th Cir.), cert. dismissed, [423 U.S. 802 \(1975\)](#), a [section 2](#) monopolization case.

⁴Product improvements may be the cause and/or effect of changes in consumer demand, but the nature of that demand is what counts.

5) In the past, HBJL officials worked to keep their external Gilbert workshop separate and distinct in customers' minds from the HarBrace workshop within the full-service course, because many customers preferred to buy from two different companies to get multiple providers' perspectives on the MBE.

6) Defendants have not consolidated the operation of the full-service and supplemental courses; Gilbert continues to be administered and marketed **[**18]** separately.

7) One or more of Defendants' officers contemplated that the inclusion of the Gilbert workshop in the full-service course at no added charge would be only temporary.

8) Other bar review industry participants view full-service and supplemental MBE courses as separate products.

This evidence is sufficient to create a material factual dispute over whether there is enough consumer demand in Colorado for full-service courses without supplemental MBE workshops to make it efficient to sell the two separately. If there is, then the BAR/BRI-Gilbert package should be viewed as two products.

b. *The Conditioning Requirement*

HN9 [↑] The final element of an illegal tying arrangement is conditioning. For an illegal tie-in to exist, "purchases of the tying product must be conditioned upon purchases of a distinct tied product." *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 44 F.3d 1465, 1481 (10th Cir. 1995) (quoting *Fox Motors, Inc. v. Mazda Distrib. (Gulf), Inc.*, 806 F.2d 953, 957 (10th Cir. 1986)), petition for cert. filed, 63 USLW 3819 (U.S. May 8, 1995) (No. 94-1838). HBJL and CBR argue that this element requires a showing of coercion, and that by adding Gilbert **[**19]** to BAR/BRI in the summer of 1992 they did not force or coerce any BAR/BRI students to forgo PMBR's supplemental workshop; since they did not raise BAR/BRI tuition, the economic incentives remained the same as before.

The Defendants are correct with respect to the summer 1992 course, when the bundled BAR/BRI-Gilbert course cost the same as the separate BAR/BRI course had cost previously. It appears that Gilbert truly was free to BAR/BRI customers during that summer's session, so that no separate, tied purchase was involved.

HBJL and CBR do not address, however, the evidence that in the winter 1993 course they raised the tuition of the bundled course by \$ 50, in part to cover some of the costs of providing Gilbert. **HN10** [↑] Where the price of a bundled product reflects any of the cost of the tied product, customers are purchasing the tied product, even if it is touted as being free. See *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 610 (6th Cir. 1987); 3 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* P733a (1978) ("The tie may be obvious as in the classic form, or somewhat more subtle, as when a machine is sold or leased at a price that covers 'free' servicing."). **[**20]**

PMBR has presented enough evidence to create a triable issue as to whether the tuition for the bundled BAR/BRI course covered some portion of the Gilbert costs in 1993, and therefore whether the conditioning element was satisfied. See Plaintiff-Appellant's App. at 207-08 (Summary). Summary judgment on the tie-in claim therefore was premature.

2. *Section 1 Predatory Pricing Claim*

PMBR has alleged that by packaging Gilbert with BAR/BRI for a nominal or no charge, HBJL and CBR engaged in predatory pricing, in violation of both *section 1* and *section 2* of the Sherman Act.

HN11 [↑] To establish a *section 1* violation, PMBR must show a conspiracy to engage in short-term price cutting to secure long-term monopoly profits. *Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987). To be predatory, prices must be set below "an appropriate **[*1549]** measure" of costs. *Brooke*

[Group Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2587 \(1993\).](#) ⁵ [HN12](#) 

Because of the time value of the money lost through price cuts and the uncertainty involved in predatory pricing schemes, the Supreme Court has said such a conspiracy is rational only if the conspirators [**21](#) "have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#); cf. [Brooke Group, 113 S. Ct. at 2587-89](#) (discussing the elements of predatory pricing under Sherman Act [section 2](#) and the Robinson-Patman Act).⁶

[**22](#) The district court dismissed PMBR's predatory pricing claim because it found that the bundled BAR/BRI-Gilbert course was a single product, and PMBR had not alleged that the package was priced below cost. As noted above, however, we find that a factual dispute remains as to the existence of two products.

The parties do not appear to dispute for summary judgment purposes the joint action element of the conspiracy claim. Nor do Defendants disagree that in the summer 1992 course, they included Gilbert for free, a level below any measure of Gilbert's costs.⁷ We see no evidence in the appellate record, however, of any below-cost pricing in the winter 1993 course, when tuition was raised by \$ 50. See Plaintiff-Appellant's App. at 344 (Baseman Aff. Ex. 4.) The only Gilbert cost evidence we have located in the record shows that the cost of Gilbert materials was approximately \$ 15 per person. See [id. at 452, 458 \(Davis Dep.\)](#).

[**23](#) HBJL and CBR argue that PMBR has failed to show any evidence that they are likely to be able to recoup, with interest, their losses from any alleged predatory pricing. As discussed infra in our review of the [section 2](#) claims, we find that PMBR has adduced enough evidence of high entry barriers and other structural factors in the supplemental market to create a triable issue as to this element. We therefore conclude that summary judgment on the [section 1](#) predatory pricing claim was premature.

3. [Section 2 Attempted Monopolization of Supplemental MBE Course Market](#)

PMBR alleges that HBJL and CBR attempted to monopolize the supplemental MBE workshop market by means of tying, predatory pricing, false advertising, and the creation of schedule conflicts. The district court dismissed the attempt claim after deciding that tying and predatory pricing could not have occurred because only a single product was involved, that any reasonable [*1550](#) juror would find the inclusion of Gilbert in the BAR/BRI course to be a procompetitive product improvement, and that PMBR had failed to show a triable issue as to the existence of schedule conflicts and false advertising.

⁵ Unfortunately for litigants, neither the Supreme Court nor we have taken a position on which of various cost measures is the definitive one, although we have spoken of marginal and average variable costs as being relevant. See [Brooke Group, 113 S. Ct. at 2588 n.1; Instructional Sys., 817 F.2d at 648; Pacific Eng'g & Prod. Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790, 797](#) (10th Cir.), cert. denied, [434 U.S. 879, 54 L. Ed. 2d 160, 98 S. Ct. 234 \(1977\)](#).

⁶ Separate from but closely related to the question of whether a defendant's acts are likely to succeed is the question of whether a defendant with a monopoly in one market would have any plausible reason to use its monopoly profits in that market to subsidize predation in a second market. See [Matsushita, 475 U.S. at 596](#) (requiring a showing of plausible motive for predatory pricing and observing that "a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another").

Here, where PMBR has presented evidence that it was probably the most likely challenger to the Defendants' monopoly in the Colorado full-service market, we cannot say as a matter of law that Defendants would find it economically irrational to price below cost in the MBE market for the summer 1992 course as part of a larger scheme, employing tie-ins and schedule conflicts, to monopolize the supplemental market, in order to discipline PMBR for refusing to allocate markets and to deprive PMBR of the resources necessary to continue its full-service market incursions.

⁷ Although the record below is somewhat ambiguous, HBJL and CBR do not appear to seriously dispute on appeal that if the BAR/BRI-Gilbert package does comprise two separate products, then the relevant product for predatory pricing's cost-price analysis is the supplemental workshop, rather than the package.

PMBR argues on appeal [\[**24\]](#) that summary judgment was inappropriate as to each type of anticompetitive act alleged. HBJL and CBR argue that the district court's reasoning was sound, and that, in addition, PMBR has failed to show the requisite dangerous probability that the Defendants will succeed in monopolizing the supplemental MBE workshop market.

[HN13](#)[↑] To succeed on an attempted monopolization claim, PMBR must show: (1) relevant geographic and product markets; (2) specific intent to monopolize; (3) anticompetitive conduct in furtherance of an attempt to monopolize; and (4) a dangerous probability of success. See [TV Communications Network, Inc. v. Turner Network Tel., Inc.](#), [964 F.2d 1022, 1025](#) (10th Cir.), cert. denied, [121 L. Ed. 2d 537, 113 S. Ct. 601](#) (1992). The parties do not appear to contest the first and second elements for summary judgment purposes. We proceed, therefore, to examine the evidence with respect to conduct and probability of success.

a. Anticompetitive Conduct

[HN14](#)[↑] Anticompetitive or exclusionary conduct under [section 2](#) is "conduct constituting an abnormal response to market opportunities. [HN15](#)[↑] Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits [\[**25\]](#) or are more restrictive than reasonably necessary for such competition," if the conduct appears "reasonably capable of contributing significantly to creating or maintaining monopoly power." [Instructional Sys.](#), [817 F.2d at 649](#) (citations omitted). [HN16](#)[↑] A defendant may avoid liability by showing a legitimate business justification for the conduct. See [Kodak](#), [504 U.S. at 483](#).

(1) Tying and Predatory Pricing

As discussed above, PMBR has shown enough evidence to create triable issues as to the existence of a predatory pricing conspiracy in 1992 and a tying arrangement in 1993 in violation of [section 1](#). [HN17](#)[↑] Illegal tie-ins and predatory pricing under [section 1](#) may also qualify as anticompetitive conduct for [section 2](#) purposes. See, e.g., [Directory Sales](#), [833 F.2d at 613](#); [Great Escape, Inc. v. Union City Body Co.](#), [791 F.2d 532, 541](#) (7th Cir. 1986); [Heattransfer Corp. v. Volkswagenwerk, A.G.](#), [553 F.2d 964, 981](#) (5th Cir. 1977), cert. denied, [434 U.S. 1087, 55 L. Ed. 2d 792, 98 S. Ct. 1282](#) (1978); see also Areeda & Turner, *supra* P733c.

HBJL and CBR offer three justifications, however, which they say made the inclusion of Gilbert "for free" as part of the BAR/BRI course permissible competitive [\[**26\]](#) activity. First, they argue that since supplemental MBE workshops were being offered "for free" as part of full-service courses in Colorado by SMH and outside Colorado by PMBR, SMH, and other providers, they (HBJL and CBR) were entitled to meet their competitors' prices, even if those prices were predatory. Second, they contend, they were entitled to use legal and ordinary marketing methods such as bundling to respond to PMBR's and SMH's "attack" advertisements, which criticized Defendants for charging "extra" for their MBE workshop. Third, they argue, the bundling of Gilbert with BAR/BRI was a procompetitive improvement of their full-service course.

(a) Meeting competition

Determining when the meeting-competition defense properly applies to a predatory pricing claim can require substantial analysis. See Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) P717' (Supp. 1994). But Defendants have not shown, at any rate, why they should be allowed to price Gilbert below cost in Colorado in order to meet PMBR's prices in California, Alabama, Tennessee, and Georgia. And PMBR has offered enough evidence to create a triable issue regarding whether HBJL and CBR were truly [\[**27\]](#) concerned about and responding to competition from SMH. See Plaintiff-Appellant's App. at 203 (Summary).

[*1551] (b) Ordinary marketing methods

HBJL and CBR say their "free" inclusion of Gilbert in the BAR/BRI course was nothing more than one of the "legal and ordinary marketing methods already used by others in the market" that we have previously said even monopolists are free to use. See [Telex](#), [510 F.2d at 927](#). We do not necessarily read *Telex* to mean that absolutely

every marketing method available to any nonmonopolist is equally proper when used by a monopolist, since such a reading might eliminate the law on tying arrangements. But in the supplemental MBE market, where HB JL and CBR were not monopolists, they may have been at liberty to temporarily engage in promotional pricing—even giving Gilbert away free—to try to boost the sales of a product that consumers were rejecting. A problem in this case, however, is that they did not offer Gilbert free to every prospective Gilbert customer. Instead, they offered it free only to purchasers of their monopolized BAR/BRI course. Although, as we noted above, this could not have constituted an illegal tying arrangement in [\[**28\]](#) 1992 because the allegedly tied Gilbert product was not purchased, neither can we find this linking of a product giveaway to monopoly power in a separate market to be a legal and ordinary marketing method, absent some showing of legitimate business reasons for distinguishing the BAR/BRI customers from other purchasers of Gilbert.⁸ See [*SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1059-62, 1065 \(3d Cir. 1978\)](#), cert. denied, 439 U.S. 838, 58 L. Ed. 2d 134, 99 S. Ct. 123 (1978).

[29] (c) Product improvement**

HN18  Product improvement can sometimes be a defense to a [section 2](#) claim.⁹ See, e.g., [*Telex*, 510 F.2d at 906, 926-27; *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 443-44 \(N.D. Ca. 1978\)](#), aff'd sub nom. [*Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 \(9th Cir. 1980\)](#), cert. denied, 452 U.S. 972, 69 L. Ed. 2d 983, 101 S. Ct. 3126 (1981). PMBR argues, however, that the Defendants' product improvement justification at most creates a factual dispute. PMBR contends that its evidence shows that the claimed improvement was neither intended as an improvement nor accepted by the market as one.

[30] HN19**  Both the purpose and results of a product change, including customers' reception of the change, are relevant to whether a claimed product improvement is pro- or anticompetitive.¹⁰ See [*In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1003-05 \(N.D. Cal. 1979\)](#), aff'd sub nom. [**1552 Transamerica Computer Co., Inc. v. IBM Corp.*, 698 F.2d 1377](#), (9th Cir.), cert. denied, 464 U.S. 955, 78 L. Ed. 2d 329, 104 S. Ct. 370 (1983). But see [*Telex Corp. v. IBM Corp.*, 367 F. Supp. 258, 347 \(1973\)](#) (refusing to second-guess technological justifiability of integrating more internal memory into computer's central processing unit where integration reduced costs and increased utility), rev'd on other grounds, [*510 F.2d 894*](#) (10th Cir.), cert. dismissed, 423 U.S. 802 (1975).

⁸ We recognize the split among the circuits regarding the legality of so-called "monopoly leveraging," i.e., using a monopoly in one market to gain a competitive advantage in a second, where the purpose is not to monopolize or attempt to monopolize the second market. Compare, e.g., [*Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 \(2d Cir. 1979\)](#), cert. denied, [*444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 \(1980\)*](#), with [*Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546-49 \(9th Cir. 1991\)](#), cert. denied, [*503 U.S. 977, 112 S. Ct. 1603, 118 L. Ed. 2d 316 \(1992\)*](#). Our case falls outside this debate, however, because PMBR has specifically alleged an attempt to monopolize the supplemental MBE workshop market.

⁹ It may seem contradictory that a product improvement motivation—at least without something more, such as demonstrated efficiencies—will not save an otherwise illegal tying arrangement under [section 1](#), see [*Jefferson Parish*, 466 U.S. at 25 n.41](#), but it may still weigh in the balance in [section 2](#) analysis. The two sections are distinct, however, and the [section 2](#) balancing test is different from the analysis for per se offenses under [section 1](#).

¹⁰ Professors Areeda and Hovenkamp, who argue for a rule of presumptive legality for all product changes, concede the possible anticompetitive nature of what they term "implicit tying" through product integration. See Areeda & Hovenkamp, *supra* P P738.1 & 738.4. But they say an inquiry into whether a defendant's intent was actually to harm rivals, as distinct from making a better product, is difficult, costly, and usually pointless, because the evidence is frequently mixed or ambiguous. See *id.* P738.4e. And they say an objective appraisal of whether a product change truly is an improvement—let alone whether a given improvement could have been achieved with less harm to competition—will often be beyond the courts' competency and may seriously chill innovation. See *id.* P738.4f.

We are sensitive to both the difficulties and the dangers of these inquiries. Where, as here, however, the claimed product improvement takes the form of a marketing change, rather than some complex technological integration of previously separate functions, our degree of deference to product designers is reduced.

[**31] 1) *Purpose of product change*

PMBR has offered evidence that the bundling was a response to PMBR's refusal to take part in a proposed market allocation agreement, see Plaintiff-Appellant's App. at 193-94 (Summary); that Defendants' executives never have believed that bar applicants need Gilbert to pass the bar, *id. at 201 (Summary)*; that Defendants intended the bundling to be only temporary, *id. at 199 (Summary)*; and that bundling cannot reasonably be explained as a response to competitive market conditions where, prior to the bundling of Gilbert, Defendants' course already had more MBE workshop hours than SMH's full-service course, and where SMH's then-partner, Kaplan, went bankrupt around the time the Gilbert bundling began in Colorado. *Id. at 203 (Summary)*.

2) *Customer reception of product change*

PMBR also cites evaluations from bar applicants in California and elsewhere outside of Colorado, in the summer of 1992, who described the "free" Gilbert sessions as "horrible," "a waste of time," "awful" and "a joke." See *id. at 201-02 (Summary)*.¹¹ PMBR offers evidence that immediately prior to bundling, one-half to two-thirds of Colorado bar applicants [**32] who took a full-service course did not choose to take a supplement, see *id. at 189-90 (Summary)*, and that many prefer to take their MBE workshop from a different provider than their full-service company. See *id. at 547 (Reed Dep.)*.

3) *Results of product change*

PMBR further argues that if the addition of Gilbert had actually improved the product, one would expect Defendants' share of the full-service market and the pass rate of its course enrollees to have increased, but in fact they declined. The Defendants' market share--as measured by the percentage of first-time Colorado bar exam takers taking the BAR/BRI course--dropped from 76 percent in 1991 to 72 percent in 1993, see *id. at 336-37 (Baseman Aff. Ex. 2)*, and BAR/BRI customers' pass rate declined from 5 percentage points above the [**33] Colorado average in July 1990 to 1 percentage point above the state average in July 1992. See *id. at 413-14 (Sullivan Aff. Exs. 12, 13)*.

Taken together, the preceding evidence is enough to create a triable issue regarding the validity of the Defendants' product improvement justification for the alleged tying and predatory pricing behavior. In sum, PMBR has sufficiently controverted for summary judgment purposes the arguments that the Defendants were only responding to competition, that they used nothing more than legal and ordinary marketing methods, and that the bundled course was a procompetitive product improvement.

(2) *Schedule Conflicts*

PMBR also claims the Defendants deliberately created scheduling conflicts between the BAR/BRI course and PMBR's workshop in furtherance of their attempt to monopolize the workshop market. PMBR offers evidence of increased numbers of schedule conflicts nationwide, e.g., 23 conflicts in the summer of 1990, 2 of them major, versus 37 conflicts in the summer of 1992, 17 of them major, see Plaintiff-Appellant's App. at 206 (Summary); *id. at 370-71 (Feinberg Aff.)*; and three specific conflicts in Colorado, in the summer 1991, winter [**34] 1991 and summer 1992 courses. *Id. at 366-68*.

PMBR contends that the increased conflicts were intended to discourage people from taking PMBR's workshop. The district [*1553] court held that where PMBR's workshop ran from 9 a.m. to 4 p.m., and the Defendants' classes ran from 6 p.m. to 9 p.m., no reasonable juror could find that any schedule conflicts existed. HBJL and CBR further point out that BAR/BRI students who wished to attend PMBR's course could check out audiotapes of the BAR/BRI lectures at any time or attend videotape replays at various locations.

PMBR argues on appeal that the court erred in concluding that to be actionable, the schedule conflicts had to make it impossible, rather than merely inconvenient, for BAR/BRI students to take PMBR's workshop. We agree.

¹¹ While the evaluations are not from Colorado students, neither side has suggested they are irrelevant because either the Gilbert course or the students taking it are different in Colorado than elsewhere.

HN20 [+] The relevant inquiry is whether the Defendants' scheduling patterns were anticompetitive, i.e., "an abnormal response to market opportunities ... impairing opportunities of rivals and ... not competition on the merits or ... more restrictive than reasonably necessary for such competition." *Instructional Sys.*, 817 F.2d at 649. What matters is not so much whether the classes actually overlapped as whether the scheduling [**35] pattern was reasonably capable of contributing significantly to a monopolization attempt by discouraging BAR/BRI customers from taking PMBR's course, and, if so, whether it was nevertheless justified.

PMBR presented enough evidence to create a triable issue as to whether this same-day scheduling could significantly discourage BAR/BRI students from taking its workshop. See Plaintiff-Appellant's App. at 365-72 (Feinberg Aff. P P 41-63).¹² The Defendants contend, however, that even if there were conflicts, they were justified, because the overwhelming likelihood "is that any same-day scheduling was the inevitable result of two courses attempting to shoe-horn their complex schedules into the same narrow time frame." Defendants-Appellees' Br. at 28.

[**36] PMBR offers circumstantial evidence that the three schedule conflicts it has identified in Colorado were not accidental or inevitable, but instead deliberate and unjustified. PMBR points to a substantial increase nationwide in the number of conflicts after HBJL's Mr. Conviser allegedly proposed the illegal market allocation agreement in 1989 and PMBR's Mr. Feinberg rejected it in the spring of 1990. Mr. Feinberg stated by affidavit that there have always been conflicts between PMBR's course and that of BAR/BRI and its licensees, including CBR, but the vast majority were minor or inconsequential until 1991 and thereafter. See Plaintiff-Appellant's App. at 366-72 (Feinberg Aff. P P 47-63). This sequence of events is enough to create a jury question as to whether the disputed schedule conflicts in Colorado were deliberate or the "inevitable result" of crowded curricula and short time frames.

(3) False Advertising

PMBR contends that Defendants advertised falsely when they advertised that their BAR/BRI course included the Gilbert workshop "for free." In 1993, PMBR points out, Defendants raised the price of the BAR/BRI course by \$ 50, and an HBJL official testified that [**37] the added cost of Gilbert was one of the reasons for the tuition increase. See *id.* at 207-08 (Summary). The district [**1554] court found no triable issue, because Gilbert was being offered as part of the full-service course and, "I guess that is free to that extent." *Id. at 313 (Tr. Summ. J. Hr'g)*.

We affirm for a different reason. Even assuming the advertising was false, PMBR has not shown how it could have contributed to an attempt to monopolize the supplemental MBE market, rather than just to maintenance of Defendants' full-service course monopoly. PMBR has not adduced any evidence that had BAR/BRI enrollees known the alleged "truth"--that they were not getting Gilbert for free but were being forced to pay for it in order to get the desired BAR/BRI course--they would have been more likely to spend another \$ 300 or so to take PMBR or another MBE workshop in addition to the BAR/BRI-Gilbert course. We therefore affirm the district court's rejection of false advertising as an anticompetitive act in furtherance of the attempted monopolization claim.

¹² Defendants argued below that they had no duty to accommodate PMBR's scheduling. They analyzed the situation as a monopolist's refusal to cooperate with a competitor and read *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985), as standing for the proposition that a monopolist has a duty to assist a competitor only where the monopolist has accommodated the competitor in the past and then abruptly terminates assistance. We do not necessarily interpret *Aspen Highlands* as narrowly as do the Defendants, but principles governing refusals to deal do not control here anyway.

PMBR's complaint goes beyond merely alleging that Defendants refused requests to affirmatively accommodate PMBR's course. PMBR alleges that the Defendants deliberately created schedule conflicts to avoid helping PMBR, and in fact, to harm PMBR. Since the Defendants naturally would not create conflicts between their BAR/BRI full-service course and their own MBE workshop, Gilbert, see Plaintiff-Appellant's App. at 370 (Feinberg Aff. P 58), there is a triable issue as to whether schedule conflicts between BAR/BRI and PMBR's MBE workshop would disproportionately raise PMBR's costs. See *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 368 (7th Cir. 1987) (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986)). This would qualify as anticompetitive conduct unless HBJL and CBR could demonstrate a legitimate business justification for it.

b. Dangerous Probability of Success

As an alternative basis for affirming the district court's dismissal of the attempted [**38] monopolization claim, HBJL and CBR argue that PMBR has failed to demonstrate a dangerous probability that their alleged attempt will succeed. PMBR contends that it has provided ample evidence.

HN21[] "To establish the dangerous probability of success element of an attempted monopolization claim, 'the plaintiff must show that there was a dangerous probability the defendant would achieve monopoly status as the result of the predatory conduct alleged by the plaintiff.'" *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991) (quoting *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683, 693 (10th Cir. 1989), cert. denied, 498 U.S. 972, 112 L. Ed. 2d 424, 111 S. Ct. 441 (1990)). **HN22**[] Factors relevant to determining dangerous probability include, but are not limited to, a defendant's market share, whether the defendant is a multimarket firm, the number and strength of other competitors, market trends, and entry barriers. See *id.*; *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986). Where predatory pricing is alleged, the defendants' financial strength and ability to absorb losses are also relevant. See *Brooke Group*, 113 S. Ct. at [**39] 2589; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). **HN23**[] Because we are talking about probabilities, it is not necessary for a defendant to already possess monopoly power in the target market; indeed, if it did, the offense would be monopolization, not attempt. Of course, "the higher the firm's initial market share, the greater the likelihood that it will eventually gain monopolistic control over the market." *Colorado Interstate Gas*, 885 F.2d at 694.

(1) Defendants' Market Share/Multiple Markets

HN24[] "The [market] share that is relevant for determining whether the defendant can satisfy the 'dangerous probability of success' requirement of attempted monopolization should be either that which he possesses at the time of litigation or the largest share he possessed during the period of the alleged offense." Areeda & Hovenkamp, *supra* P P 711.2d, 835.2b.¹³ [**41] No specific minimum market share is universally accepted. But in this case, the Defendants stipulate that they possess monopoly power in the full-service course market, which is closely related to the target supplemental workshop market; they are accused of leveraging that power to increase [**40] their share of the supplemental market; their share of the supplemental market [*1555] went from less than 2 percent in the winter of 1992 to more than 70 percent within a year, while the share of their major competitor, PMBR, went from 84 percent to 23 percent in the same period (and from 22,000 nationwide in 1990 to 14,000 in 1992).¹⁴ *Fiberglass Insulators, Inc. v. Dupuy*, No. Civ. A. 84-1244-1, *1986-2 Trade Cas. (CCH) P67,316, 1986 WL 13356* at ** 3-4 (D. S.C. Sept. 30, 1986) (denying summary judgment on attempted monopolization claim where defendant's market share increased from 5 percent to nearly 51 percent in four years); *Indiana Grocery Co. v. Super Valu Stores, Inc.*, *647 F. Supp. 254, 258 (S.D. Ind. 1986)* (refusing to dismiss attempted monopolization case for failure to state a claim where defendant, a new market entrant with extensive resources, obtained a 15 percent market share in 18 months).

¹³ Professors Areeda and Turner, in their earlier, 1978 main volume, said some courts have required a showing that a defendant possessed a significant share of the target market at the time when the challenged conduct was undertaken, and they cite, inter alia, to one of our cases as standing for that proposition. See *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), cert. denied, 425 U.S. 907, 47 L. Ed. 2d 758, 96 S. Ct. 1501 (1976) (cited in Areeda & Turner, *supra* P P 831, 835a). We do not read *Delaney* as clear support for such a rule, but even if it were, we would hold it distinguishable from this case, where the Defendants are accused of leveraging their monopoly power in a second market to gain a new monopoly in the target market.

¹⁴ The Defendants complain that PMBR arrived at the high market share for them by counting every sale of the Defendants' full-service course as a sale of a supplemental MBE workshop after the Gilbert inclusion in the summer of 1992. But they do not show why this is conceptually wrong, at least for 1993, when the evidence shows that part of the fee increase charged to enrollees was to cover Gilbert costs, so that we can fairly call the Gilbert enrollments "sales." At any rate, we accept PMBR's numbers for summary judgment purposes. See *Kodak*, 112 S. Ct. at 2076-77.

(2) *Defendants' Resources*

PMBR has presented evidence that Defendants have access to substantial money with which to sustain a predatory campaign. HBJL's parent company, General Cinema, had total assets of over \$ 5.5 billion as of Jan. 31, 1993, compared with PMBR's assets of less than \$ 1.042 million as of June 30, 1993. See Plaintiff-Appellant's App. at 200 (Summary).

(3) *Number and Strength of Competitors*

PMBR's market structure evidence suggests that if PMBR is seriously damaged or eliminated, remaining **[**42]** competitors in the supplemental market may not be able to compete effectively against Gilbert. The Colorado supplemental MBE market is highly concentrated, dominated by PMBR and the Defendants. The other two competitors--APTS and Reed Law Group--have been relatively weak in Colorado. In 1993, Defendants had 76.2 percent of the market; PMBR had 22.6 percent, and APTS had 1.2 percent. *Id. at 339 (Baseman Aff. Ex. 3)*. Reed cancelled its 1993 workshops. *Id. at 361 (Feinberg Aff.)*. SMH offered a workshop in 1991, but it is unclear to us whether they still compete in the supplemental market.

(4) *Market Trends*

The trends in the supplemental MBE market, as reflected in PMBR's evidence, provide additional support for PMBR's claim. PMBR's market share increased from 71 percent to 84 percent between 1989 and 1991, but dropped to 25 percent in 1992 and to 23 percent in 1993. The Defendants' market share showed an opposite trend, dropping from 29 percent to 11 percent between 1989 and 1991, then increasing to 72 percent by the end of 1992 and 76 percent in 1993. Figures for the third competitor, APTS, available for 1991-93, showed a steady decline from 4 percent in 1991 to 1 percent **[**43]** over that period.

(5) *Entry Barriers*

PMBR has also offered evidence that if PMBR is eliminated, new market entrants may not be able to establish a competitive MBE workshop market. PMBR's economic expert testified that entry barriers exist in both the full-service and the supplemental MBE markets in Colorado, because of Defendants' high degree of name recognition and accumulated goodwill, HBJL's large size nationwide, HBJL's economies of scope and scale in the full-service market, and the widespread discounting practices of the bar review industry. See *id. at 323-24 (Baseman Aff.)*. PMBR has presented further evidence of entry barriers in that there have been only three attempted entries in the Colorado supplemental MBE market since 1972, two of them largely unsuccessful. *Id. at 192 (Summary)*, 361 (*Feinberg Aff.*).

The preceding evidence of the Defendants' market share and resources, the nature of the competition they face, and the barriers to **[*1556]** entry in the supplemental workshop market, are sufficient to create a material factual dispute with regard to dangerous probability of success. A jury question exists as to whether HBJL and CBR, by predatorily pricing Gilbert **[**44]** sales to BAR/BRI customers in the summer 1992 course and then subsequently tying the BAR/BRI course to purchases of Gilbert, and by creating scheduling conflicts with PMBR's course, could so harm PMBR and other MBE providers that HBJL and CBR could monopolize the MBE market and maintain that monopoly long enough to recoup any predatory pricing losses plus interest. Although many subissues are subject to serious factual dispute, summary judgment on the attempt claim was premature.

4. *Section 2 Conspiracy to Monopolize Supplemental MBE Market*

PMBR next contends that the district court erred in dismissing its *section 2* claim of conspiracy to monopolize the supplemental MBE market, because all of its elements except one--the existence of a conspiracy--are subsumed in the attempt claim, and it has provided evidence of the conspiracy element as well.

HN25 To succeed on a claim of conspiracy to monopolize, PMBR must show: "(1) 'the existence of a combination or conspiracy to monopolize'; (2) 'overt acts done in furtherance of the combination or conspiracy'; (3) 'an effect upon an appreciable amount of interstate commerce'; and (4) 'a specific intent to monopolize.'" *TV*

*Communications, [**45] 964 F.2d at 1026* (quoting *Olsen v. Progressive Music Supply, Inc., 703 F.2d 432, 438* (10th Cir.), cert. denied, 464 U.S. 866, 78 L. Ed. 2d 172, 104 S. Ct. 197 (1983)).

As to the conspiracy element, PMBR has presented evidence that major decisions regarding the Colorado course, such as pricing and course content, required the approval of HBJL as well as CBR. See Plaintiff-Appellant's App. at 206-07 (Summary); *id. at 455* (Davis Dep.). We agree that this evidence, when combined with the evidence supporting the attempt claim, creates a triable issue and precludes summary judgment on the conspiracy claim.

5. Monopolization of and Conspiracy to Monopolize Full-Service Bar Review Market

PMBR alleges that HBJL and CBR were guilty of Sherman Act [section 2](#) monopolization of and conspiracy to monopolize the full-service bar review market by means of a geographic market allocation agreement, which is illegal per se under [section 1](#).

HBJL and CBR reply that PMBR lacks standing, that a 1990 release agreement and the statute of limitations bar this claim, and that PMBR has not presented evidence that an illegal market allocation agreement ever existed. The district court appears to have relied on the [**46] 1990 release agreement in dismissing this claim. Although the court also mentioned the statute of limitations, it does not appear to have made a specific finding based on it. We conclude that PMBR has failed to establish a triable issue regarding the existence of an illegal agreement.

[HN26](#) [↑] Defendants correctly argue that ambiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under Sherman Act [section 1](#). *Matsushita, 475 U.S. at 588*. A plaintiff must offer evidence tending to exclude the possibility that the alleged conspirators either acted independently or colluded in a way that could not have harmed the plaintiff. *Id.*; *Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987)*.

We agree with the Defendants that the mere fact that they were competitors before their licensing arrangement and stopped competing afterward is not enough to show that they secretly and illegally divided the market between them. Their written agreements contained no noncompete clauses, but once they entered their licensing arrangement, both companies had legitimate business reasons not [**47] to compete and undermine the BAR/BRI trademark's value.

Also ambiguous is the evidence that CBR's founder, Jerry Kopel, once threatened to offer competing bar review courses outside Colorado if HBJL did not give him more [*1557] favorable license terms, but that he ultimately did not carry out his threat. This can be read, as PMBR reads it, to mean that Mr. Kopel was threatening to violate an existing secret agreement not to compete, but it also can be viewed as the normal posturing that occurs in any contract renegotiations.

Nor do we consider that the balance is tipped by the evidence that HBJL entered into an explicit market allocation agreement with a former competitor in Georgia in 1980, see *Palmer, 498 U.S. at 49-50*, and that it proposed market allocation agreements to Josephson's Bar Review in 1969, to SMH Bar Review in 1976 and 1980, and to PMBR in 1989-90. The timing of these various offers permits two opposite inferences to be drawn. Although PMBR insists that this evidence shows a consistent pattern of behavior, all of the alleged offers were made before November 1990. In that month, the Supreme Court ruled in *Palmer* that HBJL's market allocation agreement with BRG was [**48] "unlawful on its face." *Id. at 50*. It is clearly possible to infer that in 1991, when HBJL and CBR orally renewed their Colorado licensing agreement, they were aware of the illegality of any market allocation agreement and did not pursue or renew any such agreement.

Since all of PMBR's evidence relative to the existence of a secret market allocation agreement is ambiguous, it cannot support an inference of conspiracy to monopolize the full-service course market, and we affirm the district court's dismissal.¹⁵

[49] B. CONFIDENTIALITY ISSUES**

PMBR appeals the district court's refusal to set aside under *Fed. R. Civ. P. 72(A)* a magistrate judge's orders concerning disclosure of confidential information in the record. The basis for the court's ruling is not clear, but because we are remanding the case, this order becomes interlocutory and subject to reexamination upon renewed motion by PMBR. We therefore decline to address it at this juncture.

IV. CONCLUSION

For the reasons discussed above, the district court's judgment is REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

End of Document

¹⁵ Although the 1990 settlement agreement released any claims PMBR might have had against HBJL based on pre-1990 activities, PMBR contends that it still has a cause of action for that time period against CBR, which was not a party to the settlement. But even assuming that CBR is not protected by the 1990 release, PMBR's evidence that HBJL proposed or entered into market allocation agreements with other companies in other states in 1969, 1976, 1980, and 1989, without more, is simply too remote to furnish the basis for a conspiracy claim against CBR on grounds that CBR and HBJL, or their predecessors, allocated the Colorado and Wyoming markets in 1974, 1982, 1986, and 1988. (The latter dates are the years when CBR made or renewed its written license agreements.)



National Ass'n of Review Appraisers & Mortgage Underwriters v. Appraisal Found.

United States Court of Appeals for the Eighth Circuit

May 16, 1995, Submitted ; August 29, 1995, Filed

No. 94-2689, No. 94-3074

Reporter

64 F.3d 1130 *; 1995 U.S. App. LEXIS 24304 **; 1995-2 Trade Cas. (CCH) P71,127

National Association of Review Appraisers and Mortgage Underwriters, Inc., Plaintiff/Appellant, v. The Appraisal Foundation; The Appraisal Institute; American Institute of Real Estate Appraisers; Society of Real Estate Appraisers; American Society of Appraisers; National Society of Real Estate Appraisers, Defendants/Appellees. The Appraisal Foundation, Plaintiff/Appellee, v. National Association of Real Estate Appraisers, Inc., Defendant/Appellant. The Appraisal Foundation, Plaintiff, v. National Association of Real Estate Appraisers, Inc., Defendant, National Association of Real Estate Appraisers, Inc., Counter-Plaintiff/ Appellant, v. The Appraisal Foundation; The Appraisal Institute; American Institute of Real Estate Appraisers; Society of Real Estate Appraisers; American Society of Appraisers; National Society of Real Estate Appraisers, Counter-Defendants/ Appellees. National Association of Review Appraisers and Mortgage Underwriters, Inc.; National Association of Real Estate Appraisers, Inc., Plaintiffs/Appellants, v. Roy Morris, Defendant/Appellee. National Association of Review Appraisers and Mortgage Underwriters, Inc.; National Association of Real Estate Appraisers, Inc., Plaintiff/Appellants, Roy G. Green; George Hamilton Jones, Defendants/Appellees. National Association of Review Appraisers and Mortgage Underwriters, Inc.; National Association of Real Estate Appraisers, Inc., Plaintiffs/Appellants, Joseph S. Durant, Defendant/Appellee.

Subsequent History: [\[**1\]](#) Rehearing and Suggestion for Rehearing En Banc Denied October 10, 1995, Reported at: [1995 U.S. App. LEXIS 28113](#).

Prior History: Appeals from the United States District Court for the District of Minnesota. District No. CIV 4-91-294. Honorable Diana E. Murphy, District Judge.

Core Terms

membership, Associations, organizations, appraisal, affiliate, antitrust, real estate appraiser, decreased, sponsors, anticompetitive, declining, blame

LexisNexis® Headnotes

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

Antitrust & Trade Law > Sherman Act > General Overview

[HN1](#) [] **Actual Monopolization, Anticompetitive & Predatory Practices**

When challenged actions or practices yield a pernicious effect on competition and lack any redeeming virtue they are *per se* invalid. In such situations the actions so lack redeeming social and competitive value as to warrant being struck down without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

[Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview](#)

[Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview](#)

[Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

HN2 **Exemptions & Immunities, Collectives & Cooperatives**

Organizations are free to associate, share information, and engage in self-regulation. Accordingly, in the absence of any showing that the challenged practices are anticompetitive on their face, the court will apply the rule of reason to determine if there is an antitrust violation. Additionally, courts should hesitate to apply a *per se* rule when there is a question as to the extent of a practice's economic impact.

[Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview](#)

[Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

HN3 **Exemptions & Immunities, Collectives & Cooperatives**

A group boycott results in impermissible harm even if it results in lower prices or temporarily stimulates competition because such boycotts have, by their nature and character, a monopolistic tendency to restrain free trade.

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

HN4 **Regulated Practices, Market Definition**

In the absence of such a *per se* violation of the antitrust laws incidental harm to an individual competing in the market is a necessary residuum of the competitive process. In such an environment one competitor will always suffer some form of harm relative to a competitor that gains an advantage. Society reaps the benefits of such competitive behavior through lower prices, better products and services, and greater market efficiencies as

individual competitors seek to gain an advantage. Only anticompetitive behavior, i.e. behavior that tends to lessen the potentiality for society to realize the benefits of the competitive process, is proscribed.

Counsel: Counsel who presented argument on behalf of the appellant was Joseph Alioto of San Francisco, California. Also appearing on the brief was Daniel R. Shulman of Minneapolis, Minnesota.

Counsel who presented argument on behalf of the appellee was Peter Hendrixson of Minneapolis, Minnesota. Also appearing on the brief were Kathleen D. Sheehy and Sue Halverson of Minneapolis, Minnesota; Paul R. Hannah and Laurie A. Zenner of St. Paul, Minnesota; Jerome C. Schaefer and John P. Wintrol of Washington, D.C.; David Marx, Jr. and Anne Pramaggiore of Chicago, Illinois.

Judges: Before WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and BOGUE, * Senior District Judge.

Opinion by: WOLLMAN

Opinion

[*1132] WOLLMAN, Circuit Judge.

The National Association of Review Appraisers and Mortgage Underwriters and the National Association of Real Estate Appraisers (hereinafter referred to as the "Review Association" and "Appraisers' Association" individually, and collectively as the "Associations") appeal from the district court's ¹ orders granting summary judgment for the Appraisal Foundation and certain of its member organizations and trustees (collectively the "Foundation") on the Associations' various antitrust and tortious interference claims. We affirm.

[**2] I.

In the mid 1980s, as pressure began to increase for regulation of the appraisal industry in the wake of the nationwide savings and loan debacle, a number of appraisal organizations decided to get together to set standards for the industry in an attempt at self-regulation. As a result of this union of interests, the Foundation was created in 1987 to establish uniform appraisal standards and criteria for certifying appraisers. The eight founding member organizations appointed between one and three trustees to the Foundation depending on their size. Other members, which were organizations composed of users of appraisal services, were allowed to appoint one trustee to the board, and two at-large trustees were elected by the appointed trustees. In 1989, Congress passed Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which charged the Foundation's Appraiser Standards Board and Appraiser Qualifications Board with promulgating industry standards for federally related transactions. See [12 U.S.C. §§ 3339, 3345](#).

In 1991, the Foundation amended its by-laws to create three different types of sponsorship to the Foundation effective January [**3] 1, 1992 -- appraisal, affiliate, and corporate. Appraisal sponsors are appraisal organizations; whereas affiliate and corporate sponsors are, respectively, non-profit and for-profit organizations with a "demonstrable interest" in appraisals and appraisal practices. The board of trustees is now composed of one trustee for each appraisal and affiliate sponsor that meets sponsorship criteria, and fourteen at-large trustees selected from a pool of candidates sponsored by each category of affiliation. Since the by-laws were amended, the Foundation has admitted two appraisal and three affiliate members, as well as several corporate sponsors. About

*The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

¹The Honorable Diana E. Murphy, then Chief Judge, United States District Court for the District of Minnesota, now United States Circuit Judge for the United States Court of Appeals for the Eighth Circuit.

66% of all appraisers (62,651 total) belonged to organizations affiliated with the Foundation in 1990. As of 1992, membership encompassed approximately 71% of all appraisers (70,221 total).

The Review Association filed an antitrust action under the Sherman Act, [15 U.S.C. §§ 1 & 2](#), in 1991, challenging the Foundation's continuing refusal to admit the Review Association as an appraisal sponsor dating back to its initial application for membership in 1988. The Review Association claims that it meets all membership criteria and that the Foundation's [\[**4\]](#) control over the industry has effectively crippled the Review Association's ability to compete with other appraisal organizations that are Foundation members. The Foundation subsequently brought a declaratory judgment action against the Appraisers' Association seeking to establish that the Foundation had not violated the antitrust laws for likewise declining to grant that organization membership status. The Appraisers' Association counterclaimed, asserting claims similar to those of the Review Association. These are apparently the only two appraiser organizations that have applied but not been admitted to sponsorship in one form or another. Both are managed by the same corporate entity, International Association Managers, Inc., and are essentially controlled by the same individual and executive director, Robert G. Johnson. Ken Twitchell is the managing director of the Appraisers' Association [\[*1133\]](#) and director of national affairs for the Review Association. The cases were consolidated with several cases brought by the Review Association against the Foundation's trustees.

II. Antitrust Claims

A.

The Associations assert that the Foundation's actions constitute a *per se* antitrust [\[**5\]](#) violation as a group boycott. The direct result of this failure to admit, according to the Associations, has been a marked decline in membership, with the Review Association's membership declining from more than 7,500 in 1990 to fewer than 3,000 members by 1993, and the Appraisers' Association seeing its membership drop from a peak of more than 20,000 in 1989 to fewer than 10,000 in 1993. These numbers take on even more meaning for the Associations when considered in light of the fact that their respective memberships had increased over the three year period prior to 1990. As further evidence of the anticompetitive nature of exclusion, the Associations contrast the declining membership of other organizations during periods those organizations were not members of the Foundation with the increased membership of those within the Foundation.

HN1 When challenged actions or practices yield a "pernicious effect on competition and lack . . . any redeeming virtue" they are *per se* invalid. [Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). In such situations the actions so lack redeeming social and competitive value as to warrant being struck down "without elaborate inquiry as to [\[**6\]](#) the precise harm they have caused or the business excuse for their use." *Id.*; see [Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 \(1985\)](#). The Foundation's membership criteria are inherently exclusionary and thereby necessarily restrict competition to some degree. See [Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500, 100 L. Ed. 2d 497, 108 S. Ct. 1931 \(1988\)](#) (noting that an agreement regarding product standards is an implicit agreement not to deal in non-conforming products); [Northwest Stationers, 472 U.S. at 289](#) (acknowledging that "every commercial agreement restrains trade"). When the exclusion of an organization on the purported basis of those criteria appears to serve some legitimate purpose necessary to the proper functioning of the Foundation and overall efficiency of the market, however, we will analyze that exclusion under the rule of reason to determine whether it in fact does impermissibly restrict competition. See [Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 458, 90 L. Ed. 2d 445, 106 S. Ct. 2009 \(1986\)](#) (noting reluctance "to condemn rules adopted by professional associations as unreasonable *per se*"); [Northwest Stationers, 472 U.S. at 297-98](#) [\[**7\]](#) (expulsion from wholesale cooperative does not warrant *per se* treatment). **HN2** Organizations are free to associate, share information, and engage in self-regulation. Accordingly, in the absence of any showing that the challenged practices are anticompetitive on their face, we will apply the rule of reason to determine if there is an antitrust violation. Additionally, courts should hesitate to apply a *per se* rule when there is a question as to the extent of a practice's economic impact. See [Indiana Dentists, 476 U.S. at 458-59](#); see also [United States v. Brown Univ., 5 F.3d 658, 672 \(3d Cir. 1993\)](#) (accepting that economic harm is less certain when the market restraint is motivated by its socially utility).

The Foundation's exclusion of the Associations does not appear so deleterious on its face as to be considered *per se* illegitimate. The Foundation was created to promote educational and ethical standards for appraisal services, and its membership criteria appear to be designed to accomplish those goals by establishing such standards and requiring non-profit status for appraisal organizations. Such requirements generally pose merely incidental market restraints [**8] and are necessary to successful industry self-regulation. Establishing and enforcing such criteria may even serve some pro-competitive purposes by increasing the relative market efficiencies. See [Allied Tube, 486 U.S. at 501](#) (noting that where [*1134] "private associations promulgate . . . standards based on the merits of objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interests in stifling product competition . . . those private standards can have significant procompetitive advantages"); [Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127, 130 \(5th Cir. 1989\)](#) ("If properly administered, membership requirements serve pro-competitive purposes.").

Further, finding a *per se* violation is not mandated by the antitrust laws because this is not a case in which the alleged boycott "cuts off access to a supply, facility, or market necessary to enable the boycotted [associations] to compete." [Northwest Stationers, 472 U.S. at 294](#). To accept the Associations' argument to the contrary would require us to hold that every appraiser organization has an intrinsic and immutable right to membership in [**9] the Foundation. This is clearly not what Congress intended when it vested the Foundation with the authority to establish standards. Indeed, such a holding would defeat the very purpose of having the Foundation establish standards and admission criteria. The Associations have failed to convince us that the failure to admit cuts off their ability to transact business with their members or potential members.² Access to the market cannot be equated with success in the market. Nor does the exclusion eliminate access of their members to the related market of those in need of appraisal services.

[**10] B.

There can be no doubt that the Associations have suffered a declining membership base in recent years. That, however, is not the full extent of our inquiry. See [National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\)](#) (confining the inquiry "to a consideration of impact on competitive conditions"). We need not decide whether the Foundation has engaged in conspiratorial behavior, or whether the Foundation is capable of such conduct, for even assuming such to be the case, the Associations have failed to generate the inference of causal harm necessary to their claim.

The parties agree that the market in which appraiser organizations vie for members is the relevant market. Thus, the issue is properly framed as whether the Foundation's refusal to admit the Associations has made the market for appraisal organizations less competitive. [HN3](#) A group boycott results in impermissible harm even if it results in lower prices or temporarily stimulates competition because such boycotts have, by their "nature and character, a monopolistic tendency" to restrain free trade. [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213, 3 L. Ed.](#)

² We recognize the subtle distinctions that may alter an analysis from *per se* to the rule of reason and the potential blurring of those distinctions when faced with a combination such as we have here. See [SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 \(10th Cir. 1994\)](#), cert. denied, [115 S. Ct. 2600 \(1995\)](#) (No. 94-1719); see also 7 P. Areeda & H. Hovenkamp, [Antitrust law](#) PP 1511, 1511' (1986 & Supp. 1994) (discussing the collapsing inquiry). We need not anatomize the precedents to crystallize their theoretical development, however. Suffice it to say that our analysis of the relevant economic structures and market forces at issue here makes it evident that this is not a situation requiring *per se* treatment. See generally [National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1984\)](#) (noting that "*per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct"). Nor do the Associations' claims that the market power vested in the Foundation by the combination of its members represents a facility essential to competition. Given the apparent facial validity of the exclusion of the Associations by the Foundation, whatever restraint that exclusion poses must be analyzed under the rule of reason to determine the extent of its power and effect on competition. This will in turn answer the question whether indeed the Foundation is an essential facility and if any denial of access is truly anticompetitive in nature. See Areeda & Hovenkamp, *supra*, PP 736.2a, 736.2f (Supp. 1994) (asserting that denial of access to an essential facility is never deemed *per se* unlawful). This is entirely consonant with the usual application of the rule of reason standards to such cooperative conduct.

[2d 741, 79 S. Ct. 705 \(1959\)](#) (internal quotes omitted). [**11] [HN4](#) In the absence of such a *per se* violation of the antitrust laws, however, incidental harm to an [*1135] individual competing in the market is a necessary residuum of the competitive process. In such an environment one competitor will always suffer some form of "harm" relative to a competitor that gains an advantage. See [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 (1991). Society reaps the benefits of such competitive behavior through lower prices, better products and services, and greater market efficiencies as individual competitors seek to gain an advantage. Only anticompetitive behavior, i.e. behavior that tends to lessen the potentiality for society to realize the benefits of the competitive process, is proscribed. See [915 F.2d at 21-22; Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#).

The Associations attempt to foist blame on the Foundation for a decrease in the number of appraisers operating in the United States today and the attendant rise in cost of appraiser services. The Associations offered some evidence that consumers of appraiser services prefer appraisers that are members of organizations affiliated [**12] with the Foundation. There is no evidence tending to connect the Associations' individual harm to any such harm on the overall market for appraisal organizations, however. The Associations' claims of harm to the market reflect mere individual harm. See [T.W Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 635 \(9th Cir. 1987\)](#) (party cannot withstand summary judgment motion in absence of evidence of harm to competition). Blaming the Foundation for fluctuations in the market for individual appraiser services, and the resulting impact on association memberships, fails to raise a sufficient inference that there was harm to the competition among appraiser organizations. See [Legal Economic Evaluations, Inc. v. Metropolitan Life Ins., 39 F.3d 951, 954-56 \(9th Cir. 1994\)](#) (finding asserted harm to competition to actually lie in a different market), cert. denied, 131 L. Ed. 2d 304, 115 S. Ct. 1420 (1995). Rather, such claims are contradicted by evidence of an increase in the number of educational programs offered by the Associations as they compete with other organizations for the affiliation of appraisers. Nor is there any evidence that membership prices in organizations have increased [**13] or that the number and quality of such organizations or their output in terms of educational offerings or other benefits to their members has decreased since the dawn of the Foundation. See [Visa USA, 36 F.3d at 968](#) (lack of evidence of increased price, decreased output, or other anticompetitive indicia in the relevant market shows that challenged collective rule making body lacks market power). Even if we were to accept further that the decline in the Associations' membership ranks could sufficiently establish harm to the overall market in which appraisal organizations compete, such a claim must fail in this instance for a lack of a sufficient causal nexus to the Foundation's activities. To succeed on their claims, the Associations must show that a reasonable jury could find that the Foundation's exclusionary behavior was a material cause of the harm suffered. See [Alexander v. National Farmers Org., 687 F.2d 1173, 1210 \(8th Cir. 1982\)](#), cert. denied, 461 U.S. 937, 461 U.S. 938, 461 U.S. 939, 77 L. Ed. 2d 313, 103 S. Ct. 2108 (1983). The Associations "may not recover for losses due to factors other than the [Foundation's] anticompetitive violations." [Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1494 \(8th Cir. 1992\)](#), [**14] cert. denied, 122 L. Ed. 2d 356, 113 S. Ct. 1048 (1993).

A number of highly publicized missteps and other considerations have contributed greatly to the Associations' current deflated membership base, so much so that the Associations cannot claim that their exclusion from the Foundation was a substantially contributing factor to their problems. See [Greater Rockford Energy & Tech. Corp. v. Shell Oil, 998 F.2d 391, 404 \(7th Cir. 1993\)](#), cert. denied, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994). First, they have received a great deal of negative attention for maintaining lax standards. That cat was let out of the bag, so to speak, when the Appraisers' Association designated a feline named Tobias as a member without verifying his credentials. The Appraisers' Association sued Tobias' owner for defamation when he publicly called the association a diploma mill in the wake of this incident. In that suit, the Appraisers' Association claimed that it had [*1136] witnessed a dramatic drop in membership renewal rates as a result of the negative publicity. The district court found the characterization accurate and denied relief. *National Ass'n of Real Estate Appraisers, Inc. v. Schaeffer*, C.A. No. 89-0225T (D. R.I. Jun. 1, 1989); [**15] see also *National Ass'n of Real Estate Appraisers, Inc. v. Schaeffer*, No. CV 88-7774-RJK (TX) (C.D. Cal. Mar. 23, 1989) (dismissal for lack of personal jurisdiction). That case was referred to in the course of the adoption of subsequent amendments to FIRREA. The House Operations Committee specifically noted that it did "not intend in any way to suggest that membership [in the Foundation] should be available to such groups as the National Association of Real Estate Appraisers and its related organizations," precisely because of the finding that they were diploma mills. H.R. Rep. No. 101-981, 101st Cong., 2d sess. 1, 7 n.1

(1990). There can be little doubt but that the lingering stigma of this incident has contributed greatly to the Associations' difficulty in attracting and retaining members.

The Appraisers' Association has also blamed the State of Washington for a decrease in membership. In 1990, the Association filed suit alleging that a designation of state-licensed appraisers as "State-Certified Real Estate Appraisers" infringed on the Association's trademark rights regarding the "Certified Real Estate Appraisers" designation. In an affidavit submitted in that case, Johnson [**16] stated that the state legislation had caused the Association to lose members. The present litigation has also been a drain on membership strength.

In addition to their own litigious efforts to assign blame for their decreased market share, Johnson and Twitchell have both faced recent legal action on other fronts. Both pleaded guilty to charges stemming from a Federal Elections Commission investigation into illegal contributions to the 1988 presidential campaign. Further, the Department of Labor filed suit against International Association Managers for failing to account for and pay overtime to certain former employees. These incidents have done little to enhance the reputation or membership ranks of either association.

Further, representatives of the American Association of Certified Appraisers and the National Association of Master Appraisers, two other appraisal organizations that also witnessed declining membership before they became Foundation members (which membership decline the Associations point to as evidence of the harm on the overall market), attribute the decline in membership to factors entirely independent from the activities of the Foundation. The advent of state certification [**17] has rendered less essential affiliation with an organization and has apparently affected the entire industry. As noted above, the overall market for appraisers has declined, and the Foundation is not to be faulted for the natural market forces driving the market for real estate appraisers. Moreover, the impact of the restraint, whatever it may be, cannot be adequately determined because the Associations apparently could participate in the Foundation in another capacity, an avenue they have not explored.

The Associations have blamed everyone but themselves for their current difficulties, but their problems can be traced directly back to the corporate office. We do not require a negation of all possible explanations for the decreased membership, but in the face of this record the allegations of conspiratorial harm are too speculative to raise a triable issue. Accordingly, because the Associations have failed to establish the existence of a triable fact on the issue of causation, an element essential to their case, the entry of summary judgment in favor of the Foundation was entirely appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Matsushita Elec. Indus. Co. [**18] v. Zenith Radio, 475 U.S. 574, 576, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (must show conspiracy and injury to survive motion for summary judgment).

III. Tortious Interference

Citing their decreased membership base and attendant reduction in revenues, the Associations next contend that the Foundation's actions constitute a tortious interference [*1137] with contractual relations under Minnesota law. To fashion such a claim, the Associations must show that the Foundation intentionally and wrongfully interfered with existing or prospective contractual relations and that but for the Foundation's actions they would have received the benefits of those relations. See United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628, 632-33 (Minn. 1982); Amerinet, 972 F.2d at 1506, 1508. Our discussion of the causation aspect of the antitrust claims sufficiently disposes of this issue. Amerinet, 972 F.2d at 1508-09. In light of the host of problems faced by the Associations, they are unable to make out a submissible case that had they been admitted to the Foundation they would have retained members and attracted new members.

The judgment [**19] is affirmed.



United States v. Milikowsky

United States Court of Appeals for the Second Circuit

April 27, 1995, Argued ; August 30, 1995, Decided

Docket Nos. 94-1450, 94-1492, ; 94-1493

Reporter

65 F.3d 4 *; 1995 U.S. App. LEXIS 24457 **; 1995-2 Trade Cas. (CCH) P71,125

United States of America, Appellee-Cross-Appellant, v. Daniel Milikowsky, Defendant-Appellant-Cross-Appellee, MACC Holding Corporation, Defendant.

Prior History: **[**1]** Appeal and cross-appeal from a judgment of conviction entered August 10, 1994, following a jury trial in the United States District Court for the District of Connecticut (Ellen Bree Burns, J.). Appellant, a principal in several small steel-related businesses, was convicted of one count of price-fixing, in violation of the Sherman Act, [15 U.S.C. § 1](#), and was sentenced to two years' probation, conditioned on a period of six months' home confinement and 150 hours of community service, and a \$ 250,000 fine. Appellant contends that his conviction should be overturned because (1) the government failed to correct, and knowingly reinforced, the false testimony of a key prosecution witness; (2) the court wrongly limited cross-examination of the witness; and (3) the government made prejudicial comments during its closing argument. On cross-appeal, the government contends that the district court erred in departing downward one offense level from the Guidelines sentence because of the effect that imprisonment would have on appellant's employees.

Disposition: Affirmed.

Core Terms

Sentencing, Guidelines, Antitrust, imprisonment, departure, employees, steel, downward, circumstances, offenders, cases, district court, depart, confinement

LexisNexis® Headnotes

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

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1 [down arrow] US Department of Justice Actions, Criminal Actions

Under [U.S. Sentencing Guidelines Manual § 2R1.1\(a\)](#) (Nov. 1989), the base offense level for an individual defendant convicted of a violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), such as price-fixing is nine. [Section](#)

* voluntarily withdrawn.

2R1.1(b)(2) of the Manual provides that two levels are added to the offense level if the volume of commerce attributable to the defendant is more than \$ 15 million, and three levels are added if volume is more than \$ 50 million. Section 2R1.1(b)(1) of the Manual provides that one level is added if conduct involved bid-rigging.

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

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN2 [] US Department of Justice Actions, Criminal Actions

The Antitrust Guideline, *U.S. Sentencing Guidelines Manual § 2R1.1*, reflects the U.S. Sentencing Commission's belief that, in order to deter potential violators, antitrust offenders should generally be sentenced to prison. The commentary to the Antitrust Guideline states that the Commission believes that the most effective method to deter individuals from committing antitrust violations is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence. In very few cases will the guidelines not require that some confinement be imposed.

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

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN3 [] US Department of Justice Actions, Criminal Actions

The business effects of a white collar offender's incarceration generally provide no ground for departure from the U.S. Sentencing Guidelines Manual.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN4 [] Sentencing Guidelines, Adjustments & Enhancements

The Sentencing Reform Act, *18 U.S.C.S. § 3553(b)*, provides that a court may impose a sentence outside the range set by the U.S. Sentencing Guidelines Manual when it finds a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the guidelines. The Commission has explained that courts should treat each guideline as carving out a "heartland," a set of typical cases and that, when a court finds an atypical case that significantly differs from the norm the court may consider whether a departure is warranted.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > General Overview

HN5 [] Sentencing Guidelines, Adjustments & Enhancements

A district court not only can, but must, consider the possibility of downward or upward departure when there are compelling considerations that take the case out of the heartland factors upon which the U.S. Sentencing Guidelines Manual rest. Departure in the appropriate case is essential to the satisfactory functioning of the sentencing system. The authority to depart provides a "sensible flexibility" to insure that atypical cases are not shoe-horned into a Sentencing Guidelines range that is formulated only for typical cases.

Contracts Law > Contract Formation > Consideration > General Overview

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > Family Responsibilities

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > General Overview

[**HN6**](#) **Contract Formation, Consideration**

Among the permissible justifications for downward departure is the need, given appropriate circumstances, to reduce the destructive effects that incarceration of a defendant may have on innocent third parties. Although [U.S. Sentencing Guidelines Manual § 5H1.6](#)'s policy statement indicates that family ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the guidelines, where a defendant's parental responsibilities are "extraordinary" and incarceration would "wreak extraordinary destruction" on her four young dependents, downward departure to avoid imprisonment is warranted. While the U.S. Sentencing Commission undoubtedly took ordinary family responsibilities into account when formulating the Sentencing Guidelines, extraordinary circumstances are by their nature not capable of adequate consideration, and therefore may constitute proper grounds for departure.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > General Overview

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > Judicial Review

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Sentences

[**HN7**](#) **Standards of Review, De Novo Review**

An appellate court reviews for clear error the district court's factual determination that such extraordinary circumstances to justify downward departure from the U.S. Sentencing Guidelines Manual are indeed present.

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > General Overview

[**HN8**](#) **Sentencing Guidelines, Departures From Guidelines**

Business ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate. Departure may be warranted where imprisonment would impose extraordinary hardship on employees. The U.S. Sentencing Guidelines Manual do not require a judge to leave compassion and common sense at the door to the courtroom.

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[**2] Marion Jetton, U.S. Department of Justice, Washington, DC (Anne K. Bingaman, Assistant Attorney General,

Diane P. Wood, Deputy Assistant Attorney General, John J. Powers, III, and Peter J. Levitas, of counsel), for Appellee-Cross-Appellant.

Judges: Before OAKES, McLAUGHLIN and LEVAL, Circuit Judges.

Opinion by: OAKES

Opinion

[*5] OAKES, Senior Circuit Judge:

This appeal raises the issue, under the Sentencing Guidelines, whether a district court may downwardly depart in order to avoid imprisoning an antitrust offender when imprisonment would impose extraordinary hardship on the defendant's employees.

Daniel Milikowsky appeals, and the government cross-appeals, from a judgment of conviction entered August 10, 1994, following a jury trial in the United States District Court for the District of Connecticut (Ellen Bree Burns, J.). The jury convicted Milikowsky, a principal in several small steel-related businesses, of one count of price-fixing, in violation of the Sherman Act, [15 U.S.C. § 1](#). Departing downward to avoid imposing a prison sentence, the court sentenced Milikowsky to two years' probation, conditioned on a period of six months' home confinement and 150 hours of community service, [*3] and a \$ 250,000 fine.

Milikowsky contends that his conviction should be overturned for three reasons: (1) the government failed to correct, and knowingly reinforced, the false testimony of a prosecution witness, Benjamin DeBerry; (2) the court wrongly limited cross-examination of DeBerry; and (3) the government made prejudicial comments during its closing argument. On cross-appeal, the government contends that the district court erred in departing downward one offense level from the applicable Guidelines range because of the effect that imprisonment would have on Milikowsky's employees. Milikowsky's contentions have been thoroughly addressed in [*6] Judge Burns's comprehensive opinion denying Milikowsky's motions for a new trial and for acquittal, [United States v. Milikowsky, 1994 U.S. Dist. LEXIS 20581](#), No. 3-93-CR-191 (EBB) (D. Conn. Aug. 25, 1994), and we affirm his conviction for the reasons stated therein. We write only to address the sentencing issue.

BACKGROUND

During the period relevant to this litigation, Milikowsky, a resident of New Haven, Connecticut, was a principal in several steel-related businesses -- Jordan International Company ("Jordan"), a steel trading company headquartered in [*4] New Haven, Prospect Industries ("Prospect"), a steel pail manufacturing company, and Mid Atlantic Container Corp. ("Mid Atlantic"), which manufactured new steel drums at a plant in Linden, New Jersey, until April 1990, when its assets were sold to The Russell-Stanley Corp. In July 1993, a one-count indictment was filed in the District of Connecticut, charging Milikowsky and MACC Holding Corp. ("MACC"), the successor corporation to Mid Atlantic, along with unnamed co-conspirators, with conspiring to fix the prices of new steel drums in the eastern United States from May 1987 through April 1990. After a three-week jury trial, Milikowsky and MACC were convicted.

HN1 Under the Sentencing Guidelines (Nov. 1989 version)¹, the base offense level for an individual defendant convicted of a Sherman Act violation such as price-fixing is nine. [U.S.S.G. § 2R1.1\(a\)](#). Two levels are added to the offense level if the volume of commerce attributable to the defendant is more than \$ 15 million, and three levels are

¹ The parties agree that Milikowsky's sentence is governed by the November 1989 Guidelines, and all subsequent references refer to that version of the Guidelines.

added if volume is more than \$ 50 million. *Id.* § 2R1.1(b)(2). One level is added if conduct involved bid-rigging. *Id.* § 2R1.1(b)(1).

[**5] At sentencing, the district court found the bid-rigging enhancement inappropriate, but it concluded, over Milikowsky's objection, that a two-level enhancement, for greater than \$ 15 million volume, was appropriate. The resulting offense level, accordingly, was eleven. In view of Milikowsky's criminal history category of I, the applicable Guidelines range was eight to fourteen months' imprisonment. Under this offense level, a split sentence is available, allowing part of the term to be served by community confinement or home detention, but imprisonment for at least half the minimum term is required. *Id.* § 5C1.1(d).

Milikowsky requested a downward departure from level eleven that would allow the court to sentence him to probation rather than prison, on the basis of the effect imprisonment would have on his family and on his employees at Jordan and Prospect. The court took note of the destructive effect imprisonment would have on Milikowsky's family, but found it insufficient by itself to justify a departure. However, the court concluded that Milikowsky's other contention -- the effect of imprisonment on his employees -- did allow the court to downwardly depart, and accordingly [**6] it departed down one level, to level ten. The court noted that Milikowsky's circumstances differed from those of other high-level business people it had sentenced, in that "this is a situation where I am convinced that the loss of his daily guidance would extraordinarily impact on persons who are employed by him." Transcript of sentencing of Aug. 8, 1994, at 93. Accordingly, the court placed Milikowsky on two years' probation, with the first six months to be spent in home confinement; it also sentenced him to 150 hours of community service and fined him \$ 250,000.

DISCUSSION

The government contends that the court's downward departure is inconsistent with the deterrence rationale of [U.S.S.G. § 2R1.1](#) (the "Antitrust Guideline"), and that it is contrary to case law which rejects effect on employees as a ground for departure.

First, [HN2](#) the Antitrust Guideline, as the government notes, reflects the Sentencing Commission's belief that, in order to deter potential violators, antitrust offenders should generally be sentenced to prison. The commentary to the Antitrust Guideline states that "the Commission believes that the most effective method to deter individuals from [*7] committing [antitrust [**7] violations] is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence. . . . In very few cases will the guidelines not require that some confinement be imposed." [U.S.S.G. § 2R1.1](#), cmt. (background); see also [United States v. Haversat](#), 22 F.3d 790, 797-98 (8th Cir. 1994) (confinement should be imposed in "all but the rarest" criminal antitrust cases).

Second, the government cites cases from other circuits holding that [HN3](#) the business effects of a white collar offender's incarceration generally provide no ground for departure. See, e.g., [United States v. Reilly](#), 33 F.3d 1396, 1424 (3d Cir. 1994) ("there was nothing extraordinary in the fact that the incarceration of a company's principal might 'cause harm to the business and its employees'"); [United States v. Sharapan](#), 13 F.3d 781, 785 (3d Cir. 1994); [United States v. Rutana](#), 932 F.2d 1155, 1158 (6th Cir.), cert. denied, 502 U.S. 907, 116 L. Ed. 2d 243, 112 S. Ct. 300 (1991); [United States v. Mogel](#), 956 F.2d 1555, 1563-64 (11th Cir.), cert. denied, 121 L. Ed. 2d 115, 113 S. Ct. 167 (1992). Since enforcement actions by the Antitrust Division have been directed in large [**8] part against industries made up primarily of small businesses, see *Report of the American Bar Ass'n, Section of Antitrust Law, Task Force on the Antitrust Division*, 58 Antitrust L.J. 747, 755 (1990); *60 Minutes with Charles F. Rule, Assistant Attorney General, Antitrust Division*, 57 Antitrust L.J. 257, 258-61 (1988), the government contends that there is nothing "extraordinary" about the prospect of imprisoning, and potentially putting out of business, small business owners.

We are not convinced that the government's contentions require vacatur of the court's decision to depart. [HN4](#) The Sentencing Reform Act provides that a court may impose a sentence outside the Guideline range when it finds a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing

Commission in formulating the guidelines." [18 U.S.C. § 3553\(b\) \(1988\)](#). The Sentencing Commission has explained that "courts should treat each guideline as 'carving out a "heartland," a set of typical cases' and that, 'when a court finds an atypical case,' that 'significantly differs from the norm, the court may consider whether a departure is warranted.'" [United States v. Merritt](#) [\[*91](#), 988 F.2d 1298, 1309 (2d Cir.) (quoting U.S.S.G., intro. 4(b)), cert. denied, 124 L. Ed. 2d 683, 113 S. Ct. 2933 (1993).

This court has taken this guidance firmly to heart in recent years, making clear that [HN5](#) a district court not only can, but must, consider the possibility of downward or upward departure "when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest." [United States v. Monk](#), 15 F.3d 25, 29 (2d Cir. 1994); see also [United States v. Restrepo](#), 999 F.2d 640, 644 (2d Cir.) (listing cases upholding departures), cert. denied, 126 L. Ed. 2d 352, 114 S. Ct. 405 (1993); [Merritt](#), 988 F.2d at 1309-10 (same). "Departure in the appropriate case," we have emphasized, "is essential to the satisfactory functioning of the sentencing system." [Merritt](#), 988 F.2d at 1309. "The authority to depart provides a 'sensible flexibility' to insure that atypical cases are not shoe-horned into a Guidelines range that is formulated only for typical cases." [United States v. Rogers](#), 972 F.2d 489, 493 (2d Cir. 1992).

[HN6](#) Among the permissible justifications for downward departure, we have held, is the need, given appropriate circumstances, to reduce the destructive [\[*10\]](#) effects that incarceration of a defendant may have on innocent third parties. Although a Guidelines policy statement indicates that "family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the guidelines," [U.S.S.G. § 5H1.6](#) (policy statement), we have nonetheless held that, where a defendant's parental responsibilities were "extraordinary" and incarceration would "wreak extraordinary destruction" on her four young dependents, downward departure to avoid imprisonment was warranted. [United States v. Johnson](#), 964 F.2d 124, 126-30 (2d Cir. 1992); see also [United States v. Califano](#), 978 F.2d 65 (2d Cir. 1992) (per curiam); [United States v. Alba](#), 933 F.2d 1117, 1122 (2d Cir. 1991). [*8] While the Commission undoubtedly "took ordinary family responsibilities into account when formulating the Guidelines," we reasoned, "extraordinary circumstances . . . are by their nature not capable of adequate consideration" and "therefore may constitute proper grounds for departure." [Johnson](#), 964 F.2d at 128.

We find the reasoning of *Johnson* applicable to the antitrust and employment context. It is true, as the government notes, [\[*11\]](#) that the Antitrust Guideline favors prison terms for antitrust offenders as a means of deterring potential violators. See [U.S.S.G. § 2R1.1](#), cmt. (background). Additionally, in drawing up the Antitrust Guidelines, the Commission could hardly have overlooked the effect that imprisonment of offenders would have on small businesses that are likely to be heavily dependent on those very offenders for their continuing success. See cases cited *supra*, at 5. In considering, and taking into account, the effect of imprisonment on antitrust offenders' businesses, however, the Commission did not thereby take into account the effect imprisonment would have in "extraordinary circumstances." Such circumstances, as we explained in [Johnson](#), 964 F.2d at 128, "are by their nature not capable of adequate consideration."

The issue before us, then, is whether the facts considered by the district court comprise such "extraordinary circumstances," falling outside the heartland envisioned by the Antitrust Guideline. Our *de novo* review, see [Rogers](#), 972 F.2d at 492, makes clear that extraordinary effects on an antitrust offender's employees, "to a degree[] not adequately taken into [\[*12\]](#) consideration by the Sentencing Commission," warrant a downward departure. [HN7](#) We thus review for clear error the district court's factual determination that such extraordinary circumstances are indeed present. [United States v. Jagmohan](#), 909 F.2d 61, 64 (2d Cir. 1990).

The district court found Milikowsky's situation extraordinary when it distinguished his case from other "high level business people" it had sentenced. Tr. of sentencing of Aug. 8, 1994, at 93. What distinguished his situation, the court noted, was the "extraordinary" impact that the loss of his daily involvement would have on his business and, consequently, on his employees. *Id.* The record more than adequately supports this conclusion.

Before the court were unrebutted letters and testimony from family members, employees, business associates, and Milikowsky's chief trade creditor attesting to his indispensability to Jordan and Prospect, Milikowsky's two remaining businesses. This record, undisputed by the government, allowed the court to conclude that Milikowsky is the only

individual with the knowledge, skill, experience, and relationships to run Jordan, the steel trading concern, on a daily basis: he is the sole **[**13]** buyer of all steel, the only person with the requisite ability and contacts to buy steel at competitive rates, the most successful seller, and the person who deals with Jordan's customers and suppliers. The record allowed the court to conclude, additionally, that Milikowsky's daily involvement at Jordan is necessary to ensure the continuing viability of Prospect, the steel pail company. Milikowsky is the sole buyer of all the steel Prospect uses to make pails, and, according to testimony, the cost advantage attributable to his steel-buying expertise is virtually the only reason that Prospect remains a viable operation.

The two companies' dependence on Milikowsky is greatly increased by the companies' extremely precarious financial condition. The two companies, as well as the Milikowsky families personally, are indebted for approximately \$ 20 million to an international steel conglomerate, TradeARBED. According to the testimony of Milikowsky's business lawyer, Jordan and Prospect are so deeply indebted that they are unable to obtain credit from anywhere else, and TradeARBED continues to provide credit only so long as the companies remain profitable. The court, crediting the unrebutted **[**14]** testimony on behalf of Milikowsky, was able to conclude that the companies' continuing livelihood depends entirely on Milikowsky's personal involvement, and that, in his absence, TradeARBED might well withdraw its credit, leading to both companies' immediate bankruptcy and **[*9]** the loss of employment for Jordan's employees and Prospect's 150 to 200 employees.

On the basis of this record, we cannot find clear error in the court's conclusion that imprisoning Milikowsky would have extraordinary effects on his employees to a degree not adequately taken into consideration by the Sentencing Commission. While we agree with our sister circuits that [HN8](#)[↑] business ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate, see cases cited *supra*, departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees. As we have noted in similar circumstances, the Sentencing Guidelines "do not require a judge to leave compassion and common sense at the door to the courtroom." [Johnson, 964 F.2d at 125](#).

CONCLUSION

We have considered all of Milikowsky's contentions as to why his conviction should be reversed, **[**15]** and the government's contentions as to why the sentence should be vacated, and have found no basis for either reversal or vacatur. The judgment of conviction and the sentence are affirmed.



Associated Bodywork & Massage Professionals v. American Massage Therapy Ass'n

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

September 1, 1995, Decided ; September 5, 1995, DOCKETED

No. 95 C 367

Reporter

897 F. Supp. 1116 *; 1995 U.S. Dist. LEXIS 12847 **; 1995-2 Trade Cas. (CCH) P71,207

ASSOCIATED BODYWORK AND MASSAGE PROFESSIONALS, a Colorado corporation, Plaintiff, v. AMERICAN MASSAGE THERAPY ASSOCIATION, Defendant.

Core Terms

massage, therapy, allegations, antitrust, anticompetitive, certification, regulations, affiliate, Counts, mail, sham

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

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

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

HN1[] Trade Practices & Unfair Competition, State Regulation

On a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), all well-pleaded factual allegations are presumed to be true. The court must view those allegations in the light most favorable to the plaintiff, and accept all reasonable inferences to be drawn from those allegations as true. However, the court is not constrained by the plaintiff's legal characterizations of its allegations.

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

Governments > Legislation > Vagueness

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

HN2[] Defenses, Demurrsers & Objections, Motions to Dismiss

On a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a court must construe the pleadings liberally, and mere vagueness or lack of detail alone will not constitute sufficient grounds to dismiss a complaint. The complaint need

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not specify the correct legal theory nor point to the right statute to survive a [rule 12\(b\)](#) motion to dismiss. Rather, the complaint must state, either directly or inferentially, allegations establishing the necessary elements for recovery under the chosen legal theory.

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

[**HN3**](#) Exemptions & Immunities, Noerr-Pennington Doctrine

When private organizations encourage legislative action eventually resulting in anticompetitive restraints on potential competitors, those organizations enjoy absolute immunity for the anticompetitive restraint.

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

Governments > State & Territorial Governments > Legislatures

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

[**HN4**](#) Private Actions, Remedies

Where an alleged antitrust injury stems from a defendant's success in influencing legislation, that injury is caused by the state legislatures' political decisions, not by the defendant itself, thus breaking the chain of causation between defendant's actions and any injury suffered by plaintiff.

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

[**HN5**](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The [First Amendment's](#), [U.S. Const. amend. I](#), protection of political efforts to encourage legislation extends even where a party possesses an anticompetitive motive in petitioning for legislation. The selfishness of a party's political motives is irrelevant. Concerted efforts to influence legislatures are shielded from the reaches of the Sherman Act, regardless of anticompetitive intent or purpose. Accordingly, a defendant's successful efforts to encourage legislation are protected by the [First Amendment](#), even if those efforts were motivated by anticompetitive animus.

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

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

[**HN6**](#) Exemptions & Immunities, Noerr-Pennington Doctrine

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The narrow "sham" exception to the general rule providing immunity from antitrust claims as a result of a defendant's lobbying efforts applies only if a defendant had no reasonable expectation of obtaining the favorable legislation.

Antitrust & Trade Law > Sherman Act > General Overview

HN7 [] Antitrust & Trade Law, Sherman Act

Restraints which are generally not within the reach of the Sherman Act are not brought within its sweep by mere allegations that the restraints were accomplished by improper means under state law.

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

HN8 [] Regulated Practices, Trade Practices & Unfair Competition

Actionable antitrust conspiracies must involve separate and unrelated entities, not closely held affiliates.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN9 [] Freedom of Speech, Political Speech

For purposes of the [First Amendment, U.S. Const. amend. I](#), immunity, "free trade of information" means free trade in the opportunity to persuade action, not merely to describe facts.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

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

HN10 [] Freedom of Speech, Political Speech

Allegations of nonviolent state law transgressions will not inject Racketeering and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-1968](#), implications into protected speech.

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

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN11 [] Racketeering, Racketeer Influenced & Corrupt Organizations Act

Business rivals may not use the Racketeering and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-1968](#), to support a cause of action for injuries indirectly caused by mail fraud which was perpetrated against third parties.

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Judges: CHARLES RONALD NORGLE, SR., Judge, United States District Court

Opinion by: CHARLES RONALD NORGLE, SR.

Opinion

[*1118] OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is the motion of Defendant American Massage Therapy Association ("AMTA") to dismiss the complaint of Associated Bodywork pursuant to [Rule 12\(b\)\(6\)](#). For the reasons set forth below, the motion is granted as to Counts II and IV; because Plaintiff's federal claims are dismissed, the court sua sponte declines to exercise supplemental jurisdiction over Counts I and III.

I. Background

Plaintiff Associated Bodywork and Massage Professionals is a for-profit corporation whose stated purpose is the assistance of massage therapy professionals in the advancement of massage therapy as a profession. At all times material to this case, Plaintiff was a business of good name and reputation, enjoying high esteem both from the public in general and within the massage therapy industry. Defendant is a not-for-profit organization. Through its Government Relations Committee, Defendant contacts various state legislatures across the nation and recommends the enactment of regulatory schemes for the practice of massage [**2] therapy.

Defendant has also created the National Certification Board for Therapeutic Massage and Bodywork ("NCBTMB"), as Defendant's administrative affiliate, to supervise certification of massage therapists. The Commission on Massage Therapy Training Accreditation/Approval ("COMTTA") evaluates massage therapy schools and education programs as a self-run affiliate of Defendant. Several state legislatures have approved both NCBTMB and COMTTA programs as part of their massage therapy regulatory schemes.

Through its Government Relations Committee, Defendant routinely distributed literature to legislators of various states, advocating the adoption of massage therapy regulation. The advocated regulations provide, in part, that massage therapists (1) participate in massage therapy training programs which have been accredited by an independent accrediting body (such as COMTTA), (2) receive certification from a national certification program similar to the NCBTMB's, and [*1119] (3) belong to a recognized national professional society. In detailing this third recommended regulation, membership in a recognized national professional society, Defendant's literature states, in part:

Closely-held, [**3] for-profit enterprises such as the Associated Bodyworkers and Massage Professionals of Colorado would be excluded from the professional membership qualification. Unfortunately, a private organization provides a loophole model too easily adapted to the service of organized crime.

(Compl. Ex. A.)

Plaintiff's complaint contains four counts: Count I alleges a state law libel claim based on the above quotation; Count II alleges violation of the Sherman Antitrust Act, [15 U.S.C. § 1 \(1964\)](#); Count III alleges violation of the

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Uniform Deceptive Trade Practices Act, 815 ILCS 510 (1966); and Count IV alleges violation of the Organized Crime Control Act, Racketeer Influenced and Corrupt Organizations ("RICO"), [HN1](#) [↑] [18 U.S.C. § 1961](#).

On a motion to dismiss, all well-pleaded factual allegations are presumed to be true. [Land v. Chicago Truck Drivers](#), [25 F.3d 509, 511 \(7th Cir. 1994\)](#). The court must view those allegations in the light most favorable to the plaintiff, [Gould v. Artisoft, Inc.](#) [1 F.3d 544, 546 \(7th Cir. 1993\)](#), and accept all reasonable inferences to be drawn from those allegations as true, [Meriwether v. Faulkner](#), [821 F.2d 408, 410 \(7th Cir.\)](#), cert. denied, [484 U.S. \[**4\] 935, 98 L. Ed. 2d 269, 108 S. Ct. 311 \(1987\)](#). However, the court is not constrained by the plaintiff's legal characterizations of its allegations. [Republic Steel Corp. v. Pa. Eng'g Corp.](#), [785 F.2d 174, 183 \(7th Cir. 1986\)](#).

Additionally, [HN2](#) [↑] the court must construe the pleadings liberally, and mere vagueness or lack of detail alone will not constitute sufficient grounds to dismiss a complaint. [Strauss v. City of Chicago](#), [760 F.2d 765, 767 \(7th Cir. 1985\)](#). The complaint need not specify the correct legal theory nor point to the right statute to survive a [Rule 12\(b\)](#) motion to dismiss. [Tolle v. Carroll Touch, Inc.](#), [977 F.2d 1129, 1134-35 \(7th Cir. 1992\)](#). Rather, the complaint must state, either directly or inferentially, allegations establishing the necessary elements for recovery under the chosen legal theory. [Glatt v. Chicago Park Dist.](#), [847 F. Supp. 101, 103 \(N.D. Ill. 1994\)](#).

II. Antitrust Count

In Count II of the complaint, Plaintiff contends that Defendant's efforts to influence the legislatures, in conjunction with the functioning of the NCBTMB and COMTTA, restrain trade in violation of the Sherman Antitrust Act, [15 U.S.C. § 1 \(Supp. 1989\)](#). According to Plaintiff, [**5] Defendant AMTA, NCBTMB and COMTTA have intentionally conspired to monopolize the industry of massage therapy, thus directly restraining trade and interstate commerce in violation of the Act. Plaintiff states that they have done so state-by-state, by lobbying for and creating "certification requirements" which expressly favor Defendant and its affiliates, and by structuring these requirements to effectually exclude non-AMTA-members from the industry. This has caused Plaintiff to suffer damage to its business reputation, loss of prospective financial income, and severe hardship in the operation of its business.

Defendant anchors its motion to dismiss the antitrust portion of Plaintiff's complaint on the argument that Defendant's actions enjoy protection from prosecution under the [First Amendment](#). Indeed, the type of activity Plaintiff complains of has long been recognized as immune by the [First Amendment](#) right to petition the government. [Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.](#), [365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#); [United Mine Workers v. Pennington](#), [381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#). Defendant argues that the law on [**6] this issue in this circuit is "gin clear." (Def.'s Mem. Dismiss at 7 (citing [Lawline v. American Bar Ass'n](#), [956 F.2d 1378 \(7th Cir. 1992\)](#), cert. denied, [126 L. Ed. 2d 452, 114 S. Ct. 551 \(1993\)\).\)](#)

[Lawline](#) holds that, [HN3](#) [↑] when private organizations encourage legislative action eventually resulting in anticompetitive restraints on potential competitors, those organizations "enjoy absolute immunity for the anticompetitive restraint." [Lawline](#), [956 F.2d at 1383](#) (citing [Allied Tube & Conduit Corp. v. Indian Head, Inc.](#), [486 U.S. 492, 499, 108 S. Ct. 1931, 1936, 100 L. Ed. 2d 497 \(1988\)](#)). This rule acknowledges that a contrary holding could chill the exercise of the constitutionally [**1120] protected right to petition the government, thereby denying the government useful input from parties fearful of antitrust liability. See Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) 14 (Supp. 1992).

Furthermore, [HN4](#) [↑] where, as here, the alleged injury stems from a competitor's success in influencing legislation, that injury is caused by the state legislatures' political decisions, not by the competitor itself. Although Defendant may have encouraged the legislatures' actions, the choice [**7] to enact massage therapy regulations constituted an independent governmental choice, comprising a supervening "cause," and breaking the link between Defendant's actions and any injury Plaintiff may have suffered. *Id.* at 14.

[HN5](#) [↑] The [First Amendment's](#) protection of political efforts to encourage legislation extends even where a party possesses an anticompetitive motive in petitioning for legislation. The selfishness of a party's political motives is irrelevant. [City of Columbia & Columbia Outdoor Advertising v. Omni Outdoor Advertising](#), [499 U.S. 365, 111 S. Ct.](#)

1344, 1354, 113 L. Ed. 2d 382 (1991). Concerted efforts to influence legislatures are shielded from the reaches of the Sherman Act, regardless of anticompetitive intent or purpose. Id. at 1354 (citing United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)). Accordingly, Defendant's successful efforts to encourage legislation are protected by the First Amendment, even if those efforts were motivated by anticompetitive animus.

In its response to Defendant's motion, Plaintiff argues, in an apparent attempt to assert the "sham" exception to Defendant's First Amendment protection, that [**8] Defendant should lose the protection because Defendant attempted to deny Plaintiff access to the regulatory process. However, Plaintiff's complaint contains assertions of no more than Defendant's successful attempts to encourage legislation.

Even if Defendant did attempt to deny Plaintiff access to the legislative petitioning system, HN6[[↑]] the narrow "sham" exception would apply to Defendant's attempts only if Defendant had no reasonable expectation of obtaining the favorable legislation. See City of Columbia, 111 S. Ct. at 1354. Since, as Plaintiff emphasized in its complaint, many states actually adopted legislation like that encouraged by Defendant, Defendant cannot be said to have lacked any reasonable expectation that the legislatures would follow Defendant's recommendations.

Plaintiff further argues in its response that the "sham" exception should apply because Defendant used improper means (i.e., libel) when recommending the legislation which resulted in restrained competition. However, HN7[[↑]] restraints which are generally not within the reach of the Sherman Act are not brought within its sweep by mere allegations that the restraints were accomplished by improper means under state [**9] law. Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 at 508, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988).

The narrow scope of the "sham" exception stems from recognition that antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." Noerr, 81 S. Ct. at 531. Because they took place wholly within the political arena, Defendant's legislative efforts do not fall within the "sham" exception and, therefore, enjoy First Amendment protection.

Furthermore, HN8[[↑]] actionable antitrust conspiracies must involve separate and unrelated entities, not closely held affiliates. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). Plaintiff contends that whether NCBTMB is indeed separate and unrelated is a question of fact which necessitates the denial of Defendant's motion. However, in its complaint, Plaintiff states "NCBTMB is an administrative affiliate of Defendant, its parent organization," and continues on to detail the close ties between NCBTMB and Defendant. (Compl. at 4.) Similarly, Plaintiff details the close ties between Defendant and COMTTA. Taking, as we [**10] must, all allegations in Plaintiff's complaint as true, Plaintiff has not alleged an actionable antitrust conspiracy and Count II of the complaint is dismissed.

III. RICO Count

Count IV of Plaintiff's complaint alleges that Defendant AMTA, in conjunction [*1121] with NCBTMB and COMTTA, conspired to conduct an enterprise through a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1961. Plaintiff predicates its RICO claim on an assertion that Defendant transmitted fraudulent information through the United States mail. Plaintiff states that this mail fraud occurred when Defendant mailed its allegedly libelous literature to various state legislatures on two separate occasions, directing the legislatures to enact massage therapy regulations.

As discussed above in the antitrust context, the court recognizes that Defendant's communications with the legislatures are entitled to First Amendment protections, despite allegations that those communications contained libelous statements. Vital to our political system is the free trade of information between legislators and the public. In this marketplace of ideas, HN9[[↑]] free trade means "free trade in the opportunity to persuade action, [**11] not merely to describe facts." N.A.A.C.P. et al. v. Claiborne Hardware Co. et al., 458 U.S. 886, 102 S. Ct. 3409, 3425, 73 L. Ed. 2d 1215 (1982) (quoting Thomas v. Collins, 323 U.S. 516, 537, 65 S. Ct. 315, 325, 89 L. Ed. 430 (1945)). In the context of the instant case, RICO should not be employed so as to raise the price of trade in the free speech marketplace. HN10[[↑]] Allegations of nonviolent state law transgressions will not inject RICO implications into

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protected speech. See [*National Org. for Women, Inc. v. Scheidler, 897 F. Supp. 1047, 1995 U.S. Dist. LEXIS 10615, 1995 WL 469717*](#) at *33 (N.D. Ill. 1995).

In addition, [**HN11**](#)[] business rivals may not use the RICO statute to support a cause of action for injuries indirectly caused by mail fraud which was perpetrated against third parties. See [*Israel Travel Advisory Serv. v. Isr. Identity Tours, Inc. 61 F.3d 1250, 1995 U.S. App. LEXIS 18607, 1995 WL 425224*](#), at *7 (7th Cir. 1995) (citing [*Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405-06 \(9th Cir. 1991\)*](#)). Plaintiff seems to complain of a fraud perpetrated against the state legislatures but which caused injury to Plaintiff. Plaintiff was not the direct victim of the alleged fraud: the injury complained [[****12**](#)] of stems directly from political decisions to legislate, not from the Defendant's conduct.

In drafting RICO, Congress did not intend to create a statutory sieve through which business rivals can filter the content of their competitors' communications with legislative bodies. Nor was it their intent to create protection for themselves from the content of unwanted, unsolicited, even if offensive, communications from private or commercial interests. A representative republic requires the unimpeded flow of information and ideas from its citizens. Although Plaintiff may have a common law remedy against Defendant, the alleged indirect injury does not give rise to a RICO remedy.

Therefore, because Plaintiff has failed to allege the predicate mail fraud and because of [*First Amendment*](#) considerations, Plaintiff's RICO Count is dismissed.

IV. Conclusion

Accordingly, Defendant's motion to dismiss is granted with prejudice as to Counts II and IV. The court declines to exercise supplemental jurisdiction over Counts I and III.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGL, SR., Judge

United States District Court

DATED: 9/1/95

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Nichols Motorcycle Supply v. Dunlop Tire Corp.

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

September 5, 1995, Decided ; September 6, 1995, DOCKETED

No. 93 C 5578

Reporter

913 F. Supp. 1088 *; 1995 U.S. Dist. LEXIS 13278 **

NICHOLS MOTORCYCLE SUPPLY INC., an Illinois corporation, Plaintiff, v. DUNLOP TIRE CORPORATION, a Delaware corporation, ED TUCKER DISTRIBUTOR, INC. d/b/a TUCKER-ROCKY DISTRIBUTING, a Texas corporation, and LEMANS CORPORATION, a Wisconsin corporation, Defendants.

Core Terms

Nichols, distributors, termination, prices, tires, discounts, competitor, dealer, Motorcycle, sales, warehouse, conspiracy, manufacturer, vertical, memo, summary judgment, market share, conversation, antitrust, customers, Reply, increased price, price-fixing, damages, parties, rule of reason, percent, horizontal, consumers, products

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

HN1 [PDF] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Antitrust Act states: "Every contract, combination or conspiracy, in restraint of trade or commerce among the several States is declared to be illegal." [15 U.S.C.S. § 1 \(1995\)](#).

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > Sherman Act > General Overview

[**HN2**](#) [down] **Sherman Act, Claims**

According to the Sherman Antitrust Act, a plaintiff claiming a [section 1](#) violation must establish a combination or some form of concerted action between at least two legally distinct economic entities. [15 U.S.C.S. § 1](#). Under well-established principles of [antitrust law](#), unilateral conduct by a single person or enterprise falls outside the scope of this provision. Whether an unlawful conspiracy or combination exists should be judged by what the parties actually did rather than by the words they used. Once a plaintiff establishes the existence of an illegal contract, combination or conspiracy, it must then proceed to demonstrate that the agreement constituted an unreasonable (and therefore illegal) restraint of trade under either the per se rule or the rule of reason. The nature of the restraint (e.g., vertical price restraint, vertical nonprice restraint, horizontal price restraint etc.) determines which rule must be applied.

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

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

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

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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

[**HN3**](#) [down] **Horizontal Refusals to Deal, Boycotts**

Conduct a considered illegal per se is limited to cases where a defendant's actions are so plainly harmful to competition, that they are presumed illegal and the need for further proof of anticompetitive impact is unnecessary. Per se cases include horizontal and vertical price fixing agreements and certain types of group boycotts.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

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

[**HN4**](#) [down] **Sherman Act, Claims**

[Section 1](#) of the Sherman Act requires that there be a contract, combination or conspiracy between the manufacturer and other distributors in order to establish a violation. [15 U.S.C.S. § 1](#). Independent action is not

proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN5 Price Fixing & Restraints of Trade, Vertical Restraints

Interdependent behavior without evidence of parallelism, however, does not reflect an unlawful agreement under section 1 of the Sherman Act. 15 U.S.C.S. § 1.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN6 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In a rule of reason case, the inference of an illegal agreement may be sustained merely by producing evidence that "casts doubt" on inferences of independent action. However, although the agreement may not be as difficult to prove under the rule of reason, additional elements must be met. For instance, a plaintiff must show that the defendants had market power to fix prices and that the price fixing scheme had an anticompetitive impact on the market as a whole.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason test, a plaintiff bears the initial burden of showing that the challenged agreement has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice.

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

HN8 Price Fixing & Restraints of Trade, Vertical Restraints

The Seventh Circuit has held that a district court must proceed to the first step in the rule of reason analysis, which is to balance the effects the vertical restraint has on intrabrand and interbrand competition, only if the evidence gives rise to the inference that defendants had sufficient market power to control dealer resale prices. Ultimately, the factfinder must weigh the harms and benefits of the challenged behavior.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

[**HN9**](#) [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The 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 the facts and to predict consequences.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

[**HN10**](#) [] Remedies, Damages

"Like any damages remedy, the purpose of the Clayton Act is to place the antitrust plaintiff as far as possible in the position it would have occupied but for the violation. Thus, any calculation of section 4 damages must strive to approximate a violation-free state of affairs.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

[**HN11**](#) [] Price Discrimination, Buyer Liability

Section 2(f) of the Robinson-Patman Act, which makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited" by the Act. [15 U.S.C.S. § 13\(f\)](#).

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

HN12[] **Defenses, Cost Justification Defense**

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), makes it illegal to discriminate in price between buyers when the consequence is an injury to competition. To establish a *prima facie* violation of § 2(a), a plaintiff must establish the existence of (1) price discrimination, and (2) injury to competition. A *prima facie* violation, however, may be rebutted by one of the Robinson-Patman Act's two affirmative defenses: (1) "cost justification" or (2) "meeting a competitive price". If established, an affirmative defense eliminates the need to decide the issue of injury to competition, because a properly established defense renders such injury justifiable.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Contracts Law > Personal Property > Bona Fide Purchasers

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN13[] **Price Discrimination, Competitive Injuries**

Section 2(b) of the Robinson-Patman Act, states: that nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. [15 U.S.C.S. § 13\(b\) \(1975\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN14[] **Robinson-Patman Act, Claims**

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Price discrimination under the Robinson-Patman Act is merely a price difference" between the price for which a defendant sells to one buyer versus the price to which it sells to another.

[Antitrust & Trade Law > Robinson-Patman Act > Defenses](#)

[Antitrust & Trade Law > Clayton Act > Defenses](#)

[Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview](#)

[Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense](#)

[Antitrust & Trade Law > Robinson-Patman Act > Claims](#)

HN15 [] **Robinson-Patman Act, Defenses**

A defense to an allegation of price discrimination under § 2(b) of the Robinson-Patman Act, [15 U.S.C.S. § 13\(b\)](#), has two elements; both must be factually supported to send the defense to a jury. The two elements of a § 2(b) defense are as follows. First, the seller, who has knowingly discriminated in price, must show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. Second, the seller must demonstrate that its price was a good-faith response to a competitor's lower price.

[Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview](#)

HN16 [] **Price Discrimination, Defenses**

The Supreme Court has identified four factors that may be relevant to the determination of the seller's good faith. These include whether the seller (1) had received reports from other customers of similar discounts; (2) was threatened with a termination of purchases if the discount were not met; (3) made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data; and (4) had past experience with the buyer.

[Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act](#)

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[Criminal Law & Procedure > ... > Fraud > False Pretenses > General Overview](#)

[Criminal Law & Procedure > ... > Fraud > False Pretenses > Elements](#)

HN17 [] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

Section 2 of the Consumer Fraud Act provides: Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise,

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misrepresentation or the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act,' approved August 5, 1965, in the conduct of any trade or commerce hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act. [815 Ill. Comp. Stat. 505/2.](#)

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[**HN18**](#) [+] **Regulated Practices, Trade Practices & Unfair Competition**

The Illinois Consumer Fraud Act, although intended to protect Illinois consumers, does not contain a geographic limitation.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[**HN19**](#) [+] **Regulated Practices, Trade Practices & Unfair Competition**

To establish a claim under the Illinois Consumer Fraud Act, a plaintiff must allege and prove the following elements: (1) the misrepresentation or concealment of a material fact; (2) an intent by the defendant that the plaintiff rely on the misrepresentation or concealment; and (3) that the deception occurred in the course of conduct of any trade or commerce. [815 Ill. Comp. Stat. 505/1 et seq.](#)

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

[**HN20**](#) [+] **Consideration, Promissory Estoppel**

In Illinois, the elements necessary to establish a claim of promissory estoppel are: (1) an unambiguous promise; (2) on which the promisee reasonably and justifiably relied; (3) which was foreseeable by the promisor; and (4) on which the promisee relied to his detriment.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

[**HN21**](#) [+] **Consideration, Promissory Estoppel**

The elements necessary to assert a claim for equitable estoppel are: (1) words or conduct consisting of misrepresentations or concealment of material facts; (2) defendant must have actual or implied knowledge at the time the representations are made that they are untrue; (3) plaintiff does not know that the representations are untrue at the time that they are made; (4) the party estopped must intend or expect that his conduct or representations will be acted on by the plaintiff; (5) plaintiff relies on the representations in such a manner that he would be prejudiced if the party making the representations is allowed to deny the truth thereof.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

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[**HN22**](#) [blue document icon] **Business Torts, Fraud & Misrepresentation**

The elements of a cause of action for common law fraudulent misrepresentation are: (1) false statement of material fact; (2) known or believed to be false by the party stating it; (3) intent to induce the other party to act; (4) justifiable reliance by the other party on the misrepresentation; and (5) damage to the other party resulting from such reliance.

Contracts Law > Breach > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

[**HN23**](#) [blue document icon] **Contracts Law, Breach**

The elements that a plaintiff must allege and prove for a valid claim of tortious interference with contract include: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) that the defendant was aware of the contractual relationship; (3) an intentional and unjustified inducement of a breach of the contract which causes a subsequent breach by the third party; and (4) damages.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

[**HN24**](#) [blue document icon] **Intentional Interference, Elements**

The elements of a claim for tortious interference with prospective economic advantage are: (1) the plaintiff's reasonable expectation of entering into a valid business relationship; (2) the defendant's purposeful interference and destruction of this legitimate expectancy; and (3) that the defendant's actions caused harm to the plaintiff.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Criminal Law & Procedure > ... > Waiver of Jury Trial > Requirements for Waiver > Knowing & Voluntary Waivers

Criminal Law & Procedure > ... > Waiver of Jury Trial > Requirements for Waiver > General Overview

Criminal Law & Procedure > Juries & Jurors > Waiver of Jury Trial > Right of Waiver

[**HN25**](#) [blue document icon] **Jury Trials, Right to Jury Trial**

Although the [*U.S. Const. amend. VII of the United States Constitution*](#) guarantees the right to a jury trial in civil cases, this right may be waived. However, such a waiver must be made knowingly and voluntarily. Indeed, as the right of jury trial is fundamental, courts indulge in every reasonable presumption against waiver. The factors to consider in determining whether a contractual waiver of the right to jury trial was entered into knowingly and voluntarily include: (1) the parties' negotiations concerning the waiver provision, if any, (2) the conspicuousness of

the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity to review the agreement.

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Judges: Ruben Castillo, United States District Judge

Opinion by: Ruben Castillo

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(j) April 30, 1993: Logue Conversation with Motorcycle Stuff Regarding Tucker/Rocky's Low Prices

(k) May [**2] 6, 1993: Buckley Visits Nichols, Meets Jack Jesse, and Writes Call Reports (PX 14)

(l) May 6, 1993: Buckley Spends Evening with Jeff Fox of Parts Unlimited

(m) May 7, 1993: Buckley Visits Tucker/Rocky Warehouse in Chicago

(n) Early May 1993: "Firm Commitments" (PX 17)

(o) Late May 1993: Tucker/Rocky Issues Revised Price List (PX 214; PX 645)

(p) May 20, 1993: Buckley's "Price War" Memo (PX 3)

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(a) June 1993: Tucker/Rocky Branch Manager's Report (PX 277)

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(d) September 1993: Trade Show Memo (PX 206)

(e) Metzeler Memo of October 5, 1993 on "Price Stability" (PX 303)

(f) Tucker/Rocky Memo Regarding "Market Stabilizing Programs" (PX 280)

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(a) James Stewart

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(i) Market Theory

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(b) Parts Unlimited's 1993 Price Increases

(c) Tucker/Rocky and Parts Unlimited's 1994 Price Increases

(b) The Gregg letters are ambiguous evidence and therefore do not support an inference of price-fixing or a termination agreement

(i) The March 22, 1993 Gregg Letter

(ii) The April 8, 1993 Gregg Letter

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[*1096] MEMORANDUM OPINION AND ORDER

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¹ On August 1, 1995, following oral argument, the Court, in a minute order, granted summary judgment in favor of all defendants as to Counts I-VI (1-6) of the Third Amended Complaint. The Court also granted Defendant Dunlop's Motion for Summary Judgment with respect to Counts IX through XIV (9-14) and Tucker/Rocky's and Parts Unlimited's Motion for Summary Judgment with respect to Counts VII, XVI, and XVII (7, 16, and 17) of the Plaintiff's Third Amended Complaint. The Court denied Defendant Dunlop's Motion for Summary Judgment with respect to Counts VII, VIII and XV (7, 8, and 15) of the Plaintiff's Third Amended Complaint. The Court further granted Plaintiff's Motion for Partial Summary Judgment on Defendant Dunlop's Section 2(b) affirmative defense to Count VII of Plaintiff's Third Amended Complainant, and denied Dunlop's Motion to Strike Plaintiff's jury demand. The minute order was intended to give the remaining parties sufficient time to prepare for trial. This Opinion is intended to provide reasons for those judgments. The entry of final judgment will be ordered on the date this Opinion is issued.

[**5] On June 15, 1993, after a thirty-year business relationship, Dunlop Tire Corporation ("Dunlop"), the largest manufacturer of motorcycle tires in the United States, terminated Nichols Motorcycle Supply Inc. ("Nichols"), its oldest distributor. The termination letter -- commonly referred to in the vernacular as a "Dear John" letter -- merely stated:

[*1097] Dear Jack:

Please see enclosed copy of your "Dunlop Distributor Motorcycle Tire/Tube Agreement" signed by you on January 11, 1993.

In reference to item nine of above-mentioned agreement, Dunlop Tire Corporation exercises its option to terminate this agreement effective five days from receipt of this letter.

Regards,

DUNLOP TIRE CORPORATION

Mike Buckley

National Sales Manager

Motorcycle Tire Division

Not surprisingly, as a direct result of this letter, Nichols commenced a multi-faceted litigation campaign against Dunlop and other parties. Thus, currently pending before this Court is an antitrust action brought by Nichols against Dunlop and Dunlop's two largest distributors, Tucker/Rocky Distributing ("Tucker/Rocky") and LeMans Corporation, through its Parts Unlimited division ("Parts [*6] Unlimited"), Nichols' former competitors.² The Third Amended Complaint contains seventeen counts.³ The federal antitrust conspiracy claims, brought under the Sherman Antitrust Act, [15 U.S.C. § 1 \(1995\)](#), and the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C. § 13\(a\) \(1995\)](#),⁴ are asserted in Counts I-III and VII. The Illinois Antitrust Act claims are asserted in Counts IV-VI and the supplemental state law claims are asserted in Counts VIII-XVII. The Court has federal subject matter, supplemental and diversity jurisdiction. The fate of the state law claims depends largely upon the decisions this Court makes regarding the Sherman and Robinson-Patman Act claims. We will begin there.

[**7] I. The Facts

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[**8] The relevant market for antitrust purposes in this case is defined as the manufacture, sale, distribution and resale of replacement and premium motorcycle tires in the United States. 12(N)(3)(b) Reply P 5. The relevant manufacturers and distributors, for purposes of this case, are as follows.

²This lawsuit was originally assigned to Judge Conlon and transferred to this Court, by order of the Executive Committee, on May 13, 1995.

³Count XVIII, alleging a civil conspiracy, was dismissed with prejudice by this Court on December 9, 1994.

⁴The Robinson-Patman Act, [15 U.S.C. § 13 et seq.](#), is commonly referred to by its internal numbering as § 2 of the Clayton Act, and will be referred to as § 2 in this opinion.

⁵The following facts are derived from the parties' Statements of Material (undisputed) Facts filed pursuant to Local Rules 12(M)-(N)(3)(b) of the United States District Court for the Northern District of Illinois. Some facts in this case will be more easily understood in context of the asserted claims and will be discussed in those portions of the Opinion. References to the undisputed facts, identified in the parties' Rule 12(M) statements and admitted by the non-moving party in the Rule 12(N) statement, will be designated "12(M) P --." Factual disputes, when relevant, will be designated "12(N) P --." Where additional facts supporting the denial of the summary judgment motion, as identified in the Rule 12(N)(3)(b) Statement, have been admitted by the moving party, those facts will be designated "12(N)(3)(b) P --." Where certain facts are admitted and others denied, the admitted facts of the Rule 12(N)(3)(b) Statement of Additional Facts, will be designated " 2(N)(3)(b) Reply P --." The undisputed facts summarized in this opinion are those facts that appear to be "without substantial controversy" pursuant to [Fed. R. Civ. P. 45\(d\)](#). These facts should not be relitigated during trial.

A. Nichols

Nichols is an Illinois corporation with its principal place of business in Alsip, Illinois. Nichols has been in the business of distributing motorcycle parts, accessories, supplies, and clothing since around 1960. 12(M) P 1. Jack Jesse has been Nichols' president since [*1098] the spring of 1993. 12(M) App. A. Terry Baisley has been Nichols' national sales manager since October 1989. *Id.* Ken Anderson is the marketing manager. *Id.* Nichols currently operates two warehouse distribution centers. Nichols' principal distribution center, which it has operated since approximately 1970, is in Alsip, Illinois (a Chicago suburb). In September 1992, Nichols acquired a second warehouse distribution center in Phoenix, Arizona. 12(M) P 33. These warehouses currently remain open. *Id.* See also 12(N)(3)(b) Reply P 67.

Nichols formerly distributed Dunlop tires and was Dunlop's [**9] oldest distributor, acting in this capacity for over 30 years before being terminated on June 15, 1993. 12(M) PP 146, 400. At the time Nichols was terminated, Dunlop tires constituted approximately 20 percent of Nichols' total sales. PX 608 at 29. Nichols has never distributed Metzeler products. 12(N)(3)(b) Reply P 54. Nichols, however, does sell about 150 lines of motorcycle-related merchandise to both motorcycle retailers and approximately 15-20 different distributors. Nichols also currently sells the following tire brands: Bridgestone, Cheng Shin, Continental, Kenda, and Kings. 12(M) P 2. In the past Nichols has also sold Dunlop, Avon, Michelin, Pirelli, and Yokohama. Nichols is also the owner of the Pro Sport line of motorcycle products and the exclusive agent for Kings motorcycle tires in continental North America. Nichols sells Pro Sport products and Kings tires through a network of distributors and publishes an annual catalog of suggested resale prices. 12(M) PP 12, 48.

Nichols' market share for Dunlop tires between 1990-1994, as indicated by the percentage of tires Dunlop sold to Nichols, was as follows:

*6*Table 6. Dunlop
Motorcycle Tire Sales to

*6*Select Distributors,
1990-94

6(Percent)

	1990	1991	1992	1993	1994
Nichols	13.2	5.4	9.3	1.9	0.00

[**10] 12(N)(3)(b) P 12.⁶

B. Dunlop

Dunlop is a Delaware corporation with its principal place of business in West Amherst, New York. 12(M) P 4. Dunlop manufactures motorcycle tires and sells them to wholesale distributors, who resell them to retail dealers and subdistributors. Retail dealers in turn sell Dunlop tires primarily to the consuming public. *Id.* Robin Mitchell is Dunlop's senior vice president of marketing and sales. 12(M) App. A. Patrick Logue was Dunlop's national sales manager from approximately 1987 through March 1993. *Id.* Michael J. Buckley succeeded Mr. Logue as the national sales manager in [**11] March 1993. *Id.*

Dunlop is the largest selling motorcycle tire manufacturer in the United States. Its current market share in the relevant markets is approximately 62-70 percent. 12(M) P 6. Dunlop's success can be partially attributed to the fact that Dunlop has very high consumer name recognition, which predisposes many consumers to purchase Dunlop

⁶ Defendants have admitted, solely for summary judgment purposes, the assertions of Nichols' expert regarding percentage of sales of various motorcycle tire brands in certain markets because they believe that these assertions are immaterial to the Court's inquiry into whether the parties agreed to fix prices. The relevant expert data is contained in Plaintiff's Exhibit ("PX") 608 at 19.

replacement motorcycle tires. 12(N)(3)(b) Reply P 7. Dunlop tires are also used by distributors as a lead product to generate sales of other non-Dunlop products to dealers. 12(N)(3)(b) Reply P 8.

At the time Nichols was terminated as a Dunlop distributor in June 1993, Dunlop sold tires to 18 distributors: American Honda, Bell Industries, Custom Chrome, Cycle Products, Cycle Sports (in Puerto Rico), Dixie, Harley-Davidson, Intrac, J & D Walter, KK Motorcycle, Marshall Distributing, Motorcycle Stuff, Parts Unlimited, Performance Tire, Pikes Peak, Tucker/Rocky, and Tri-State. Of these 18 distributors, Dunlop sold the most tires to the following four distributors between 1990-1993 (in decreasing order). Tucker/Rocky, Parts Unlimited, Motorcycle Stuff, and Nichols Supply. 12(M) P 10. Dunlop's top three distributors, measured by the percentage [**12] of tires sold to them from 1990-1994, are: Tucker/Rocky, followed closely by Parts Unlimited (within 2-5%), [*1099] and Motorcycle Stuff (7-9 % off the leader from 1990-92; 21% off the leader in 1993; 12.4% off the leader in 1994; and 12.2% off the leader for all four years). *Id.* (PX 608, App. Table D-3). Nichols followed in fourth and fifth⁷ place from 1990-1992, until its termination on June 15, 1993. *Id.*

C. Metzeler

Metzeler is a German tire manufacturer, owned by Pirelli. Metzeler Motorcycle Tire North America is its North American subsidiary. 12(M) PP 7-8. Gregory Blackwell has been the president of Metzeler N.A. since January 1992. 12(M) App. A.

Metzeler is the second largest selling motorcycle tire manufacturer in the relevant market. 12(N)(3)(b) Reply P 9. Metzeler tires [**13] generally sell at a higher price than Dunlop, and are not discounted as much because there is less intrabrand competition (*i.e.*, fewer distributors) for Metzeler tires. 12(N)(3)(b) Reply P 13. In the last several years, Metzeler has reduced its distributor base from approximately 12 distributors to five. 12(N)(3)(b) Reply P 14. Metzeler's five U.S. distributors are: KK Motorcycle, Motorace, Parts Unlimited, Pike's Peak and Tucker/Rocky. 12(M) P 10. Tucker/Rocky and Parts Unlimited sell the largest numbers of Metzeler tires; together they account for 90 percent of its sales (Tucker/Rocky buys 60% and Parts Unlimited buys 30%). 12(N)(3)(b) Reply P 14.

In 1990, Metzeler had a market share in the relevant markets of 24-30 percent. The president of Metzeler N.A., Gregory Blackwell, estimates that Metzeler's market share is currently 25-30 percent. However, Dunlop's reports indicate that Metzeler's total market share for tires fell to about 12.8-13.75 percent in 1993, although its share of the premium tire market may have been 15 percent. 12(N)(3)(b) Reply P 10 (PX 608 at 16-18).

D. Tucker/Rocky

Tucker/Rocky is a Texas corporation with its principal place of business [**14] in Irving, Texas (Dallas). 12(M) P 5. Robert Nickell is the current chairman and past president (October 1989 to October 1992). Robert Gregg succeeded Mr. Nickell as president on October 1, 1992. 12(M) App. A. Tucker/Rocky owns and operates 12 warehouses in the United States and is considered a national distributor. Tucker/Rocky is in the business of distributing parts, accessories, and apparel for motorcycles and watercraft. 12(M) P 5. Tucker/Rocky is Dunlop's largest distributor, as indicated by its market share. 12(N)(3)(b) Reply P 12. This market share is based on the percentage of tires Dunlop sold to Tucker/Rocky during the periods 1990-1994, and was as follows:

*6*Table 6. Dunlop
Motorcycle Tire Sales to

*6*Select Distributors,
1990-94

6(Percent)

Tucker/Rocky	1990	1991	1992	1993	1994
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⁷ Nichols was beaten by Bell Industries in 1991, in terms of Dunlop distributor purchases, by .9 percent. This was the only year between 1990 and 1992 that Nichols did not finish fourth. See PX 608, App. Table D-3.

***6*Table 6. Dunlop
Motorcycle Tire Sales to**

***6*Select Distributors,
1990-94**

***6*(Percent)**

Tucker/Rocky	1990	1991	1992	1993	1994
	25.2	27.5	27.2	36.4	33.3

12(N)(3)(b) P 12.

E. Parts Unlimited

LeMans Corporation is a Wisconsin corporation with its principal place of business in Janesville, Wisconsin. 12(M) P 6. Fred Fox is the current chairman and chief executive officer. Jeff Fox is Fred Fox's son, and has been the president of Parts Unlimited since approximately [**15] October 1992. 12(M) App. A. LeMans, through its Parts Unlimited division, is in the business of distributing parts and accessories for motorcycles, watercraft, and snowmobiles. 12(M) P 6. Parts Unlimited is Dunlop's second largest distributor, as indicated by its Dunlop market share. 12(N)(3)(b) Reply P 12. This market share is based on the percentage of tires Dunlop sold to Parts Unlimited during the period 1990-1994, and was as follows:

***6*Table 6. Dunlop
Motorcycle Tire Sales to**

***6*Select Distributors,
1990-94**

***6*(Percent)**

Parts Unlimited	1990	1991	1992	1993	1994
	19.0	23.6	24.7	31.5	28.0

[*1100] 12(N)(3)(b) Reply P 12. Plaintiff's expert concedes that Parts Unlimited, by itself, does not possess market power. *Id.*

F. Combined Market Share

For the years 1990-1994, Tucker/Rocky and Parts Unlimited, combined, held the following market share:

***6*Table 6. Dunlop
Motorcycle Tire Sales to**

***6*Select Distributors,
1990-94**

***6*(Percent)**

T/R & PU	1990	1991	1992	1993	1994
Subtotal	44.2	51.1	51.9	67.9	61.4

12(N)(3)(b) Reply P 12. This data establishes that Tucker/Rocky and Parts Unlimited's combined [**16] market share at the end of 1993 rose by 16 percent, dropping off in 1994, but remaining 9.5 percent higher than their combined 1992 market share. The combined market share of Dunlop and Metzeler is currently about 85 percent. 12(N)(3)(b) Reply P 11.

G. The Economic Experts

Nichols has retained an economist, Dr. John Pisarkiewicz, as an expert to perform several tasks in this litigation. 12(M) PP 21, 196. Raymond S. Sims is a Vice President at A.T. Kearney, Inc., in Chicago, Illinois. He has been retained as an expert in this case by Dunlop. 12(M) P 201. The defendants also offer Professor David T. Sheffman, who has produced a report entitled "Trends in the Motorcycle Industry 1985-1993," which indicates that the number of motorcycle dealers selling motorcycles and other related products dropped from 12,953 to 9,264 from 1985 to 1993. The number of real dollars (per million) from these sales, according to this report, also dropped from \$ 1,671 to \$ 1,247 during that time period. DX 70.

II. The Antitrust Conspiracy Claims

A. The Sherman Act § 1

In Counts I, II, and III, plaintiff broadly alleges that the defendants unreasonably restrained trade [**17] by forming an illegal conspiracy to terminate smaller discounting distributors, like Nichols, to consolidate the market and implement an agreement to raise and stabilize resale dealer prices for Dunlop tires in violation of [section 1](#) of the Sherman Antitrust Act. 12(N)(3)(b) P 12.⁸ In particular, Nichols claims that Dunlop, Tucker/Rocky and Parts Unlimited performed vertical and horizontal combinations.⁹

[**18] [HN1](#) [↑]

[Section 1](#) states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." [15 U.S.C. § 1 \(1995\)](#). [HN2](#) [↑] According to the statute, a plaintiff claiming a [section 1](#) violation must establish a combination or some form of concerted action between at least two legally distinct economic entities. See [Copperweld Corp. v. Independence Tube Corp.](#), [467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#). Under well-established principles of [antitrust law](#), unilateral conduct ("independent action") by a single person or enterprise falls outside the scope of this provision. [Monsanto Co. v. Spray Rite Serv. Corp.](#), [465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#)(citing [United States v. Colgate](#), [250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#)).¹⁰ Whether an unlawful conspiracy or combination exists should be judged by what the parties actually did rather than by the words they used. See [United States v. Parke, Davis & Co.](#), [362 U.S. 29, 44, 4 L. Ed. 2d 505, 80 S. Ct. 503 \(1960\)](#) (citing [Eastern States Retail Lumber Dealers' Ass'n v. United States](#), [234 U.S. 600, 612, 58 L. Ed. 1490, 34 S. Ct. 951 \(1914\)](#); see also [United](#) [*1101] [States v. General Motors Corp.](#), [384 U.S. 127, 142, 16 L. Ed. 2d 415, 86 S. Ct. 1321 \(1966\)](#) (holding explicit agreement is not a necessary part of a [**19] Sherman Act conspiracy where joint and collaborative effort is pervasive). Once a plaintiff establishes the existence of an illegal contract, combination or conspiracy ("an agreement"), it must then proceed to demonstrate that the agreement constituted an unreasonable (and therefore illegal) restraint of trade under either the *per se* rule or the rule of reason. The nature of the restraint (e.g., vertical price restraint, vertical nonprice restraint, horizontal price restraint etc.) determines which rule must be applied. See [Denny's Marina, Inc. v. Renfro Prods., Inc.](#), [8 F.3d 1217, 1220 \(7th Cir. 1993\)](#). The *per se* claims will be addressed first.

1. Count I: Per Se Violations

⁸ Defendants admit only that Dunlop terminated Nichols as a distributor. Defendants do not concede that the record supports Nichols' theory of concerted activity to consolidate market share and to fix prices.

⁹ Restraints imposed by agreement between competitors have traditionally been labelled horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints; thus the nature of a restraint is determined by the type of agreement that gives rise to the restraint rather than the anticompetitive economic effects of the restraint. See [Business Elecs. Corp. v. Sharp Elecs. Corp.](#), [485 U.S. 717, 730 n.4, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1980\)](#).

¹⁰ Under the *Colgate* doctrine, "independent action is not proscribed. A manufacturer of course has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Id.*

In Count I, plaintiff alleges that the defendants participated in a vertical and a horizontal conspiracy [**20] to fix prices in violation of [section 1](#) of the Sherman Act. The plaintiff's theory in Count I is that these agreements were illegal *per se*. In particular, plaintiffs theory is that Dunlop, together with its two largest distributors, Tucker/Rocky and Parts Unlimited, conspired to terminate smaller discounting distributors, like Nichols, to consolidate their market share and implement an illegal agreement to raise and stabilize resale dealer prices for Dunlop motorcycle tires. There are two agreements under this theory: an agreement to terminate Nichols (because it was a discounter) and an agreement to fix prices. Plaintiff defines these agreements as both horizontal (between the two defendant distributors) and vertical (between Dunlop, Tucker/Rocky and Parts Unlimited) and admits that the proof of these conspiracies "tends to blend together." Transcript at 26. A review of the plaintiff's proof follows a short discussion of the applicable legal principles.

a. Legal Standards

HN3 ↑ Conduct a considered illegal *per se* is limited to cases where a defendant's actions are so plainly harmful to competition, [Business Elecs. Corp. v. Sharp Elecs. Corp.](#), 485 U.S. 717, 724, 99 L. Ed. 2d 808, 108 S. Ct. 1515 [**21] (1988), that they are presumed illegal and the need for further proof of anticompetitive impact is unnecessary.¹¹ [**22] [Atlantic Richfield Co. v. USA Petroleum Co.](#), 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); [Continental T.V., Inc. v. GTE Sylvania, Inc.](#), 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). *Per se* cases include horizontal and vertical price fixing agreements and certain types of group boycotts. See [Capital Imaging v. Mohawk Valley Medical Assoc.](#), 996 F.2d 537, 542-43 (2d Cir. 1993) (listing the types of *per se* violations recognized by the Supreme Court). Price-fixing agreements need not include an "explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices." [Denny's Marina, Inc. v. Renfro Productions, Inc.](#), 8 F.3d 1217, 1221 (7th Cir. 1993) (citing cases). Rather, price-fixing agreements need only have been formed for the *purpose and effect* of fixing or stabilizing the price of a product in interstate commerce.¹² *Id.* Tacit agreements are therefore actionable if they can be shown to exist. 6 P. Areeda, [Antitrust Law](#) § 1410 at 66 (1986).

An agreement that is illegal *per se* under [section 1](#) is difficult to prove. Much like Title VII cases, the antitrust analysis proceeds in stages because it involves shifting burdens that lead to an ultimate burden of proof which is

¹¹ The *per se* presumption simply eliminates the plaintiff's burden of proving anticompetitive impact to the finder of fact through market analysis by an expert economist, as required under the rule of reason; it does not eliminate the need to find antitrust injury, nor does it relieve the plaintiff of its burden to identify and articulate the precise anticompetitive impact caused by the *per se* price-fixing violation. An antitrust injury flows from price-fixing agreements which plainly reduce competition. However, some price-fixing agreements do not "restrain trade" and are therefore reasonable. [Atlantic Richfield Co. v. USA Petroleum Co.](#), 495 U.S. 328, 339-40, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). It is important to note, however, that "the antitrust laws were enacted for 'the protection of competition, not competitors.'" *Id. at 338* (citing [Brown Shoe Co. v. United States](#), 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)). Thus, a competitor "may not complain of conspiracies that set minimum [or maximum] prices at any level." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 585, n.8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (minimum prices); [Albrecht v. Herald Co.](#), 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968) (maximum prices), unless the dangers identified by *Albrecht* are present (i.e., the smaller competitor is eliminated from competition pursuant to the price agreement and distribution is then channelled "through a few large or specifically advantaged dealers."). [Atlantic Richfield](#), 495 U.S. at 327. Therefore, finding an agreement is only the first step; the agreement is not illegal under [§ 1](#) of the Sherman Act unless the nature of the price-fixing agreement reduces competition and injures dealers or consumers. *Id.* The Court must therefore carefully scrutinize the competitive effect of the price-fixing agreement alleged to be illegal *per se*. Because the presumption of injury eliminates the need for a plaintiff to produce an economist, this theoretical hurdle is now a question of law for the court on summary judgment. This Court is extremely cognizant of this important distinction, recently recognized by the Seventh Circuit in [Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.](#), 61 F.3d 1250, Nos. 94-1451, 94-1554, 94-1815, & 94-1816, 1995 WL 425224. *5 (7th Cir. July 20, 1995) (Easterbrook, J.) ("the antitrust injury doctrine applies with full vigor to the *per se* offenses").

¹² An agreement to terminate a distributor without evidence of a related agreement on price is not sufficient to establish a *per se* violation. However, an agreement to terminate, if proven to have an anticompetitive impact, could be illegal under the rule of reason as a nonprice restraint. See [Business Electronics](#), 485 U.S. at 724, 726. Nonprice restraints are not alleged in this case.

extremely difficult for a plaintiff to satisfy.¹³ [Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1171 \(7th Cir. 1990\)](#). The Seventh Circuit has articulated a burden shifting formula: "when the defendants establish that their conduct is consistent with independent action, the plaintiffs are required to come forward with evidence tending to exclude the possibility of independent action." *Id.* If the plaintiff's evidence of a conspiracy is ambiguous, ([**23] i.e., is as consistent with the defendant's permissible independent interests, then the case may not proceed to a jury). *Id.* Conversely, the case may proceed if the plaintiff can demonstrate, through specific evidence, that the "inference of conspiracy to fix prices is reasonable in light of the competing inference of independent action." [*Id. at 1171*](#) (quoting [Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 660-61 \(7th Cir.\), cert. denied, 484 U.S. 977, 98 L. Ed. 2d 486, 108 S. Ct. 488 \(1987\)](#)).

These Seventh Circuit standards have been derived from the specific standards set out by the Supreme Court in [Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#), and [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1983\)](#). In *Matsushita*, the Supreme Court [**24] granted certiorari to articulate the standard that district courts must apply when deciding a motion for summary judgment in an antitrust conspiracy case. In *Monsanto*, the Court granted certiorari to articulate the standard of proof required to find a vertical price-fixing conspiracy in violation of [section 1](#) of the Sherman Act. These two cases establish the legal parameters for this Court's decision.

In *Monsanto*, Justice Powell, writing for the Supreme Court, found that the plaintiff presented sufficient evidence of an agreement to terminate a distributor, pursuant to a vertical price-fixing conspiracy between a manufacturer and a large distributor, to create a jury issue. In reaching this conclusion, the Court articulated the proper standard to be applied to [section 1](#) claims like the one before us. The Court also outlined several important distinctions that are worth repeating here because they address the very heart of this case:

This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. *First, there is the basic distinction between concerted and independent action -- a distinction not always clearly* [**25] *drawn by the parties and the courts.* [HN4](#) [Section 1](#) of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. [15 U.S.C. § 1](#). Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to [^{*}1103] deal, with whomever it likes, as long as it does so independently. [United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#); cf. [United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 \(1960\)](#). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination. The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. See [Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-409, 55 L. Ed. 502, 31 S. Ct. 376 \(1911\)](#). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances [**26] of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition. See [Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#).

While these distinctions in theory are reasonably clear, often they are difficult to apply in practice. In *Sylvania* we emphasized that the legality of arguably anticompetitive conduct should be primarily judged by its "market impact." But the economic effect of all the conduct described above -- unilateral and concerted vertical price-setting, agreements on price and nonprice restrictions -- is in many, but not all, cases similar or identical. [citation omitted]. And judged from a distance, the conduct of the parties in the various situations can be indistinguishable. For example, the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A

¹³ Unlike Title VII cases, however, the Plaintiff cannot prove an agreement to conspire merely by showing that the defendants' assertions of independent conduct were a pretext for price-fixing and illegal termination agreements.

manufacturer and its distributors have legitimate reasons to exchange information about price and the reception of their products in the market. [**27] Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. *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. *Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the Colgate doctrine allows*. Nevertheless, it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable [**28] danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.

[Monsanto, 465 U.S. at 760-63](#) (emphasis added). The Supreme Court then held that evidence that is sufficient to show agreement is evidence that "tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." [465 U.S. at 764](#).¹⁴

[*1104] In *Matsushita*, the Court found that the defendants lacked an economically [**29] plausible motive to conspire and thus concluded that there was no genuine issue for trial. On the issue of motive, Justice Powell, again writing for the Court, found:

the absence of plausible motive to engage in the conduct charged is highly relevant to whether a genuine issue for trial exists within the meaning of [Rule 56\(e\)](#). 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 others, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

[475 U.S. at 596](#). To summarize, *Monsanto* requires the plaintiff to produce evidence that tends to preclude independent action. *Matsushita* limits the range of justifiable inferences that can be drawn from ambiguous evidence offered to comply with *Monsanto*.

Direct evidence of a conspiracy will always meet this standard. "Ambiguous" circumstantial evidence, alone, will not be enough. Somewhere between these two extremes lies the kind of circumstantial evidence that will provide enough direction for the factfinder to conclude that [**30] the defendants' minds met, and from this meeting an agreement arose and was implemented through concerted action that achieves an unlawful objective. [Monsanto, 465 U.S. at 761 n.9](#). The demarcation between circumstantial evidence which is "ambiguous" and that which is not, however, is unclear.

Ambiguous evidence permits equally competing inferences without "tending" to point in one direction or the other. [Market Force, 906 F.2d at 1171](#). For example, circumstantial evidence of a conspiracy that is "consistent with independent action" is ambiguous. [Monsanto, 465 U.S. at 763](#). Ambiguous evidence cannot be sent to a jury because a court may not invite the factfinder to speculate that an agreement existed. See 6 P. Areeda, [Antitrust Law](#) § 1405 at 21-23, for a good discussion of the judge and jury's role in determining whether an agreement exists.

¹⁴ In a footnote, the Court explained:

The concept of a meeting of the minds or a common scheme [to fix prices] in a distributor termination case includes more than a showing that the [nonterminated] distributor conformed to the [manufacturer's] suggested resale price. It means . . . that evidence must be presented [by the plaintiff that shows] that the distributor [not only] communicated its acquiescence or agreement, [but] that this [acquiescence] was [also] sought by the manufacturer.

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To prevent such speculation, the Supreme Court has held that "the range of [permissible] inferences that may be drawn from ambiguous evidence [must be] limited," [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#); [Capital Imaging v. Mohawk Valley Medical Assoc., 996 F.2d 537, 542 \(2d Cir.\),](#) [**31 cert. denied, 126 L. Ed. 2d 337, 114 S. Ct. 388 \(1993\); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 660-61 \(7th Cir. 1987\)](#), and cannot be used, without more, to establish the existence of a [Section 1](#) agreement.

Conversely, unambiguous evidence tends to point in a single direction -- like a signpost.¹⁵ The Supreme Court has defined the absence of ambiguity as evidence which "tends to exclude the possibility" that the defendants acted independently for lawful business reasons, rather than in concert for unlawful purposes. [Monsanto, 465 U.S. at 761](#). As Professor Areeda says:

Notwithstanding many difficulties in appraising the sufficiency of circumstantial evidence, we know what we are looking for: some level of commitment to a common course of action. The fact-finder may be perplexed by the evidence, but his reasoning will not be confused if he keeps clearly in mind that he is looking for a traditional agreement.

The analytical problem is that there is a "no man's land" between the traditional agreement and tacit coordination through recognized interdependence. The line between [*1105](#) lawful interdependent behavior and unlawful commitment is not sharp. The former [**32](#) can often blend into the latter, because reciprocal assurances can be communicated by conduct rather than be words and remain "agreements" even though vague, incomplete, and riddled with qualifications and exceptions.

Id. § 1410 at 67. The crucial question is "Who was in agreement with whom and about what?" *Id.* § 1409 at 59.

[33] b. The Plaintiff's Evidence**

What follows is the evidence that the plaintiff has relied upon in an attempt to meet the requirements of *Monsanto* and *Matsushita* and to survive the defendants' Motions for Summary Judgment.¹⁶ It is summarized in a chronological fashion to give the reader a comprehensive view of the evidence plaintiff discovered to prove its case and which this Court evaluated in reaching its decisions.¹⁷

[34] (i) The Year 1991**

In August of 1991, Tucker/Rocky, the largest distributor for Dunlop tires in the United States, attempted to purchase Nichols' business, which then consisted of just one warehouse located in Alsip, Illinois, a suburb of Chicago. Tucker/Rocky threatened to open its own warehouse in Chicago if Nichols declined to sell. Nichols declined to pursue negotiations with Tucker/Rocky. 12(N)(3)(b) Reply P 17. Tucker/Rocky then made good on its threat, opening its own Chicago warehouse (its 12th location) in August 1992. In May 1992, Nichols began planning to open a Phoenix, Arizona warehouse.

¹⁵ As a practical matter, it may be difficult to draw a distinction between direct and unambiguous circumstantial evidence, since the characterization depends upon the facts of an individual case. Cf. 6 Areeda, [Antitrust Law](#) § 1410 at 64 ("Direct evidence [of an agreement includes] such [things] as documents, meetings, and participant testimony that defendants exchanged commitments or otherwise collaborated by some means other than making a marketplace decision."). In this case, the documents and testimony that will be reviewed do not manifest an agreement that is so obvious that the Court need not pause in reaching a decision under [Section 1](#). Quite the contrary, the evidence in this case never exceeds the outer limit of ambiguity.

¹⁶ References to the Exhibits submitted in this case are as follows: Defendants' Joint Exhibits are marked "DX --"; Plaintiff's Exhibits are marked "PX --." Deposition testimony is designated by the name and page number.

¹⁷ The Court has attempted to summarize the Plaintiff's most relevant evidence. The fact that every single piece of Plaintiff's evidence is not contained in this summary does not mean that the evidence was not evaluated by this Court. The Court has fully evaluated all the evidence cited by the Plaintiff in deciding the motions addressed in this Opinion and has followed the urging of [Big Apple BMW, Inc. v. BMW of No. Am., 974 F.2d 1358, 1364 \(3d Cir. 1992\)](#), to view the evidence as a whole.

In the meantime, a price war among distributors had developed regarding the sale of Dunlop tires.¹⁸ For instance, in September of 1991, Tucker/Rocky's monthly reports indicate that its Dunlop sales were dropping due to "deteriorating service level and competitive pressure." PX 252U. Reports in the following months bore the same complaints. An October 1991 report noted the existence of "severe price pressure on Dunlop." PX 251. A December 1991 report referred to "another 25% drop in Dunlop sales over the previous month Discounting by the competition has to be a [**35] big factor." PX 250U.

Despite its one-warehouse operation, the evidence indicates that Nichols successfully used discounting methods to undercut Tucker/Rocky and Parts Unlimited in areas of the country where these large distributors were strongest. There is also deposition testimony that Tucker/Rocky was "unwilling to sell" at Nichols' prices and that Jeff Fox of Parts Unlimited discussed the need to "clean up the market" with Pat Logue of Dunlop.

(ii) The Year 1992

In January 1992, Tucker/Rocky's monthly reports [**36] indicated that "if profits fell in 1991, [Dunlop] was probably to blame." PX 249U. In April 1992, Tucker/Rocky indicated that it was concerned about maintaining a "decent [profit] margin." PX 228. By November 1992, Bob Gregg found it necessary to send a memo to Tucker/Rocky's sales representatives to pass the word that "dealers should resent deals that are too low" and should "tell the opportunist distributor that the path to long term success is not short term deep discounts that actually hurt the dealer. Rather, if they want the business they must [*1106] earn it through market stabilizing programs, service and support that helps a dealer short and long term." PX 280 (emphasis in original). Gregg also noted that dealers "should not switch orders from an industry supporter like Tucker/Rocky to an opportunistic offer." *Id.*

During the summer and fall of 1992, various meetings took place between Dunlop, Nichols, Tucker/Rocky and Parts Unlimited. For instance, in July or August 1992, Pat Logue of Dunlop met with Jack Jesse, the president of Nichols. Nichols did not mention the new warehouse at that time. On August 16, 1992, Logue attended Tucker/Rocky's open house for its [**37] new Chicago warehouse. On August 17, 1992, Logue held a business meeting with Jeff Fox of Parts Unlimited. On September 14, 1992, Nichols leased the new Phoenix warehouse. Later that month, at the IMAE trade show in Las Vegas, Nevada, Jesse told Logue that Nichols planned to open a new warehouse in Phoenix. In October 1992, Logue flew to Dallas to hold business meetings with Bob Nickell, the current chairman and past-president of Tucker/Rocky, and Bob Gregg, the president of Tucker/Rocky since October 1, 1992. In November of 1992, Nickell spoke with Jeff Fox of Parts Unlimited at a Dunlop distributor meeting in Hawaii. Fox recalled discussing only non-business matters with Nickell in Hawaii.

On November 14, 1992, Lee Walsh, a Parts Unlimited representative, wrote a letter to Jeff Fox, which stated:

Nichols Motorcycle supply has recently hired 2 Road Reps for this area. One in Washington and One in Oregon. While in Oregon this week I got my hands on the discount program that they are proposing to the dealers. (copy enclosed). I also did a price compare spread sheet so we could see where we stood (copy enclosed).

The pricing is bad enough, but they are also talking up [**38] the new Phoenix warehouse and are telling the dealers that they are looking to expand their warehouse locations and that Seattle is one of the target areas!

This is probably a big line of bull -- but the dealers are sure listening.

I'm not concerned, but I thought you ought to know and should see how the pricing actually ends up.

Please show this to Jet.

Thanks,

Jeff

PX 22.

¹⁸ This price war consisted of aggressive price discounting by Dunlop distributors to dealers nationwide. Dunlop discounting was particularly fierce in southern California, which was an important market for motorcycle tires. 12(N)(3)(b) P 20 (citing PX 601 a Dunlop Memorandum identifying Arizona (Phoenix, Scottsdale, Mesa, and Chandler); California (Los Angeles and San Jose); and Illinois (Chicago) as "key" markets). Southern California was a stronghold for Parts Unlimited. PX 6.

On December 28, 1992, Pat Logue, the National Sales Manager for Dunlop, issued the following Memorandum to all of Dunlop's distributors:

To: All Dunlop Motorcycle Tire Distributors
 From: P.J. Logue
 Date: December 28, 1992
 Subject: 1993 Dunlop Distributor Motorcycle Tire/Tube Agreement

As we move into 1993, it is important that you understand Dunlop's plans for the 1993 tire replacement market is not going to grow in the predictable future. Our distributor base is still at approximately the same level as it was when the market was 35% larger than it is today.

Because of this situation, it is our intention to reduce our account base before the September IMAE by at least two to three distributors. This is a very difficult decision but [**39] it is still one that must be made. In addition, anyone involved in sub-distribution will be cancelled. Clearly if we are concerned about the size of our existing direct distributor base, it would only make sense that "unapproved" sub-distribution base must be eliminated first.

You are encouraged to read the entire Motorcycle Tire/Tube Agreement. In particular, read point number 3. The channel of distribution that Dunlop will support and approve is detailed in this section.

Please return the signed agreement by January 8, 1993. After January 8th, all shipments will cease to distributors that have not returned agreements.

Thank you for both your understanding and cooperation. Happy Holidays!

[*1107] Patrick J. Logue
 National Sales Manager
 Dunlop Motorcycle Tires

PX 1.

(iii) The Year 1993

By the beginning of 1993, the ongoing price war had driven the resale price of Dunlop tires down. Decreased retail sales and "small dealer purchases from distributors" led to deep price cutting. PX 605 (Tucker/Rocky Feb. 1993 Report). On January 14, 1993, three days after Nichols signed its 1993 distributor agreement,¹⁹ Logue flew to Dallas to [**40] have dinner with Nickell, Gregg, and Andre Lacy, the owner of Tucker/Rocky's parent company. Logue testified that the four men discussed the termination of distributors and the pricing of Dunlop tires. Nickell and Gregg do not recall any such conversation.²⁰ Logue Dep. 985-88.

[**41] Tucker/Rocky and Parts Unlimited also admit that they often complained to Dunlop about Nichols' pricing during this time frame. PX 240U (refers to "Nichols' ridiculous pricing"); PX 510 states that "our most frequent thorn is Nichols M/C in Chicago" due to deep discounting). By February 1993, Tucker/Rocky's President's Report indicated that the ongoing price war had reduced the profit margins for Tucker/Rocky to an "unacceptable" level. PX 605H.

On February 1, 1993, the two defendant distributors issued their annual published dealer price catalogs for that year. Tucker/Rocky's prices remained the same as its 1992 dealer resale prices. Parts Unlimited's prices, however, increased to reflect Dunlop's increased manufacturer's suggested dealer ("MSD") prices for 1993. The defendants

¹⁹ This agreement contained an alleged jury trial waiver which is discussed at the end of this Opinion.

²⁰ In many instances, the testimony in this case is in conflict. Plaintiff claims that this conflict creates a credibility issue for the jury. Defendants correctly point out that Plaintiff cannot establish genuine issues of material fact with credibility arguments. *Trans Aire Int'l, Inc. v. Northern Adhesive Co., Inc.*, 882 F.2d 1254, 1257 (7th Cir. 1989)(affirming entry of summary judgment and dismissing plaintiff's suggestion that deposition testimony relied on by the defendant is not credible); *Walter v. Fiorenzo*, 840 F.2d 427, 434 (7th Cir. 1988)(A motion for summary judgment cannot be defeated merely by an opposing party's incantation of lack of credibility over a movant's supporting affidavit.").

argue that this disparity in pricing demonstrates the lack of a conspiracy . Nichols claims, however, that the disparity shows only that Tucker/Rocky reneged on the agreement to raise prices.

In February 1993, a new round of conversations between the defendants ensued. Pat Logue talked to Jeff Fox about Tucker/Rocky's published prices for Dunlop tires in early February 1993 at the Cincinnati dealer show. **[**42]** According to Logue, Fox pointed out that Parts Unlimited's published prices were significantly higher than Tucker/Rocky's published prices. 12(N)(3)(b) P 31(g). Fox admits that he recalled talking to Pat Logue about price levels, but did not recall when this conversation took place. *Id.* Mike Buckley (who did not yet work for Dunlop) and Jeff Fox also spoke together at the Cincinnati show. 12(N)(3)(b) Reply P 31(j). In addition, Pat Logue's daybook contains a notation for February 15, 1993, stating "Call J. Fox." *Id. at P 31*(g)(citing PX 153). ²¹ Logue assumed that he entered the notation because he received a message to call Fox, but he could not recall the subject matter of any message or phone call. *Id.* Then, on February 16, 1993, Nickell, Tucker/Rocky's chairman, attended a sports banquet in Buffalo, New York, as Logue's guest. 12(N)(3)(b) P 31(h). On February 17, 1993, Tucker/Rocky's phone records indicate that someone at Tucker/Rocky (although the source of the call could not be identified) placed a telephone call to the Parts Unlimited main switchboard that lasted 17 minutes and 32 seconds. There is no evidence regarding the subject matter or the persons involved **[**43]** in that telephone call. 12(N)(3)(b) Reply P 31(i) . Two days later, on February 19, 1993, Logue and Fox once again discussed Tucker/Rocky prices at a trade show.

Standing alone, these conversations, despite their coincidental (and perhaps suspicious) **[*1108]** timing, are not probative of the issue before us: whether the defendants agreed to fix prices and terminate Nichols. ²² The February conversations, however, do not stand alone; they provide the context for the two events which took place on March 22, 1993: ²³ **[**45]** (1) Parts Unlimited published its revised dealer price list for 1993, in which it dropped its prices (including its "best quantity" price) significantly below the MSD price, thereby equalling or undercutting Tucker/Rocky's published February 1, 1993, prices--in most cases by mere cents, PX 444; ²⁴ and (2) the March 22, 1993, Gregg Letter to Pat Logue (PX 4), the first documented communication **[**44]** between the three defendants since the February 19, 1993, trade show meeting between Logue and Fox.

(iv) March 1993 - June 15, 1993

The following evidence is a list of events, documents and testimony that date from March 1993 through June 15, 1994.

(a) March 15, 1993: Tucker/Rocky Article Quoting Bob Gregg (PX 382)

An in-house article by Tucker/Rocky, regarding a Tucker/Rocky meeting, reports: Bob [Gregg] indicated that Tucker/Rocky will immediately undertake to require stable pricing and minimal discounting at the retail level of all house brands sold by Tucker/Rocky.

²¹ The daybook also contains notations regarding routine contact with Nichols' personnel. 12(N)(b)(3) Reply P 31(g).

²² At most, the admissions on record indicate that Jeff Fox of Parts Unlimited felt it was necessary to point out to Logue that Tucker/Rocky's published prices were lower than those published by Parts Unlimited. This evidence, taken at face value, reflects only Parts Unlimited's complaint and general expectation, which it believed Dunlop should hear about, that Tucker/Rocky should raise its prices in 1993. Logue's subsequent and contemporaneous discussions with Nickell of Tucker/Rocky, and Tucker/Rocky's mysterious phone call to Parts Unlimited, while sufficient to raise a question in the factfinder's mind, do not tend to point in the direction of an agreement to fix prices. Without evidence regarding the subject of these conversations, the suspicious timing alone does not take plaintiff's Section 1 case past Monsanto.

²³ Parts Unlimited claims that it issued the revised price list on March 19, 1993, rather than March 22, 1993. Because the portion of that memorandum (PX 444) dated March 19, 1993, is redacted, it is impossible for the Court to make this determination. However, the portion of the memo dated March 22, 1993, appears to confirm the revision just as well.

²⁴ According to Plaintiff, Parts Unlimited had never before issued revised prices prior to publication of its next annual catalog and never before had its "best quantity" prices (the subject matter of the March 22, 1993, Gregg Letter) been the same as Tucker/Rocky's prices--they were generally lower.

12(N)(3)(b) Reply P 39. Gregg apparently stated: "Tucker/Rocky will take a leadership role in bringing price stability to major house brands." *Id.*

(b) *The March 22, 1993 Gregg Letter (PX 4C)*

On or around March 22, 1993, Robert Gregg, the president of Tucker/Rocky, **[**46]** wrote a two-page letter to Patrick Logue, then the national sales manager for Dunlop, and enclosed a price analysis comparing Tucker/Rocky's and Parts Unlimited's 1992 dealer resale prices with each other and then against Dunlop's suggested dealer price. This letter is reprinted in its entirety:

March 22, 1993

Mr. Pat Logue

Dunlop Tire & Rubber Co.

P.O. Box 1109

Buffalo, NY 14240

Re: Dealer Price Analysis

Dear Pat,

Enclosed please find a detailed analysis of current Tucker/Rocky dealer prices, relative to Dunlop suggested dealer, Parts Unlimited, and Tucker/Rocky 1992. Note: Parts Unlimited and Tucker/Rocky are both published quantity prices. The following observations are of interest:

1. Tucker/Rocky 1993 prices are equal to Tucker/Rocky 1992 prices. That is, it confirms Tucker/Rocky has not passed along Dunlop's 1993 price increase.
2. Excluding ATV and Scooter, 213 tires are in the analysis. Of those the number and percentage of tires fall into the following categories:

[*1109]

TR Prices Greater Than PU	22	10%
TR Prices 0%-3.5% Lower Than PU	112	52%
TR Prices 3.5%-5.0% Lower Than PU	36	17%
TR Prices 5.0% + Lower Than PU	32	15%
TR Prices With Errors**	11	5%

*All K591R and K127

*Adjusted Approx. 3/12/93

[47]**

As you read this, 85% of Tucker/Rocky prices are higher or within 5% of Parts Unlimited. 15% (K591R and K127) are more than 5% lower than Parts Unlimited.

Conclusion: Tucker/Rocky would like to pass on the 1993 Dunlop price increase at this time.

(Page Two)

Problem: Tucker/Rocky pricing relative to Parts Unlimited is not relevant. Single warehouse distributors who dump tires at disruptively low and predatory prices, thousands of miles from their warehouse and service area continue to damage Dunlop's marketing objectives.

Solution: Dunlop is on record that Dunlop has too many distributors. We strongly urge Dunlop to take the action Dunlop has already identified as necessary to bring Dunlop distribution in line with market conditions. Please take into consideration the percentage of tires sold *outside* a distributor's service area (i.e., more than 500 miles from any warehouse) and the degree of disruptive and predatory pricing.

Tucker/Rocky will increase the amount of resources Tucker/Rocky spends to promote and service Dunlop tires to assure Dunlop increased sales and market share for Dunlop via the resulting distributor network. This [**48] extra Tucker/Rocky expenditure on behalf of Dunlop market share will increase interbrand competition.²⁵

Sincerely,

Robert R. Gregg

President

RRG:ms/enclosure

PX 4C (emphasis in original).

During the course of discovery, the plaintiff found copies of this letter and the price analysis in the files of both Dunlop and Tucker/Rocky. Plaintiff also found a copy of the *first page* of the letter in the files of Parts Unlimited. PX 4A. No one knows how (or why) this page was sent to Parts Unlimited, nor who sent it (no envelope with the names of the addressee or addressor was found). The Parts Unlimited copy has a handwritten notation on the front stating:

3/26--Fred-Donna C. rec'd this in her mail today-!? (She didn't get envelope, so we don't know who it was addressed to) Janice.

(PX [**49] 4B). "Donna C." is Donna Colclasure, the person in charge of credit inquiries at Parts Unlimited. 12(M) P 87. "Janice" is the secretary to Jeff Fox, the current president of Parts Unlimited and Fred Fox's son. "Fred" is Fred Fox, chairman and former president of Parts Unlimited. In Fred Fox's handwriting, the following is written: "Lynne Forward to Jeff." There is no evidence that Parts Unlimited received a copy of either the second page of the letter or the attached price analysis, both of which Pat Logue at Dunlop did receive. *Id.* Pat Logue also gave a copy of the letter to his successor at Dunlop, Michael Buckley. 12(M) P 83. Logue testified that he never asked for the letter, 12(M) P 79, but spoke to Gregg after receiving it and was told that Gregg wanted to show that Tucker/Rocky's prices "aren't that different than those of Parts Unlimited." Logue Dep. at 301. Gregg denied any such conversation. Gregg Dep. at 328-29. Gregg also denied ever discussing the letter with Parts Unlimited. Gregg Dep. at 356. In his deposition, however, Gregg explained his motivation for sending the letter. For instance:

Question: "Why were you comparing the prices for Logue?"

Answer: [**50] "I thought he would find it interesting."

Question: "Why?"

Answer: "Because he's in the tire business."

Gregg Dep. at 269-70; Transcript at 20.

(c) March 22, 1993: Parts Unlimited Revises Price List (PX 444)

On March 22, 1993, Parts Unlimited issued a revision of its February 1, 1993, price list to [*1110] conform its prices with those issued by Tucker/Rocky on the same date. The revision went into effect on March 23, 1993. Parts Unlimited's prices were higher than Tucker/Rocky's February 1, 1993, prices with respect to the "any" price (quantity of 1), with about 2-6 cents difference. On the "best quantity" price (large orders) the differences are negligible. The parties agree that the best quantity price is the important price because most dealer discounts are applied to that number. Fox Dep. at 677; Nickell Dep. at 222.

(d) March 31, 1993: Phone Call (PX 624)

On March 31, 1993, Bob Gregg at Tucker/Rocky made a phone call to the Parts Unlimited switchboard; the call lasted 18 minutes. 12(N)(3)(b) Reply at P 31(k). Gregg cannot remember making the call. Gregg Dep. at 455-69, 477.

²⁵ Interbrand competition means competition between different manufacturers; intrabrand competition means competition among different distributors selling the same product.

(e) *Late March 1993: Mike Buckley Replaces Pat Logue as Dunlop's [**51] National Sales Manager*

In late March 1993, Michael Buckley was hired by Dunlop to replace Logue. Before hiring Buckley, Logue talked with Robert Gregg and Robert Nickell at Tucker/Rocky and Jeff Fox at Parts Unlimited to inquire whether their contacts with Buckley had been agreeable. Buckley received a favorable recommendation.

(f) *Late March 1993: Gregg Phone Call to Buckley Regarding Termination of Distributors*

Around the time of Gregg's March 22, 1993, Letter, Gregg telephoned Mike Buckley, who had just replaced Logue as Dunlop's national sales manager. According to Buckley, Gregg wanted to know if Dunlop was going to terminate any distributors. (Buckley, 91-95). Gregg, however, denied the conversation. (Gregg, 247-49; 327).

(g) *April 1, 1993: Buckley Memo To Dunlop Distributors (PX 2)*

On April 1, 1993, Mike Buckley sent a memo to all Dunlop distributors introducing himself as Dunlop's new national sales manager. PX 2. In this memo, Buckley indicated that he would be meeting with the distributors to become acquainted. He also stated that he would continue with Logue's plan to move Dunlop's distribution "to a more limited focus" in the coming months. Buckley [**52] also specifically requested a "current price list" to update his files.

(h) *The April 8, 1993 Gregg Letter (PX 5)*

On April 8, 1993, Mike Buckley received a letter from Bob Gregg regarding "1993 Suggested Dealer Pricing." This letter is reprinted in its entirety:

April 8, 1993

Mr. Mike Buckley

National Sales Manager

Dunlop Motorcycle Tires

P.O. Box 1109

Buffalo, N.Y. 14240-1109

Re: 1993 Suggested Dealer Pricing

Dear Mike:

Enclosed please find analysis of published "each" prices in the market. In most cases, Tucker/Rocky publishes manufacturer suggested dealer (MSD) prices. As you know, our current price list is from 1992 due to stock carryover.

It has been our opinion that Dunlop MSD is unrealistically high versus actual market conditions. Column # 2 is approximately 4.5% below Dunlop 1993 MSD and seems to be a more realistic level.

Just a suggestion to discuss:

How about issuing a new 1993 MSD price list that (without changing distributor cost) lowers MSD about 4.5%. This would be an official lowering of MSD, making Dunlop dealer pricing more competitive without reducing the amount for which Dunlop [**53] sells tires to distributors.

It would also make our imminent 1993 price increase more logical as we could just publish Dunlop MSD.

Please give it some thought and call me as we need to make a decision soon as to new prices.

Best regards,

Robert R. Gregg

President

[*1111] RRG:ms

enclosure

P.S. Our Dunlop sales were up 15% and 16% in February and March. PX 5.

The letter also includes a handwritten post-script, asking Buckley to find out if Parts Unlimited's new published prices are intended to be an "April Special" or "long term repricing." There is no evidence that Parts Unlimited received a copy of this letter.

(i) April Phone Call Between Buckley & Gregg Regarding April 8, 1992 Gregg Letter

Mr. Buckley remembers, and Mr. Gregg does not, one telephone conversation in which Mr. Buckley said he would disregard the suggestions in Mr. Gregg's April 8, 1993, Letter. 12(N)(3)(b) P 31(1). Buckley recalls telling Gregg that "it didn't make sense to change a suggested dealer pricing in the middle of the year. There's no good reason to do that." Buckley Dep. at 139.

*(j) April 30, 1993: Logue Conversation with Motorcycle Stuff [**54] Regarding Tucker/Rocky's Low Prices*

Mr. Dodd of Motorcycle Stuff testified that he complained about Tucker/Rocky's low prices and asked Mr. Logue to take action. According to Mr. Dodd, Mr. Logue said that he would try to get Tucker/Rocky to increase its prices. 12(N)(3)(b) P 31(m).

(k) May 6, 1993: Buckley Visits Nichols, Meets Jack Jesse, and Writes Call Reports (PX 14)

On May 6, 1993, Mike Buckley made a personal visit to Nichols in Chicago. He met Jack Jesse and other Nichols personnel, discussed Dunlop's goals, the price war and Nichols' concerns about the market.

After this meeting, Mr. Buckley made two handwritten notes of the interview designated as "call reports." These call reports state:

May 6--Meeting in Chicago w/Kenny Anderson, Terry Baisley, Jack Jesse.

Nichols staff was adamant about the fact that it is D > responsibility to improve or control the inability of Dist. to make acceptable profit margins on D > Tires. Nichols felt that T/R, P/U, M.Stuff were actively discounting D> at close to Dist. cost to all dealers. Nichols was adamant that they are not involved w/mail order houses. They feel that the 3 previously mentioned dist. all [**55] sell mail order houses at cost. Nichols feels its D > responsibility to address this. Jack Jesse made specific mention that if we don't address the mailorder and discounting problems that very soon Nichols will have to stop selling D >. ²⁶ He also asked me what I felt sold our Tires. I replied-- Advertising, Racing, Club + PR involvement, word of mouth. He replied Bull He feels Dealers only! Sell in this system and we need to do everything possible to make them more profitable. While at this meeting we discussed Pro Sport--aline of offroad apparel and acc. exclusively imported by Nichols. While touring their warehouse I observed a container of Alpinestar Boots which they had Gray-Marketed in from Europe to sell against P/U--the exclusive importer of Alpinestar in the U.S. Aggressive Tone Throughout meeting.

[**56]

(DN00438).

Meeting--Nichols Dist.
Terry Baisley
Kenny Anderson
Jack Jesse

Topics

Gave Dist. Interview
Talked Quite a bit about Mail order Problem
Nichols doesn't sell Mail order.
" has much concern about where current trends are taking D >

²⁶There is no other evidence in the record that any other distributor, including Tucker/Rocky and Parts Unlimited, ever threatened to stop selling Dunlop if Dunlop did not respond to their price complaints or other grievances.

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" Does not agree That D > has a "loyal" cust base

[*1112] " Feels That dealers will begin switching to Profitable brands.

" is now importing their own Private label tire--"Kings"

This Tire is Mail order Prohibited.

Also heavily involved in their own Private label M/C acces.

inc.--"Pro Sport"

Nichols has 30 Road Reps 10 Phone

Nichols feels they are a National Dist.

I sent nichols 100 T.T.L. Brochures.

Nichols feels that P/U and T/R are causing All The Problem with Discounting out there.

(DN 00439). No call reports were prepared for any other distributor. (Buckley, 272-73). There was, however, a form filled out for the interview with Motorcycle Stuff. PX 15.

(l) May 6, 1993: Buckley Spends Evening with Jeff Fox of Parts Unlimited

Late in the afternoon on May 6th, Buckley visited Parts Unlimited's Janesville, [*57] Wisconsin office and went out for supper and drinks with Jeff Fox. Mr. Buckley called ahead to set up the meeting. Mr. Fox recalled having dinner with Buckley. Mr. Fox remembered that Mr. Buckley told him he was making a trip through the area visiting Dunlop distributors and mentioned his visit with Nichols that day, commenting that ". . . Jack Jesse was a real piece of work or something to that effect." Mr. Buckley also remembered telling Mr. Fox that he had visited Nichols on May 6 and also telling him that the visit was ". . . rather strange." Buckley denies discussing the termination of distributors with Mr. Fox. 12(N)(3)(b) P 31(n).

(m) May 7, 1993: Buckley Visits Tucker/Rocky Warehouse in Chicago

The next day, May 7, 1993, Mr. Buckley made a visit to Tucker/Rocky's Chicago warehouse and had lunch with the Bensenville, Illinois branch manager. There is no relevant testimony regarding their conversation. 12(N)(3)(b) Reply P 31(o).

(n) Early May 1993: "Firm Commitments" (PX 17)

In early May 1993 Buckley called Jeff Fox of Parts Unlimited and Bob Gregg of Tucker/Rocky seeking commitments from these distributors to absorb the sales volume of any unnamed distributor [*58] to be terminated. Fox and Gregg gave Buckley "firm commitments" which Buckley memorialized in a document designated PX 17. Fox admits this conversation. Gregg denies it. Although defendants collectively admit that they individually discussed the absorption of sales volume of unnamed distributors to be terminated with Buckley, they do not admit a common commitment to fix prices or terminate distributors. 12(N)(3)(b) Reply P 31(p).

(o) Late May 1993: Tucker/Rocky Issues Revised Price List (PX 214; PX 645)

In late May 1993, shortly before Nichols' termination, Tucker/Rocky published a new dealer resale price list on Dunlop tires, which significantly raised its prices above those published on February 1, 1993.

(p) May 20, 1993: Buckley's "Price War" Memo (PX 3)

On May 20, 1993, Mike Buckley sent the following memo to all Dunlop distributors entitled "Price Wars." Buckley attached a Wall Street Journal Article to the memo entitled "How to Avoid a Price War." Buckley wrote:

Enclosed please find some "food for thought" regarding the negative effects of attempting to gain market share by lowering price. I think [the article] raises some extremely valid points [*59] to the long term damage we do when we attempt these types of practices. Particularly alarming is the fact that almost never do we accomplish what we attempt (market share gain) when we do business in this way. The only thing we do is establish a "lower perceived value" for our products.

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I'm sure you'll all agree that this doesn't do anything positive for our future growth. I'm not pointing fingers here; I'm just offering some more information. We can never have enough information.

The Wall Street Journal Article goes on to suggest:

[*1113] "All too often, this kind of price war has no real winner except the customer." PX 3.

(q) *Buckley's Memos to Robin Mitchell (PX 17; PX 18)*

In May 1993, Mike Buckley wrote two memos to Robin Mitchell proposing to terminate Nichols as a distributor. The first memo, titled "Reasons For Change" states:

1. Overall market size shrinking. Less sales available for same number of distributors when market was bigger.
2. National distributor expansion provides excellent regional coverage (overnight service anywhere in U.S.)
3. Nichols only real weapon right now--discounting.
4. Nichols recently opened warehouse [**60] in Phoenix market. Recent meeting with Nichols officials revealed plans to expand further. Next market--Dallas.
5. Recent meeting also revealed Dunlop and Nichols are at odds on how to continue to grow Dunlop business. Dunlop--Advertising, racing, public relations.
Nichols--None of the above, stop mail-order.
6. Nichols focus right now on off-shore produced "house brands," pro-sport off-road apparel, kings--private label tires, etc. In this scenario, Dunlop gets used as a loss leader to leverage sales for "exclusive" products.
7. Nichols claims no mail-order solicitation--invoices prove otherwise.
8. Firm commitment from T/R and P/U to absorb volume of any cancelled distributor.
9. Cycle Products--credit situation makes the decision easy.

PX 17 (DN 02279).

The second memo is dated June 15, 1993, and the subject is "Motorcycle Distributor Reduction."

As a follow-up to our discussion of the above-mentioned topic two weeks ago, I want to update you on the current situation.

As I told you, Pat Logue and I agreed that since the motorcycle market continues to shrink, it has now become necessary to cut the number of distributors [**61] we have. This is a list of the reasons for this move:

1. Less sales available for same number of distributors has led to aggressive discounting tactics.
2. Expansion of national distributors allows us complete coverage off 11 parts of the country (overnight service).
3. Discounting has produced a low "perceived value" for premium Dunlop product.

The two distributors I am cancelling immediately are Nichols Distributing and P.J. Cycle Products.

Nichols is currently viewed as the leaders of the "sales by discounting" philosophy. By analyzing invoices from all over the country, it is clear that Nichols is using Dunlop as a "loss leader" ²⁷ to leverage sales for their own private label--high margin products. In addition, Nichols management does not agree with Dunlop's marketing ideas for future growth of the Dunlop brand.

P.J. Cycle Products has gone through recent financial [**62] problems including restructuring. A continual habit of slow pay still exists and from a credit risk standpoint, this decision is much easier than the Nichols decision.

It is my feeling that this move will send a message to our current distributor base that we are very interested in maintaining profitability for our customers, in addition to our premium image which we've worked so hard to achieve. This will create more Dunlop loyalty.

Please contact me if you have further questions.

²⁷ Buckley's testimony regarding his "loss leader" theory is found in his deposition: DX 13 at 114-121.

[*1114] PX 18 (DN 00443). In deposition testimony, Buckley explained that he terminated distributors to achieve "an increased sense of loyalty to Dunlop" among the remaining distributors. Buckley Dep. at 167.

(r) June 15, 1993: *Dunlop Terminates Nichols* (PX 16)

In a letter dated June 15, 1993, Dunlop informed Nichols that Nichols was terminated as a Dunlop distributor, effective in five days. After 30 years of service, Dunlop's explanation, given by Robin Mitchell, was that Nichols had been terminated because of its price discounting and that Tucker/Rocky had given Dunlop the invoices showing Nichols' low prices. Dunlop terminated another distributor, P.J. Cycle (Cycle Products), [*63] which also discounted Dunlop tires. P.J. Cycle was in Chapter 11 bankruptcy and delinquent in payment.

(v) ***Post-Termination Evidence***

(a) June 1993: *Tucker/Rocky Branch Manager's Report* (PX 277)

A Tucker/Rocky branch manager, Bob Crawford, wrote to Nickell and Gregg reporting that a Tucker/Rocky salesman, Jay Crist was "glad to see Nichols problem being resolved and says thanks." PX 277 at 515. In the same report, Mr. Crawford wrote that another salesman, Kevin Christensen, was "also elated over the Nichols/Dunlop deal," and "hopes Shoei (Tucker/Rocky's other largest selling line) will follow suit or put pressure on their distributors." Crawford Dep. at 516.

(b) *Joe Piazza* (PX 540)

A Tucker/Rocky regional manager (Joe Piazza) indicated that Tucker/Rocky was aware of Nichols' termination before it occurred. Piazza wrote in a July 1993 report:

There are several large accounts that I am anticipating to recapture the Dunlop business away from Nichols Distributing now that their distribution restriction has become public knowledge.

(c) *Tucker/Rocky's Missing Branch Manager Reports*

Plaintiff claims that Piazza's reports from [*64] May and June 1993 are missing and that the July statement indicates that the earlier reports would have mentioned Nichols' termination. Piazza regularly prepared reports through the fall of 1993. Other reports from Chicago, Michigan and Portland are missing, and there are no reports from Corona, California and Maryland.

(d) September 1993: *Trade Show Memo* (PX 206)

A couple months after Nichols was terminated, Buckley wrote a memo to all (remaining) Dunlop distributors which says:

For 1994, our goals in marketing, as I mentioned earlier[,] take on a new focus. We will be committed to the dealer network, developing closer relationships with dealers through seminars, dealer visits, hospitality events, dealer incentive programs, so on. We're also going to do everything in our power to use our resources to drive customers into dealerships. By doing this, in conjunction with dealer education, we hope to combat the mail order issue.

PX 206. Plaintiff argues that this evidence is proof that Buckley's reasons for terminating Nichols, as reflected in his memo to Robin Mitchell in May of 1993, were a pretext for illegal termination pursuant to a price-fixing agreement.

[**65] (e) *Metzeler Memo of October 5, 1993 on "Price Stability"* (PX 303)

The "Metzeler Memo" was written by Guido Carissimo, a Metzeler official, recalling a meeting he had with Bob Gregg, president of Tucker/Rocky, and Greg Blackwell, president of Metzeler, on September 29, 1993. This memo states in relevant part:

Bob hopes that with Mike Buckley Dunlop (as already discussed between them) will look for more price stability in 1994 (Dunlop has gained market share in 1993 but made many dealer angry).

PX 303. Defendants have raised a hearsay objection to the admission of this testimony pursuant to [Fed. R. Evid. 802](#). However, for [*1115] purposes of this ruling, the Court finds this memo admissible as a business record. [Fed. R. Evid. 803\(6\)](#).

(f) *Tucker/Rocky Memo Regarding "Market Stabilizing Programs" (PX 280)*

In November 1992, Gregg issued a memo to Tucker/Rocky sales personnel suggesting ways to deal with "super low prices" of competitors and suggesting that dealers tell Tucker/Rocky competitors that "if they want the business they must earn it through market stabilizing programs."

(g) *Dunlop Raises MSD Mid-Year*

In October 1993, Dunlop [***66] raised its MSD price even though Buckley testified that there was "no good reason" to do so in the middle of the year. Buckley Dep. at 139.

(h) *Rick Ward (DX 36)*

Rick Ward, a Parts Unlimited Sales representative, admits that in early November 1993, shortly after the Long Beach Trade Show held at the end of October 1993, he talked with Jerry Stewart, a dealer (with inadmissible testimony) about the termination of Nichols. According to Ward, Stewart complained that Nichols had been terminated because Nichols' prices were so low. Specifically, Ward and Stewart compared specific tiring pricing--"What I was able to sell it to him at versus what he could buy it at from Nichols; us always being, you know, much more expensive than what he could buy it from the Nichols organization." Ward also admits that there was a "one-year period" in which Nichols was his most aggressive competitor for Dunlop tires. DX 36, Ward at 62.

(i) *1994 Price Increases*

In January 1994, Dunlop raised its MSD prices again (by approximately 3-5%). PX 645. Similarly, on February 1, 1994, Tucker/Rocky and Parts Unlimited published annual catalogs in which both distributors raised their prices by [***67] significant margins. Parts Unlimited raised its catalog prices by 15 percent or more across the board. PX 645; PX 356. Tucker/Rocky increased its prices by approximately 10 percent. PX 209. Both distributors also incorporated the MSD price as part of their price lists. Parts Unlimited adopted Dunlop's suggested dealer price as its "best quantity" price. PX 356; PX 645. Tucker/Rocky adopted Dunlop's suggested dealer price as its "each" price (the price for less than a quantity of 25). PX 645; PX 209. The "best quantity" price is the important price, because discounts are usually applied to that price. Fox Dep. at 677; Nickell Dep. at 222. Once again, Fox became "very upset" once he saw Tucker/Rocky's published prices. Several weeks after the initial publication, Parts Unlimited published a revised version, which priced all popular brands of Dunlop at a level commensurate with the prices published by Tucker/Rocky with respect to the "best quantity" price. PX 645.

(j) *Tom Peterich*

In the fall of 1993, Tom Peterich, a dealer in Northern California, told another Parts Unlimited representative, Jim Hutzer, that there would be a price hike by LeMans (Parts Unlimited) of 15 percent [***68] in the coming year. Peterich Dep. at 10-14, 66-67, 71-72.

vi) Inadmissible Testimony

The following evidence tendered by Nichols has been determined to be inadmissible and therefore was not relied upon by the Court in reaching its decision.²⁸

(a) *James Stewart*

²⁸ Nevertheless, the Court expressly notes that even the addition of this ambiguous evidence would not have altered the conclusions it has reached herein.

This testimony is inadmissible, because the witness statement was not signed and Stewart does not admit to the statements transcribed in the statement prepared by plaintiff's counsel. See [Fed. R. Evid. 802](#). Nonetheless, Stewart allegedly testified as follows:

In approximately April of 1994, the sales representative for Parts Unlimited, Rick Ward, visited me at Cycle Country's store in Salem. He told me that Parts Unlimited had issued a new price list on Dunlop tires effective in April 1994, which changed [\[*1116\]](#) the prices on Dunlop tires from their catalog prices [\[**69\]](#) published in February 1994. He said to me that Dunlop, Tucker/Rocky and Parts Unlimited had "agreed" that Tucker/Rocky and Parts Unlimited would increase their prices on Dunlop tires in 1994, and that Parts Unlimited's catalog prices reflected that agreement, and that after Parts Unlimited had published its catalog prices for Dunlop, Tucker/Rocky didn't raise their prices like they said they would. Mr. Ward also said that Parts Unlimited then issued the new price list for Dunlop with lowered prices on Dunlop to the level of Tucker/Rocky's prices. Just he and I were present during the conversation. Mr. Ward gave me a copy of Parts Unlimited's new price list, which reflected lower prices for Dunlop tires than in the February 1994 catalog.

PX 456.

(b) *Rocky Trevino (PX 622)*

This is an affidavit by a dealer who stated that a different Parts Unlimited representative, Jon Hanson, told him in January of 1994, that "there was going to be a big increase in Dunlop tires, and that both Parts Unlimited and Tucker/Rocky would be increasing their prices on Dunlop tires by approximately 15%." Parts Unlimited strongly contests the admission of this testimony under [Fed. R. Evid. 101 801\(d\)\(2\)](#). Parts contends that this affidavit is facially ambiguous and Hanson was not involved in pricing decisions (so his remarks were not within the scope of his agency). Parts Unlimited's evidentiary arguments are well taken. This evidence will be excluded.

(c) *Terry Baisley - William Giacomelli Conversation (PX 643)*

Terry Baisley, Nichols' national sales manager, testified that in June or July 1994, he had a telephone conversation with William Giacomelli, a former branch manager at Tucker/Rocky. During the course of the conversation, Giacomelli told Baisley that Robert Gregg had told him that he (Gregg) was responsible for pressuring Dunlop to terminate Nichols as a distributor. PX 643. This testimony is also inadmissible hearsay under [Fed. R. Evid. 802](#).

c. Analysis

In this case, the "combination" of *Monsanto* and *Matsushita* is deadly. The evidence in this case is largely if not completely circumstantial, and most of it is ambiguous. The justifiable inferences that can be drawn from it, even when viewed as a whole according to plaintiff's time line and taken in the light most favorable to the plaintiff, are equally consistent with defendant's [\[**71\]](#) assertions of independent *and* interdependent conduct. See [Market Force, 906 F.2d at 1173](#) ("conscious parallelism by itself is not enough to support an antitrust conspiracy case. . . . [nor does] evidence of informal communications among several parties . . . unambiguously support an inference of conspiracy"). Although the Court has some suspicions that the defendants may have conspired to terminate Nichols in an uncoordinated effort to affect prices, the evidence presented to the Court is not sufficient to show that the defendants implemented and enforced a price-fixing agreement by terminating Nichols, given the standards set forth in *Monsanto* and *Matsushita*. Mere suspicion does not provide the basis from which a reasonable inference of agreement can be drawn, no matter how well-intentioned these suspicions may be.

The central question in this case is whether the defendants agreed to raise dealer resale prices and to terminate Nichols in violation of the Sherman Act. After careful review, the Court concludes that there is no unambiguous evidence of a horizontal agreement between Tucker/Rocky and Parts Unlimited to fix prices or to terminate Nichols.

²⁹ Plaintiff **[**72]** is therefore left with a vertical conspiracy claim involving the three defendants. The proof of a vertical conspiracy must also fail. First, there is simply no evidence that Parts Unlimited conspired with Dunlop (and **[*1117]** with Tucker/Rocky through Dunlop) to terminate Nichols. Without proof of a termination agreement, Nichols cannot sustain an antitrust price-fixing action against Parts Unlimited. Second, although the vertical conspiracy case against Dunlop and Tucker/Rocky is stronger, because there is some proof of collusion on the issue of termination and price-fixing, this evidence is also ultimately ambiguous and therefore insufficient to prove an agreement under *Monsanto* and *Matsushita*, because the limited inferences, added up, do not tend to exclude the possibility of independent action.

[73]** We begin by reviewing the evidence of a horizontal agreement, then discuss the absence of proof on the issue of termination against Parts Unlimited, and conclude by addressing the central question in this case: whether the evidence is sufficient to show a vertical agreement between Tucker/Rocky and Dunlop to fix prices and to terminate Nichols pursuant to that agreement. On all questions, we find that plaintiff's evidence has failed to prove the *per se* theories alleged under Count I.

(i) The Horizontal Agreement

Plaintiff alleges that there is a horizontal agreement between Tucker/Rocky and Parts Unlimited to raise and stabilize the dealer resale prices of Dunlop tires. During oral argument, plaintiff argued that the horizontal agreement is supported by "evidence that there were direct communications [between Tucker/Rocky and Parts Unlimited] and [indirect] communications *through Dunlop* between Tucker and Parts, . . ." Transcript at 9. There is no horizontal agreement in this case because the direct communications between Tucker/Rocky and Parts Unlimited do not provide any evidence of illegal conduct. Cf. *Denny's Marina, Inc. v. Renfro Productions, Inc.*, **[**74]** 8 F.2d 1217, 1220 (7th Cir. 1993) (holding that restraint alleged by dealer constituted *per se* horizontal price-fixing conspiracy). Similarly, the indirect communications between the two distributors *through Dunlop* do not manifest a horizontal agreement, because the presence of Dunlop reflects a vertical arrangement. See [*Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 \(1982\)](#) (noting factual difference between a horizontal and vertical conspiracy).

There are only two relevant examples of direct communication between Tucker/Rocky and Parts Unlimited in which Dunlop was not present: two telephone calls and several conversations at trade show meetings in early 1993. The telephone calls, although significant with respect to the time period in which they were made and the context in which they occurred, do not provide any evidence of a horizontal conspiracy because there is no testimony indicating who called whom or what was said during those conversations.³⁰ Even if price had been discussed, at most, these telephone calls provided a *mere opportunity* to conspire. 6 P. Areeda, *Antitrust Law* § 1417 at 97. Similarly, the trade show meetings fall **[**75]** under the category of "informal communications" which have been held to be, at best, ambiguous evidence of a conspiracy. See [*Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1172 \(7th Cir. 1990\)](#) (evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy); [*Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 662 \(7th Cir. 1987\)](#) (evidence of informal communications discussing complaints about competitors prices is not sufficient evidence to raise an inference that there was an "agreement to set, control, fix, maintain, or stabilize prices"); [*Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 805-06 \(4th Cir. 1989\)](#) (evidence that dealers agreed with a ban on discounters not sufficient to support the inference of a conspiracy). The Court therefore concludes that these conversations also merely provide opportunities for collusion rather than

²⁹ Plaintiff suggests that the Court need not find evidence of an agreement to terminate Nichols, because an agreement to terminate discounting distributors *like Nichols* is sufficient. Although we agree with this proposition, there is no significant difference in this case between the two agreements, because an agreement does not exist under either theory.

³⁰ During their depositions, both Fred Fox and Bob Gregg guessed what these conversations were about. Fox asserts that the February phone call involved a conversation between Jim and Sharon Ricci who left Parts Unlimited and were at that time talking to their prospective employer, Tucker/Rocky, in February 1993. Gregg speculates that the March phone call covered the subject of "SBS brake pads." Parts Unlimited was the exclusive distributor for these pads, and Tucker/Rocky wanted to sell them. 12(N)(3)(b) Reply at P 31(i); Transcript at 141.

unambiguous circumstantial [*1118] evidence from which the inference of an agreement or concerted action can be drawn. Consequently, Nichols has failed to prove a horizontal agreement between Parts Unlimited and Tucker/Rocky. [**76]

(ii) The Vertical Agreement

Because there is no evidence of a horizontal agreement in this case, plaintiff's Sherman Act section 1 claims are limited to vertical conduct between Dunlop and one or both of the defendant distributors. In a vertical arrangement, both distributors need not have participated in the alleged conspiracy. For purposes of *per se* liability in this case, however, the evidence must show that at least one of the defendant distributors [**77] agreed with Dunlop to terminate Nichols *and fix prices*.³¹ The evidence of a vertical agreement between Dunlop and Parts Unlimited to terminate Nichols is wholly lacking. Parts Unlimited is therefore entitled to summary judgment on Count I. Similarly, although the evidence of a vertical agreement to terminate Nichols between Dunlop and Tucker/Rocky is stronger, this evidence is also ambiguous. Finally, Nichols has no standing to assert that a price-fixing agreement caused an antitrust injury, either under the *per se* rule or the rule of reason, without a termination agreement. Under the plaintiff's theory, the antitrust injury in this case resulted when Nichols was terminated because, without Nichols' aggressive price competition, Tucker/Rocky and Parts Unlimited were able to raise prices and use their market power to force the smaller distributors to stop discounting or face termination. We will now review the evidence that is material to these determinations.

[**78] (a) *There is no evidence of parallelism supporting the inference of an agreement to terminate Nichols or to fix prices.*

"Judicial scrutiny of alleged concerted action, undertaken to determine whether it was the result of an agreement, is an intricate endeavor." *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1011 (3d Cir. 1994). The intricacy in this case involves timing: the timing of the defendants' conduct in an extremely interdependent market. If a price agreement exists in this case, it is reflected by the way the parties behaved in the market from December 28, 1992 through June 15, 1993. However, parallel behavior in an interdependent market, by itself, is not sufficient to prove the existence of an agreement to fix prices, *Reserve Supply v. Owens-Corning Fiberglas*, 971 F.2d 37, 50 (7th Cir. 1992), and the Supreme Court has "never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." *Id.* (quoting *Theatre Enter., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541, 98 L. Ed. 273, 74 S. Ct. 257 (1954)). Parallelism, however, in an interdependent market plus [**79] conspiratorial motivation and acts against self-interest may provide the basis from which to infer an agreement under *Monsanto* and *Matsushita*. 6 P. Areeda, Antitrust Law § 1434 at 213.

i) Market Theory

The traditional agreement sought by conspiracy law involves some kind of commitment to a common cause. The commitment may be weak or strong, express or implied. Because such traditional agreements are often inferred from ambiguous circumstantial evidence, the inference may be erroneously based on competitors' parallel behavior . . . in the absence of interdependence.

6 P. Areeda, Antitrust Law § 1410 at 64

Market interdependence exists when competitors "base their pricing decisions in part on anticipated reactions to them." R. Posner, Antitrust Law: An Economic Perspective 43 (1976). Interdependence exists when each competitor's "pricing decision is interdependent with that of its rivals: each knows that his choice will affect the others, who are likely to respond, and that their responses will affect the profitability of [its] initial choice." 6 P. Areeda, Antitrust Law § 1410 at 65. This process explains both price reductions [**80] and price increases. Price increases can be achieved by "oligopolistic price leadership."

³¹ Conversely, an agreement to terminate Nichols, without a price agreement, would limit Nichols to a nonprice rule of reason claim which it has not asserted.

[*1119] When one oligopolist raises his price, each of his rivals must decide whether to follow or not. Continuing the previous price would allow each of the others to increase his sales if the leader persists in charging a higher price. But each knows that the leader is likely to retract an increase that is not followed. Accordingly, each rival asks himself whether he is better off at the lower price when charged by all or at the higher price when charged by all. If the latter, as will often be the case, the leader's price increase is likely to be followed.

Id. Price leadership can result in what is known as parallel behavior by competitors, that is, conduct by one that mirrors another.

Although interdependence must be present to infer a conspiracy from parallel behavior, it cannot serve as the only basis for a section 1 claim. *Id.* § 1411. What is needed is additional proof from which the factfinder could conclude that parallel behavior "would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance **[**81]** understanding among the parties." *Id.* § 1425 at 144. Professor Areeda argues that "if the actual defendants could not or would not have acted as they did without advance communication and understanding, then their action necessarily proves a traditional conspiracy." *Id.* However, as the Professor notes, this conclusion begs the ultimate question that this Court must answer, namely, whether the defendants would not have acted without such communication and assurance. Or, to put it differently, is the parallelism in this case (if it exists) "too close" for coincidence? *Id. at 145*. Our answer to that question depends upon a close analysis of three events: Dunlop's unilateral decision to terminate distributors; Parts Unlimited's decision to raise prices in 1993; and Tucker/Rocky and Parts Unlimited's 1994 price increase.

ii) Three Examples of Non-Parallel Behavior

a) Dunlop Unilaterally Decided to Reduce Its Distribution Network

On December 28, 1993, Dunlop issued a memo to all of its distributors announcing that it planned to terminate two or three distributors in 1993 because the market for replacement tires, Dunlop's largest market, was shrinking. **[**82]** Along with this memo, Dunlop included the 1993 Distributor Agreements which contained a termination at will provision.

Although there is evidence of informal business and social conversations between the defendants at various trade show meetings and evidence of general price complaints by Tucker/Rocky and Parts Unlimited about Nichols, there is no evidence preceding December 28, 1993, that tends to exclude the possibility that Dunlop's decision to terminate distributors was an independent action. In fact, there are numerous economic justifications for Dunlop's decision to terminate distributors which support the inference of independence.

In 1993, the tire industry was extremely interdependent. When tire sales dropped off and the number of tire dealers began to decrease in 1991, a price war between competing distributors ensued to capture the remaining sales, driving the price of Dunlop tires down, far below Dunlop's suggested dealer resale price. Dealer sales went to the lowest bidder, or to the lowest bidder with the most nonprice services to offer. Dunlop expressed concern that lower prices on a long-term basis would only achieve a "lower perceived value" for Dunlop tires. **[**83]** Tucker/Rocky expressed a similar concern, remarking that price stability would support the industry, whereas excessive discounting would exploit it. Additionally, because of these concerns, both Dunlop and its two largest distributors, Tucker/Rocky and Parts Unlimited, were extremely cognizant of the prices each distributor charged dealers for various Dunlop tires.

By 1993, distributor profit margins, determined in part by the difference between the distributor's cost and the dealer resale price, were also in decline (at least on Dunlop tires), due to low dealer resale prices. The record in this case confirms that Tucker/Rocky and Parts Unlimited believed that **[*1120]** Nichols, a small but expanding competitor, was their most aggressive competitor on price. There is also evidence that Parts Unlimited complained that Nichols was charging "ridiculous prices," which were at least partially responsible for the declining profit margins. In fact, Jeff Fox of Parts Unlimited went so far as to tell Dunlop that it should "clean up [the market]." Tucker/Rocky also complained to Dunlop about Nichols' (and other distributors') low prices, indicating that it was "unwilling to sell at

those prices." [**84] Tucker/Rocky and Parts Unlimited were also concerned about Nichols' expansion into Phoenix, Arizona, and its proposed expansion into Dallas, Texas and Seattle, Washington. Finally, plaintiff argues that Tucker/Rocky and Parts Unlimited saw an opportunity to capture an increased market share once Nichols was out of the picture. Plaintiff's counsel explained, "what they're trying to do is take over the Dunlop market like they control the Metzeler market, . . . They only have 68% . . . of Dunlop [in 1993]. With Nichols out, they hope to get it up probably to 90, 95 [percent] . . ." Transcript at 33.

In an elastic market, increased sales could be generated by a large number of distributors competing vigorously on price. On December 28, 1992, however, Dunlop went on record, stating that it believed the market had become inelastic:

The tire replacement market is not going to grow in the predictable future. Our distributor base is still at approximately the same level as it was when the market was 35% larger than it is today.

Because of this situation, it is our intention to reduce our account base before the September IMAE by at least two to three distributors.

[**85]

PX 1. In an inelastic market, it is economically plausible that Dunlop, having attained the largest market share in the country and convinced that the demand for Dunlop tires had stabilized and matured, sought to increase profits for its distributors by reducing its distributor base. Cf. [Valley Liquors Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 \(7th Cir. 1982\)](#) (discussing restricted distribution cases under the rule of reason and the role of market power). Dunlop's concern with its largest distributors' profit margins, although facially suspicious, is a legitimate business concern under the relevant legal precedent. See [Monsanto, 465 U.S. at 762-63](#). Dunlop's interest in its "perceived" image is also a legitimate concern because continued lost profits for Tucker/Rocky and Parts Unlimited might translate into lost marketing services necessary to promote Dunlop's brand name. Termination of smaller competitors³² would not reduce Dunlop's profit so long as the nonterminated distributors could absorb the sales being made by the terminated distributor(s).

[**86] None of these motivations or actions violate the antitrust laws, so long as Dunlop acted independently in recognition of the interdependent market. In fact, termination of a distributor following or in response to price complaints, even those that expressly or impliedly referred to Nichols, is not enough to support the inference of a conspiracy. [Valley Liquors, 822 F.2d at 660](#) (citing [Monsanto, 465 U.S. at 764](#); [Lovett v. General Motors Corp., 998 F.2d 575, 578 \(8th Cir. 1993\)](#)). A defendant's actions become illegal only when its concerns and plans cross the line between encouragement and agreement.

After careful review, the Court has concluded that Dunlop's asserted reasons for terminating distributors, in general, were economically plausible and equally consistent, if not more consistent, than the conclusions the plaintiff would have the trier of fact draw from the same evidence. Despite the evidence of strong lobbying efforts by Tucker/Rocky, there is simply not enough evidence tending to exclude the possibility that Dunlop's decision to terminate Nichols was anything other than an independent action supported by the legitimate business reasons described above.

[**87] Although there is very little evidence tending to exclude the possibility that Dunlop's [*1121] decision to terminate Nichols was an independent action, there is one document, the March 22, 1993, Gregg Letter, which raises some inferences of concerted action between Dunlop and Tucker/Rocky. However, the letter raises equally reasonable (but competing) inferences on the issue of termination and price-fixing which render the letter ambiguous evidence at best. With respect to a price-fixing agreement among the three defendants, the additional evidence is equally as ambiguous.

(b) Parts Unlimited's 1993 Price Increases

³² Plaintiff's counsel admitted during oral argument that "Dunlop would have an independent right to reduce distributors to shake out the market so long as it did not terminate Nichols pursuant to a conspiracy." Transcript at 25.

On February 1, 1993, Tucker/Rocky and Parts Unlimited published their 1993 price catalogs. Parts Unlimited, despite the price war, raised its prices significantly. Given the fact that Parts Unlimited did not have the market power, by itself, to lead sales to a higher price level, it is rational to conclude that Parts Unlimited's decision to raise its prices would have been perilous without an advance agreement with its primary competitor, Tucker/Rocky, and some wholesale discounting support by its manufacturer, Dunlop. It was also an unusual move because it was contrary [**88] to Parts Unlimited's economic self-interest, given the competitive forces still in play in an admittedly sensitive market. In other words, it does not make economic sense for Parts Unlimited alone to simply raise its prices on February 1, 1993.

In the Court's view, this evidence may have been sufficient to raise the inference of a vertical price-fixing agreement if there were any objective evidence of parallel behavior between Parts Unlimited and Tucker/Rocky. Although Tucker/Rocky could have backed out of any agreement reached between the three defendants, the Court's speculation about what happened cannot provide the basis upon which we allow the section 1 claim to reach a jury. Nichols has simply failed to produce sufficient evidence that shows that Parts Unlimited's decision to raise prices resulted from an unlawful relationship with Tucker/Rocky and/or Dunlop. This is because there is no unambiguous evidence of market conduct which would tend to show that the defendants were committed to a common course of action and united by a common purpose.³³ Instead, the evidence shows erratic, unpredictable conduct that is more consistent with parties trying to obtain a competitive edge [**89] than with parties allied by a common cause.

To infer a conspiracy from parallel behavior, the parallel conduct must occur in a logically relevant manner. For instance, it cannot arise from a "plausible coincidence or an expectable response to a common business problem." 6 P. Areeda, Antitrust Law § 1425 at 146. Although "simultaneous" parallel action may be convincing, the time frame "is not limited to events occurring at a single moment. The definition is functional rather than literal and asks whether each alleged conspirator would normally have knowledge of another's act before deciding upon his own course of action." Id. at 147. In this case, the prices each competitor published would not necessarily be known before they were distributed, although [**90] once distributed they became public knowledge. Thus, there is nothing suspicious about the fact that Tucker/Rocky's prices differed from those Parts Unlimited published on February 1, 1993, especially since Tucker/Rocky's prices stayed the same as its 1992 prices.

There is no sequential parallelism in this case either. In sequential cases, the leader's action is known before the other players must make their choices. This method works if the leader can alter or reverse its position after seeing what the other competitors do. Id. at 147. Parts Unlimited was the leader on the price increase of 1993, and it waited until March 22, 1993, to see whether Tucker/Rocky would respond. The unfortunate coincidence for plaintiff is that on the very day that Gregg wrote the March 22, 1993, Letter to Logue confirming its desire to raise dealer resale prices to reflect Dunlop's 1993 price increase, Parts Unlimited reversed course and published prices substantially equal to those Tucker/Rocky published [*1122] for 1993 on February 1. The fact that Parts Unlimited reversed course is one more indication that the minds at Tucker/Rocky never met with those at Parts Unlimited or Dunlop and vice versa.

[**91] Finally, Tucker/Rocky's price increase in May 1993 looks more like the traditional price leadership that occurs when a distributor makes the choice to risk short-term loss in the hope that its competitors will find it more profitable to sell at the higher price rather the lower one. However, Parts Unlimited did not follow Tucker/Rocky's lead. Instead, Parts Unlimited "stayed put." As counsel for Parts Unlimited phrased it during oral argument: "The best time to rock and roll on the conspiracy [was] in May '93. They didn't do it." Transcript at 139. Parts Unlimited's motivation for staying put is irrelevant since that move, combined with Tucker/Rocky's recalcitrance in February, destroys any possible theory of parallelism and any reasonable inference that can be drawn from it. In short, the relevant conduct in the market reveals that the parties were coming and going, but never once acted in a concerted way until February 1, 1994, well after Nichols had been terminated.

c) Tucker/Rocky and Parts Unlimited's 1994 Price Increases

³³ Thus, there is no need to consider whether the presence of the so called "plus factors" -- conspiratorial motivation and acts against self-interest -- support a conspiracy inference. See 6 P. Areeda, Antitrust Law §§ 1433-1434, at 218-221.

The 1994 increase, although a more classic example of parallelism, is insufficient, by itself, to support the inference of an agreement, without [**92] additional evidence that the parties' decisions were the result of concerted action. The fact that Parts Unlimited once again needed to revise its price list to become more competitive with Tucker/Rocky, not only with respect to the percentage of the price increase, but with respect to the "best quantity" price, precludes the concerted action inference. Typically, in the context of secret bids (like the catalogs) which ultimately become public knowledge, the inference of collusion is stronger where there is price uniformity on specific terms which would not exist but for collusion. No such uniformity existed in this case. In short, shared interests do not constitute an agreement without evidence tending to show some symmetry and synchronicity in the parties' conduct, either simultaneous or sequential.

In this case the market was far from synchronized; it was erratic, full of unexpected shifts in movement which are not at all in synch with the actions one would expect from co-conspirators who combine to implement a common scheme. Thus, any inference of collusion that could be drawn from the 1993 and 1994 pricing movements by Tucker/Rocky and Parts Unlimited cannot be sustained given [**93] the undisputed fact that Jeff Fox had to revise his published prices downward for two consecutive years, 1993 and 1994, to meet Tucker/Rocky's more competitive (lower) levels. This conduct occurred both before and after Nichols' termination and therefore cannot support the inference of a conspiracy from parallel conduct because *there was no parallelism*. These pricing movements are at best ambiguous evidence because they are much more consistent with classic interdependence: each distributor resting its own decision to lead or withdraw on price based upon its belief that its competitor would do the same. [HN5](#)[] Interdependent behavior without evidence of parallelism, however, does not reflect an unlawful agreement under [section 1](#) of the Sherman Act. The inference of a [Section 1](#) agreement under the parallelism theory must therefore be rejected.

Although the preceding evidence does not prove that a vertical agreement -- either on price or termination -- existed, there is one document, as alluded to previously, upon which Count 1 turns: the March 22, 1993, Gregg letter. We will begin with that letter and analyze the events subsequent to it in light of the inferences it raises.

[94] (b) The Gregg letters are ambiguous evidence and therefore do not support an inference of price-fixing or a termination agreement**

i) The March 22, 1993 Gregg Letter

There is only one document in this case, the March 22, 1993, Gregg Letter to Logue that can be viewed as supporting the plaintiff's proof of a vertical agreement. The question this Court has carefully considered is whether this single document, viewed in [*1123] context of the record as a whole, takes the case past *Monsanto* and *Matsushita*. We believe it falls short of the mark.

There are several reasonable (but competing) inferences that can be drawn from this document. First, the concluding sentence to page one states: "Tucker/Rocky would like to pass on the 1993 Dunlop price increase at this time." This language suggests that Tucker/Rocky, in response to the pressure it received from Dunlop and Parts Unlimited after publication of the February 1, 1993, catalog, agreed to raise its prices in 1993 to reflect both Dunlop's 1993 price increase and the published increase in Parts Unlimited's prices.³⁴ The conditional language used in this sentence also implies some measure of control by Dunlop [**95] because the statement can be framed as a offer, requiring not only assent (or acceptance) but also the occurrence of an event or a condition precedent to form an agreement on price. Similarly, the second page encourages Dunlop to terminate single warehouse distributors "who dump tires at disruptively low and predatory prices, thousands of miles from their warehouse." In consideration of an agreement on these issues, Tucker/Rocky proposed that it would "increase the amount of resources Tucker/Rocky spends to promote and service Dunlop tires [which] will increase *interbrand* competition." From this language it is not difficult to infer that Tucker/Rocky was willing to increase resale dealer

³⁴ The fact that neither Nichols, nor any other distributor, is ever mentioned in either the first page of the Gregg Letter, or the price analysis, indicates that Tucker/Rocky is responding to the complaints Dunlop received from Parts Unlimited regarding Tucker/Rocky's 1993 published prices.

prices to reflect the MSD levels suggested (and desired by) Dunlop if Dunlop terminated discounting distributors, like Nichols, who prolonged the price war that made a price increase untenable. Second, the fact that Parts Unlimited received a copy of the first page of the letter implies some sort of collusion between the three defendants regarding price: the letter appears to expressly refer to the February conversations regarding Dunlop's 1993 increase of its dealer resale price (MDS) **[**96]** and Parts Unlimited's complaints that Tucker/Rocky did not pass on this increase in its published prices, as Parts Unlimited did.

The inferences break down with respect to Parts Unlimited, however, because neither a copy of the price analysis, which might have indicated plans to collude on specific tire prices, nor the second page of the letter addressing the termination of discounting distributors, like Nichols, was ever found in the possession of Parts Unlimited. Without these documents, Parts Unlimited cannot be tied to either a price-fixing or a termination agreement. The fact that Parts Unlimited admittedly only received a copy of the first page of the letter, although a somewhat strange coincidence, does not evidence **[**97]** a deliberate act to include Parts Unlimited in some form of traditional offer or acceptance.³⁵ See [Monsanto, 465 U.S. at 761 n.9](#). The most that can be said is that Tucker/Rocky addressed Parts Unlimited's concerns and someone, either Dunlop or Tucker/Rocky, sent the first page to Parts Unlimited to set the record straight.

With respect to Tucker/Rocky, the inferences are stronger, but equally ambiguous. Given the detailed price comparison between Tucker/Rocky's and Parts Unlimited's prices, the concluding sentence of the first page may simply mean: Tucker/Rocky would like to pass on the 1993 Dunlop price increase, but our prices are already higher than those charged by Parts Unlimited, our main competitor, and we cannot afford to raise them any higher until Parts Unlimited's dealer resale prices go up even **[**98]** further. The second page, although evidence of strong lobbying to terminate Nichols, may be nothing more than a complaint: identifying problems and proposing solutions. Distributors are entitled to express their opinions, and manufacturers are entitled to both listen and act on the information without being charged with illegal antitrust agreements. [Business Elecs. v. Sharp Elecs., 485 U.S. at 726.](#) **[*1124]** In this case, both Logue and Buckley testified that they did not act on the letter, which means that their decision to terminate Nichols was not based on this letter. In similar cases, courts found similar memoranda and complaints to be insufficient evidence of an agreement. [Valley Liquors, 822 F.2d at 660-61](#) (competitors' price complaints coupled with separate meetings with manufacturer before plaintiff's termination were insufficient to go to a jury); [Winn v. Edna Hibel Corp., 858 F.2d 1517, 1520 \(8th Cir. 1988\)](#) (competitor's memo to manufacturer that it didn't discount and hoped that manufacturer would prevent plaintiff distributor from discounting, followed by termination of plaintiff, was insufficient to go to jury); [Lovett, 998 F.2d at 577, 581](#) (evidence which showed **[**99]** plaintiffs' competing dealers complained specifically about plaintiff's pricing program and asked manufacturer to take strong action to eliminate plaintiffs program, followed by plaintiff's termination was insufficient to jury); [Helicopter Support Sys., Inc. v. Hughes Helicopter Inc., 818 F.2d 1530, 1533-34 & n.4 \(11th Cir. 1987\)](#) (more evidence is needed to impermissible behavior than a mere response to distributor complaints to establish liability under Colgate); [Ben Elman & Son, Inc. v. Criterion Mills, Inc., 774 F. Supp. 683, 685-86 n.6 \(D. Mass. 1991\)](#) (where largest distributor and a competitor of price-cutting plaintiff wrote memo to manufacturer stating that: "the problem [with plaintiff's pricing] has escalated to a point beyond which we can tolerate. You do what you must, we'll do what we must," court held that memo was ultimatum to manufacturer to make plaintiff raise prices or to terminate plaintiff as a distributor but was insufficient evidence of an agreement under [section 1](#)). Given the competing inferences and the case law on similar issues, the Court finds that the March 22, 1993, Gregg Letter does not tend to preclude either the possibility of independent **[**100]** action by Dunlop to terminate Nichols, nor by Tucker/Rocky to raise its prices.

In conclusion, the Court finds that one may reasonably infer from the March 22, 1993, Gregg Letter that Tucker/Rocky strongly encouraged Dunlop to terminate Nichols, even though Nichols is never mentioned in the letter, because Gregg admits that the term "single warehouse distributors" referred to Nichols.³⁶ One may also

³⁵ The Court must draw this inference, despite Parts Unlimited's "credit inquiry" theory, see *Transcript* at 131-32, because all reasonable inferences go to the plaintiff as the nonmoving party.

reasonably infer that Tucker/Rocky offered to raise dealer resale prices to reflect Dunlop's 1993 MSD price increase, if Dunlop promised to terminate Nichols. There is no evidence, however, that Dunlop accepted this offer, even though Tucker/Rocky's prices went up in May and Nichols was terminated in June. In addition, the fact that Parts Unlimited only received the first page of the letter, but not the price analysis or the second page of the letter, renders the probative value of the first page of the letter, for purposes of finding the relevant agreements against Parts Unlimited, marginal at best.

[101] ii) The April 8, 1993 Gregg Letter**

The inference that Tucker/Rocky held out on raising its prices until Nichols was terminated is undermined by Gregg's April 8, 1993, letter to Buckley. The April letter announced Tucker/Rocky's seemingly independent plans to raise its published 1993 dealer resale prices and proposes a price-fixing agreement: Tucker will trace Dunlop's MSD in its price increase if Dunlop lowers the MSD by 4.5 percent. Dunlop, however, does not lower its MSD mid-year, it raises it in October of 1993, for which Buckley concedes there was "no good reason." Furthermore, Tucker/Rocky raised its published dealer resale prices in May 1993, without waiting for Dunlop to lower the MSD. This market conduct by Tucker/Rocky and Dunlop does not evidence either simultaneous or sequential parallelism. Although there may have been a commitment by Dunlop to terminate Nichols prior to Tucker/Rocky's price increase, the equally competing inference is that Tucker/Rocky's price increase was an independent action. The Court therefore [*1125] concludes that these two letters, plaintiff's most direct evidence of an agreement between Dunlop and Tucker/Rocky, are at best ambiguous because [**102] they raise equally competing inferences of independent action.

(c) *There is no other direct or circumstantial evidence of collusion supporting Nichols' section 1 claim*

The only other evidence of a vertical agreement between Parts Unlimited, Tucker/Rocky and Dunlop to terminate distributors involves phone calls made in early May 1993 by Mike Buckley to both Bob Gregg of Tucker/Rocky and Jeff Fox of Parts Unlimited. Buckley admittedly made these calls for the express purpose of seeking "firm commitments" from the two distributors to absorb the sales of any terminated distributor. Buckley did not call any other distributor seeking similar commitments. Jeff Fox admits that he agreed to "pick up the slack" in case there was a termination. Bob Gregg denies giving his commitment. Buckley, however, memorialized both commitments in writing at the time he made the phone calls. Although the exchange of commitments can constitute direct evidence of collusion, in this case they do not. Admittedly, the statements allude to the prospective termination of distributors, but these calls do not raise any inferences that Parts Unlimited or Tucker/Rocky did anything more than agree to [**103] absorb sales. An agreement to absorb sales is not an agreement to fix prices, nor is it an agreement to terminate a distributor in light of Dunlop's previously stated, independently asserted, decision to terminate someone due to market stasis. Further, there is no evidence that either Parts Unlimited or Tucker/Rocky agreed with Dunlop to terminate Nichols and to absorb Nichols' sales volume. Without this evidence, there is no vertical agreement between Parts Unlimited and Dunlop or Dunlop and Tucker/Rocky.

Although *Monsanto* does not impose a higher summary judgment standard upon the plaintiff, the inferences we may draw in favor of the plaintiff from ambiguous evidence are limited. *Matsushita*, 475 U.S. at 596. The Court has determined that the plaintiff's evidence is ambiguous and therefore insufficient to support the inference of a vertical agreement between the defendants, for the reasons given above. Summary judgment is therefore granted in favor of all defendants on Count I.

2. Count II: The Rule of Reason

³⁶ Even if the March Gregg Letter constituted an agreement to terminate Nichols, it is not sufficient to state a *per se* claim under Section 1 of the Sherman Act, because it would at most constitute a nonprice restraint which, if it had an anticompetitive impact, would need to be tested under the rule of reason. Plaintiff has not alleged a nonprice restraint under the rule of reason, so the Court does not reach that question.

In Count II, plaintiff restates its price-fixing and termination conspiracy claim under the rule of reason.³⁷ Under this rule, a plaintiff must still [**104] prove the existence of an agreement that restrains trade. An agreement under the rule of reason is not as difficult to prove as it is under the *per se* rule, because there is not a presumption of antitrust injury. [HN6](#)[[↑]] In a rule of reason case, the inference of an illegal agreement may be sustained merely by producing evidence that "casts doubt" on inferences of independent action. [Capital Imaging, 996 F.2d at 545](#). However, although the agreement may not be as difficult to prove under the rule of reason, additional elements must be met. For instance, a plaintiff must show that the defendants had market power to fix prices and that the price fixing scheme had an anticompetitive impact on the market as a whole. After careful review, the Court finds that plaintiff has failed to produce sufficient evidence of anticompetitive impact for Count II to survive summary judgment.

[**105] a. Legal Standards

Most cases fall outside the narrow, carefully demarcated categories of agreements held to be illegal *per se*. In the typical case, a plaintiff must prove an antitrust injury under the rule of reason, [Capital Imaging, 996 F.2d 537 \(2d Cir.\)](#), cert. denied, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993). [HN7](#)[[↑]] Under this test, plaintiff bears the initial burden of showing that the challenged agreement has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been [*1126] harmed as an individual competitor will not suffice. [Tunis Bros. Co. Inc. v. Ford Motor Co., 952 F.2d 715 \(3d Cir. 1991\)](#), cert. denied, 505 U.S. 1221, 120 L. Ed. 2d 903, 112 S. Ct. 3034 (1992). Insisting on proof of harm to the whole market protects competition in general, rather than individual competitors. [GTE Sylvania, 433 U.S. at 52](#) (the goal of **antitrust law** is to protect interbrand rather than intrabrand competition). The Seventh Circuit has held that were the law otherwise, routine disputes between business competitors would be elevated to the status of an antitrust action, thereby trivializing the Act because of its ready availability. [Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., **1061 784 F.2d 1325, 1338 \(7th Cir. 1986\)](#) ("antitrust laws are not balm for rivals' wounds"). The plaintiff must also show that the defendant had market power, that is, the "power to raise prices significantly above the competitive level without losing all of one's business." [Valley Liquors, 822 F.2d 656, 665 \(7th Cir. 1987\)](#). [HN8](#)[[↑]] The Seventh Circuit has held that a district court must proceed to the first step in the rule of reason analysis, which is to balance the effects the vertical restraint has on intrabrand and interbrand competition, only if the evidence gives rise to the inference that defendants had sufficient market power to control dealer resale prices. *Id.* Ultimately, the factfinder must weigh the harms and benefits of the challenged behavior.

The classic articulation of how the rule of reason analysis should be undertaken is found in [Chicago Bd. of Trade v. United States, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 \(1918\)](#), where Justice Brandeis, speaking for the Supreme Court, said:

[HN9](#)[[↑]] The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine [**107] 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 the facts and to predict consequences.

Id. at 238. Moreover, it is important to recognize that "the antitrust laws were enacted for 'the protection of competition, not competitors'." [Atlantic Richfield, 495 U.S. at 338](#). Termination of a small distributor pursuant to a price agreement does not restrain trade until distribution is channeled exclusively "through a few large or

³⁷ The idea of applying a rule of reason analysis to a vertical price-fixing violation was discussed in *Monsanto* in a footnote, [465 U.S. at 760 n.7](#), but was not ruled on because it was not raised at the district court level. The Court has not found any case since *Monsanto* that discusses this theory for recovery.

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specifically advantaged dealers." *Albrecht v. Herald Co.*, 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968) (where Court found evidence of an agreement to terminate a small distributor pursuant to an agreement with larger distributor to charge maximum [**108] prices).

b. Analysis

This test is easier to state than to apply. Applying this test, the Court finds that plaintiff has failed to prove anticompetitive impact under the rule of reason and Count II must be denied. *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982) ("plaintiff must show that the refusal to deal is likely to reduce competition"). Plaintiff's theory of anticompetitive impact is that the termination of Nichols sent a message to other small distributors, whose only competitive "weapon" against the larger distributors was price. The proof of anticompetitive impact, argues plaintiff, is that prices have gone up significantly since June 15, 1993, and smaller distributors have lost sales to Tucker/Rocky and Parts Unlimited -- who absorbed not only Nichols' sales but the sales of other discounters who stopped aggressive discounting. At the outset,

Nichols only evidence of this anticompetitive impact is the testimony and opinion by its expert, Dr. Pisarkiewicz. This testimony is wholly lacking. Nichols argues that Dr. Pisarkiewicz, after extensive analysis, has concluded that the conspiracy alleged would result [**109] in an unreasonable restraint of trade and have a substantial [*1127] adverse effect on competition (PX 608 at 4, 41-42). At page 4 of his report, Dr. Pisarkiewicz claims:

Report of Dr. John Pisarkiewicz, Jr.

4. In summary my conclusions are as follows:

g) But for this lawsuit, there is compelling evidence that prices of Dunlop tires to dealers and to consumers would be significantly higher. This is a substantial adverse effect on competition. In addition, the termination of Nichols indicates that the defendants have the power to exclude competitors and discipline remaining competitors. This too is a substantial adverse effect on competition.

42. . . . the impact on competition due to the termination of Nichols is very substantial. Nichols did challenge T/R. Nichols did challenge T/R and PU and was trying to grow in spite of discriminatory prices from Dunlop. Nichols size and long standing reputation in the industry made it a competitor to be reckoned with. Its termination by Dunlop was a strong signal to other Dunlop distributors not to challenge on the basis of price. Dunlop had already signaled all of its distributors that it was concerned about price [**110] wars (5/20/93 memo from Mike Buckley to all Dunlop distributors attaching a Wall Street Journal article, entitled, "How to Avoid a Price War." Terminating Nichols strongly reinforced that signal.

43. In Addition, Dunlop has already raised prices sharply in 1993 and 1994 (App. 7, Table D-1).

44. T/R and PU receive favored treatment by Dunlop and Metzeler, and T/R and PU have used these advantages to gain market share, to earn more profits and to buy other lines of products.

Nichols contends that the full anticompetitive impact has not yet been felt, because the filing of this lawsuit prevented prices from rising to the 15 percent mark allegedly agreed upon, and has resulted in the addition of new distributors and other "anticompetitive" indicia as a cover. Nichols also claims that a question of fact exists because defendants' expert, Raymond Sims, disagrees with Dr. Pisarkiewicz's analysis.

Raymond Sims does not directly controvert Dr. Pisarkiewicz's statements, and the defendants do not use his analysis in their arguments. However, Mr. Sims would testify at trial that Nichols' prices on Dunlop tires analyzed were at or below Tucker/Rocky and Parts Unlimited between [**111] 1991-93 on the 50 best selling tires. This is disputed. Sims will also testify that Nichols' profits remained "relatively stable" while the profits of Tucker/Rocky and Parts Unlimited went up from 1991 through 1993. This is also disputed.

The defendants' position on the lack of anticompetitive impact appears to relate more to the lack of evidence offered by Dr. Pisarkiewicz, rather than to its experts' own opinions. For instance, in his deposition, Dr. Pisarkiewicz admits that he has made no analysis of actual prices that dealers paid for tires, 12(M) P 174 (Pisarkiewicz Dep. at 434, 523); that he has no opinion on whether Tucker/Rocky or Parts Unlimited is pricing at, above or below competitive levels before or after the Nichols termination, *Id.* (Pisarkiewicz Dep. at 434); that he has no information that the

Nichols termination led to reduced market output, *Id.* (Pisarkiewicz Dep. at 510-11); and that he has no formation that the Nichols termination led to a deterioration in the quality of service available to dealers, *Id.* (Pisarkiewicz Dep. at 511).

These admissions are crucial because:

there is a sense in which eliminating even a single competitor reduces competition. **[**112]** But it is not the sense that is relevant in deciding whether the antitrust laws have been violated. Those laws, we have been told by the Supreme Court repeatedly in recent years, are designed to protect the consumer interest in competition. The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality.

Products Liability, 682 F.2d at 663-64 (citations omitted). In short, there is no evidence provided by Dr. Pisarkiewicz, other than his theory that "but for this litigation" **[*1128]** prices would not be competitive, that the termination of Nichols, due to its aggressive discounting, sent a message that reduced competition and injured consumers or their dealers. This testimony is not sufficient evidence to withstand a motion for summary judgment, even under the rule of reason, because it is mere speculation, without a sound economic analysis to support it. Therefore, the Court must grant the defendants' Motions for Summary Judgment because the plaintiff failed to produce evidence of anticompetitive impact on the market as a whole.

3. Count III: Group Boycott

In Count **[**113]** III, Nichols vaguely alleges that the defendants' actions constitute an illegal group boycott in violation of section 1 of the Sherman Act. Nichols claims that Tucker/Rocky and Parts Unlimited convinced both Dunlop and Metzeler not to deal with Nichols. To prove a group boycott, Nichols must allege a horizontal agreement by Tucker/Rocky and Parts Unlimited to engage in concerted activity to deprive Nichols of access to sell motorcycle tires. Business Electronics, 485 U.S. at 734; United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966); Phil Tolkan Datsun, Inc. v. Greater Milwaukee, Etc., 672 F.2d 1280, 1284 (7th Cir. 1982). Although some group boycott claims (those involving concerted refusals to deal with a competitor) are analyzed under the *per se* rule, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959), Nichols has alleged its section 1 group boycott claims under the rule of reason and therefore must show anticompetitive impact. Thus, Nichols must only submit some evidence that Tucker/Rocky and Parts Unlimited agreed to induce Metzeler not to add Nichols as a distributor, or that Tucker/Rocky and Parts Unlimited agreed to induce Dunlop to terminate **[**114]** Nichols as a distributor.

Although there is "some" ambiguous circumstantial evidence that the defendant distributors agreed to induce Dunlop to terminate Nichols, there is no evidence of an agreement among Tucker/Rocky and Parts Unlimited to induce Metzeler to refuse to deal with Nichols. The only evidence of any inducement is a conversation Metzeler President Greg Blackwell had with Tucker/Rocky and Parts Unlimited regarding the addition of new distributors in general and Nichols in particular. The defendant distributors independently advised Blackwell that they did not advise adding new distributors, in particular, Nichols, a known discounter. This evidence does not satisfy the concerted action/agreement requirement. Regardless, there is no evidence of anticompetitive impact, with respect to a boycott involving Dunlop or Metzeler, for the reasons expressed in Count II. Therefore, Count III also fails for lack of proof on the element of anticompetitive impact.

B. The Illinois Antitrust Act

In Counts IV, V and VI, plaintiff alleges various vertical and horizontal agreements between the defendants to fix prices, terminate Nichols and refuse to deal with Nichols. **[**115]** Counts IV and V must be dismissed for failure to state a claim. Count V states a rule of reason claim under section 3 of the Illinois Antitrust Act, 740 ILCS 10/3. Summary judgment must be granted for the defendants on all counts.

1. Count IV: Per Se Pricefixing

In Count IV, plaintiff alleges that the defendants conspired to raise, fix, maintain or stabilize prices, in violation of section 3 of the Illinois Antitrust Act ("IAA"), 740 IL CS 10/3. Because Nichols levies its allegation against "all defendants," that is, Dunlop (a seller), Tucker/Rocky (a buyer) and Parts Unlimited (a buyer), it alleges a *vertical* price-fixing agreement. Nichols' claim fails as a matter of law.

Per se offenses are those set out in section 3(1) of the IAA. See [740 ILCS 10/3](#), Bar Committee Comments-1967 (1993). "The conduct proscribed by section 3(1) is violative of the Act without regard to, and the courts need not examine, the competitive and economic purposes and consequences of such conduct." *Id.* The Bar Committee Comments clearly state, however, that a vertical [\[*1129\]](#) price-fixing agreement is not prohibited under section 3(1):

Section 3(1) does not reach vertical agreements, [\[*116\]](#) such as agreements between buyers and sellers fixing the price at which the buyer shall resell. Although not unlawful under section 3(1), such vertical price fixing, if not exempt under the Illinois Fair Trade Act, may be proscribed by section 3(2), the general restraint of trade section. Since the draftsmen carefully constructed section 3 to require it, the Illinois courts should conclude that they must examine the competitive and economic purposes and consequences of such agreements before reaching a conclusion that section 3(2) has been violated. While it is perhaps possible, as under Federal law, that the courts may hold such agreements violative of section 3(2) without such an examination, they should not, since to do so would defeat the clear intention of the draftsmen.

Id. The Bar Committee Comments could not be any more explicit that a vertical agreement may not constitute a *per se* violation of section 3 of the IAA, because *per se* claims are only those listed in section 3(1), which does not cover vertical price-fixing agreements. While Nichols could have alleged that "all defendants" violated section 3(2), the general restraint of trade subsection of the [\[*117\]](#) IAA, section 3(2) necessarily requires a rule of reason analysis of the "economic purposes and consequences" of the agreement and therefore does not contemplate *per se* violations. Count IV fails as a matter of law.

2. Count V: Rule of Reason

In [Laughlin v. Evanston Hosp.](#), [133 Ill. 2d 374, 550 N.E.2d 986, 996 \(Ill. 1990\)](#), the Illinois Supreme Court held that the analysis for rule of reason claims under section 3 of the Illinois Antitrust Act, [740 ILCS 10/3](#), tracks the legal analysis applied in federal cases under [section 1](#) of the Sherman Act. Therefore, since Count V is the counterpart to Count II, which alleges a rule of reason claim under [section 1](#) of the Sherman Act, the Court grants summary judgment for all defendants on this claim for the reasons expressed in the portion of the opinion analyzing Count II.

3. Count VI: Group Boycott

Nichols alleges in Count VI that the actions of all the defendants constitute a *per se* illegal group boycott in violation of section 3 of IAA. Because Nichols alleges a *per se* violation of the IAA, its claim falls under section 3(1) of the IAA, which is the only subsection of the IAA that refers to *per se* violations. See Bar [\[*118\]](#) Committee Comments-1967 (1993). The Bar Committee Notes are clear however, that an alleged boycott does not present a legally cognizable claim under Section 3(1). In its discussion of claims under section 3(1), the Comments note that:

boycotts are not proscribed by this " *per se*" subsection. Here again in view of federal precedents and of Section 11, horizontal boycotts may be found unlawful under the general restraint of trade Section 3(2). Vertical agreements to refuse to deal or boycotts, that is, agreements between persons at different levels of production and distribution which have as their immediate purpose the depriving of a third person of a supply of a commodity or service, may also be found violative of Section 3(2).

Id. Thus, although Nichols could have alleged a group boycott under section 3(2), it has instead alleged a *per se* violation, which falls under section 3(1) of the IAA and does not contemplate group boycotts. Count VI therefore fails as a matter of law.

C. The Robinson-Patman Act Claims

1. The Facts

Price is an important sales determinant in the industry. 12(N)(3)(b) **P 57.** **Motorcycle** tire manufacturers [**119] (*i.e.*, Bridgestone, Cheng Shin, Continental, Dunlop, Metzeler, etc.) commonly provide discounts, including volume-based discounts, in selling tires to distributors. 12(M) P 323. The defendants concede that Dunlop provided discounts to Nichols' competitors that Nichols did not receive. 12(N)(3)(b) P 44. For instance, Parts Unlimited requested and received from Dunlop a one-time special promotional discount for the opening of its facility in Southern California. 12(M) P 312 (PX 181). Tucker/Rocky and Parts Unlimited also admit [*1130] that they knew of and took advantage of discounts that Dunlop did not publish but made available to them. 12(N)(3)(b) P 53. Because Tucker/Rocky and Parts Unlimited are sophisticated business entities that separately monitor information from dealers about prices at which competitor distributors sell products, 12(N)(3)(b) PP 51-52, they knew they were receiving individually negotiated prices on Dunlop tires. 12(N)(3)(b) P 53 (PX 161-187). For instance, Pat Logue of Dunlop informed them that large orders would permit Dunlop manufacturing facilities to have longer production runs on specific tires without the need to stop production, change molds, and switch over [**120] to producing other types of tires. 12(M) P 322. Large orders, in turn, would result in greater discounts during certain periods.

Other distributors, such as Bell Industries, Dixie, KK Motorcycle, and Pike's Peak, also received a variety of discounts. Bell Industries, Dixie, Parts Unlimited, and Tucker/Rocky earned Dunlop's growth bonus in 1993. 12(M) P 316. Motorcycle Stuff is a Dunlop distributor headquartered in Cape Girardeau, Missouri. Over the past four years, according to Nichols' expert report, Motorcycle Stuff has purchased fewer Dunlop tires each year than did Tucker/Rocky or Parts Unlimited. During the years 1990-93, even Nichols' expert concludes that Motorcycle Stuff received significantly higher overall discounts than Tucker/Rocky, Parts Unlimited, Nichols, or any other Dunlop distributor. 12(M) P 317.

Tucker/Rocky also received a range of discounts from Metzeler, Dunlop's largest rival in the alleged "premium tire" market. 12(M) P 323. Moreover, Nichols, the exclusive distributor of King's tires in the United States, offered a volume-based discount to its customers. 12(M) P 313. Sometimes Nichols also offered lower prices on Dunlop tires to its dealers than were offered [**121] by Tucker/Rocky, Parts Unlimited, and Motorcycle Stuff in the marketplace. 12(M) P 318. One printed report produced by Nichols indicates that Nichols gave discounts on Dunlop tires to almost 600 of its customers. These discounts were well over 20% off the best published pricing for many of Nichols' customers. For instance, Nichols discounted Dunlop tires by 20-24 percent for 88 of its customers and discounted Dunlop tires by 25 percent or more for 72 of its customers. 12(M) P 319.

The difference between the gross margins of Tucker/Rocky and Nichols on the sale of Dunlop tires during the relevant period was significantly greater than the alleged price advantage received by Tucker/Rocky. 12(M) P 324. Dunlop distributors faced and continue to face intense intrabrand competition from other Dunlop distributors during all relevant periods. 12(N)(3)(b) P 55 (PX 252U; PX 251; PX 250U; PX 249U; PX 240U; PX 510; PX 248; PX 246; PX 242U; PX 267U; PX 605F; PX 239U; PX 605H; PX 274; PX 248; PX228; PX 280; PX 22). The average price (the yearly revenues from the sale of Dunlop tires divided by the annual unit sales on an indiscriminate basis, without regard to product mix by model or type or size) [**122] on Dunlop tires sold to dealers decreased from 1991 to 1993 for Nichols, Tucker/Rocky and Parts Unlimited. 12(N)(3)(b) (PX 609 at 13).

2. The Merits

a. Dunlop: Section 2(a)

Dunlop seeks summary judgment on Count VII, Nichols' section 2(a) Robinson-Patman Act claim. To establish a *prima facie* violation of section 2(a), a plaintiff must establish the existence of (1) price discrimination, and (2) injury to competition. See Robert M. Klein, *The Robinson-Patman Act: Jurisdictional Aspects and Elements*, 59 Antitrust L.J. 777 (1991). Dunlop does not contest that price discrimination occurred, but asserts that Nichols has failed properly to establish injury to competition. Because Nichols' assertions and its expert's analyses demonstrate, however, that Nichols has properly asserted at least two types of damages under the Act, it must prevail on Dunlop's motion for summary judgment.

Nichols claims three types of damages under the Act: (1) damages for *lost profits* on sales of Dunlop tires that it actually made (because it was not receiving the same discounts that Dunlop granted to the defendant distributors

and had to sell at lower prices [*1131] than those [**123] at which it would have sold absent the price discrimination); (2) damages for *lost sales* of Dunlop products that Nichols was not able to make because of its increased costs; and (3) damages for *lost sales* of non-Dunlop products that it otherwise would have made from customers who would have been drawn to buy from Nichols had Nichols been able to offer more attractive prices on Dunlop products. Pl.'s Mem. Opp. Def.'s Mot. Summ. Judg. at 72-73. Dunlop asserts in its motion for summary judgment that the first type of damages that Nichols claims amounts to "automatic damages" (i.e., damages measured by the amount of the alleged price discrimination, which are not recoverable under the Act). Def.'s Mem. Supp. Mot. Summ. Judg. at 22-23. Dunlop further asserts that the second and third type of damages represent legally deficient theories that rest on unsupported assumptions. *Id.* at 25, 28.

HN10 [↑] "Like any damages remedy, the purpose of [the Clayton Act] is to place the antitrust plaintiff as far as possible in the position it would have occupied but for the violation. Thus, any calculation of section 4 damages must strive to approximate a violation-free state of affairs." [**124] [*Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 394 \(8th Cir. 1987\)*](#).

The first type of damages claimed by Nichols, lost profits due to the fact that Nichols was forced to sell Dunlop tires at lower prices than it would have absent the price discrimination, is not "automatic damages" as defined by the Supreme Court in [*J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 68 L. Ed. 2d 442, 101 S. Ct. 1923 \(1981\)*](#). In *J. Truett Payne*, the Court noted that the plaintiff could not merely infer damages from the fact that the defendant had engaged in discriminatory pricing irrespective of any showing that the defendant's behavior had an effect on competition. *Id. at 563-64*. The plaintiff had failed to produce any documentary evidence to show the effect of the discrimination on retail prices. *Id. at 564*.

In contrast, Nichols presents evidence prepared by its economic expert, Dr. John Pisarkiewicz, that calculates Nichols' market share prior to the period of the alleged discrimination, computes Nichols' projected market share absent any price discrimination for the period 1991-93 (the time of the alleged price discrimination), and alleges that Nichols' actual market share for that [**125] period declined and its competitors' shares increased as a result of Dunlop's alleged discriminatory behavior. App. to Pl.'s Mem. Opp. Defs.' Mots. Summ. Judg. Vol. III, Tab 608, at 44. Nichols also presents evidence of its declining market share and its competitors' simultaneously rising market share during the period of the alleged discrimination -- fluctuations that Pisarkiewicz attributes to competitive injury. App. to Pl.'s Mem. Opp. Defs.' Mots. Summ. Judg., Vol. III, Tab 608, at I and VI. Although Dunlop contests that Nichols has failed to demonstrate a sufficient causal connection between Nichols' declining market share, Tucker/Rocky's and Parts Unlimited's rising market share, and the alleged discriminatory behavior, Nichols has done more than simply claim automatic damages, and thus has asserted sufficient facts to support a finding of injury due to increased costs. See *J. Truett Payne, 451 U.S. at 565* (citing [*Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)*](#)) (noting that damages may be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation); *id. at 566* (citing [*Bigelow v. RKO Radio Pictures, Inc., \[**126\] 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574 \(1946\)*](#)) (noting that damages may be awarded on the basis of comparison of plaintiff's profits with the contemporaneous profits of a competitor who was not the victim of discriminatory pricing, together with evidence of plaintiff's profits during the conspiracy as compared with his profits prior to the conspiracy).

The second type of damages claimed by Nichols, lost sales of Dunlop products that Nichols was allegedly unable to make due to the discriminatory pricing, is also a legally permissible type of damages as long as Nichols' expert's calculations properly approximate a violation-free state of affairs as opposed, for example, to one in which Nichols was able to share in the benefit of the discriminatory [*1132] pricing. See [*Rose Confections, 816 F.2d at 394*](#). Nichols has properly done so.

Using Nichols' pre-violation market share, which takes into account not just the relative market shares of Tucker/Rocky and Parts Unlimited, but the other fourteen nationwide Dunlop distributors, Dr. Pisarkiewicz estimates what Nichols' market share would have been for 1991- 93 absent the alleged discriminatory pricing. Dunlop contends that Nichols' loss of market share was due to [**127] its poor customer service; if this is the case, however, it is a factual determination that must be made by a jury. Nichols has therefore asserted at least two types

of damages recognizable under the Act, therefore this Court must deny Dunlop's motion for summary judgment on this issue.³⁸

[128] b. Tucker/Rocky and Parts Unlimited: Section 2(f)**

Tucker/Rocky and Parts Unlimited also seek summary judgment on Count VII, with respect to Nichols' claim that they violated [HN11](#) section 2(f) of the Robinson-Patman Act, which makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited" by the Act. [15 U.S.C. § 13\(f\)](#). In order to establish a *prima facie* case under section 2(f), Nichols must show that Tucker/Rocky and Parts Unlimited knew or should have known that its was receiving greater discounts from Dunlop than Nichols, and that it knew or should have known that the lower prices it induced or received from Dunlop were discriminatory in violation of section 2(a) of the Act. [Automatic Canteen Co. v. FTC, 346 U.S. 61, 74, 97 L. Ed. 1454, 73 S. Ct. 1017 \(1953\)](#).

Although Nichols' evidence shows that Tucker/Rocky and Parts Unlimited received higher discounts from Dunlop than Nichols did. Nichols is unable to show that either distributor possessed the requisite knowledge (*i.e.*, knew the amount of discounts any other distributor, including Nichols, received). Both Tucker/Rocky and Parts Unlimited deny that they had any knowledge of the amount of discounts [\[**129\]](#) that any other distributor received. See Rule 12(N)(3)(b) Reply PP 52-54. Nichols' assertion that Tucker/Rocky and Parts Unlimited knew that they received better discounts than did Nichols, see 12(N)(3)(b) PP 52-54, is based on a single document (PX 158) that merely lists the annual volume bonus discounts available for 1992. Based on this list, Nichols claims that Tucker/Rocky and Parts Unlimited knew or should have known that the discounts greater than those listed were not generally available to the other distributors. [Id. at P 53](#). However, there is no dispute that Dunlop individually negotiated prices with its distributors. *Id.* This is indicated by the fact that Nichols received a 6 percent volume bonus discount in 1992, an amount higher than that listed in the Dunlop distributor program. Rule 12(M) P 304. Although Nichols asserts that Tucker/Rocky and Parts [\[*1133\]](#) Unlimited not only received higher discounts than those listed but also different discounts than those listed is insufficient, without a factual showing, to support the inference that Tucker/Rocky and Parts Unlimited knew that Nichols did not receive non-listed discounts. This evidence, taken together with Tucker/Rocky's [\[**130\]](#) and Parts Unlimited's denials of knowledge (which has not been controverted), must be taken as true. Tucker/Rocky and Parts Unlimited therefore had no basis to determine how the discounts they were able to negotiate from Dunlop compared to those that Nichols was able to negotiate.³⁹

Nichols argues, however, that Tucker/Rocky and Parts Unlimited should have known that they were receiving discriminatory prices based on their dominant positions in the marketplace (the two distributors together accounted

³⁸ The third measure of damages, lost sales on non-Dunlop products is not cognizable because Dr. Pisarkiewicz uses a statistical regression analysis to determine the percentage of Dunlop buyers who would also buy non-Dunlop products and the amount of these products that the buyers would purchase, without demonstrating evidence of a causal connection between the injury and the asserted damages. See, e.g., [BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1093 \(7th Cir. 1994\)](#) (finding causation to be established where the plaintiff presented evidence that many customers would not have purchased from the defendant had they known of the defendant's wrongdoing and that the plaintiff's position in the market would have been more advantageous absent the defendant's wrongful conduct); [Alpo Petfoods, Inc. v. Ralston Purina Co., 778 F. Supp. 555, 560 \(D.D.C. 1991\)](#)(noting that statistical regression analyses, "while useful for demonstrating general trends and the broad impact of certain actions, are simply not usable with respect to the type of specific, concrete evidence needed. Without the regression analyses, however, there is nothing in the record from which this Court can deduce a lost profits figure without speculation."), *aff'd in part and rev'd in part on other grounds*, [997 F.2d 949 \(D.C. Cir. 1993\)](#); [Nikkal Indus., Ltd. v. Salton, Inc., 735 F. Supp. 1227, 1233 \(S.D.N.Y. 1990\)](#) (finding that linear regression analysis "did not provide for the impact of other significant factors, such as the possible effect on sales of a declining trend in the popularity of [the product], the appearance of several competitors, vigorous price competition and, most importantly, [the plaintiff's] poor marketing strategy."). For example, Plaintiff would need to offer something along the lines of testimony from buyers who would have bought non-Dunlop products from Nichols who went elsewhere because of price discrimination on Dunlop products.

³⁹ Both Tucker/Rocky and Parts Unlimited note that Dunlop's pricing structure was highly individualized and flexible, and that there was no way for them to determine independently the amount of the discounts that another distributor might be receiving. See, e.g., Tucker/Rocky Mem. Supp. Mot. Summ. Judg. at 31-32.

for 60% of all Dunlop sales nationwide) and their extensive trade experience. Pl.'s Mot. Opp. Defs.' Mot. Summ. Judg. at 84; Rule 12(N)(3)(b) PP 53-54. Nichols notes that "trade experience in [**131] a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution." *Automatic Canteen, 346 U.S. at 79-80*. In *Automatic Canteen*, however, the Supreme Court stated in dicta that "by way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner . . . as the other buyer can fairly be charged with notice that a substantial price difference cannot be justified." *Id. at 80*. This is not the case in the instant situation. Both Tucker/Rocky and Parts Unlimited bought from Dunlop in greater quantities than Nichols and neither has been shown to be aware of what price any other distributor received, much less the existence of any "substantial price difference." Nichols' claim is further weakened by the fact that Motorcycle Stuff, another distributor, who has not been named as a defendant in this lawsuit, received greater discounts than both Tucker/Rocky and Parts Unlimited even though it bought fewer tires than either of these defendants. Even if Nichols could show that Tucker/Rocky and Parts Unlimited were aware of the amount of discounts that other distributors received, the [**132] fact that Motorcycle Stuff's discounts exceeded Nichols', Tucker/Rocky's, and Parts Unlimited's would have provided Tucker/Rocky and Parts Unlimited with reason to believe that the prices offered to them were not discriminatory. Therefore, Nichols has failed to show that the defendants had the requisite knowledge under section 2(f) of the Act, and summary judgment is granted in favor of Tucker/Rocky and Parts Unlimited on Count VII.

3. The "Meeting Competition" Defense

HN12[⁴⁰] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C. § 13\(a\)](#), makes it illegal to discriminate in price between buyers when the consequence is an injury to competition. *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 41 (7th Cir. 1992)* (citing *United States v. United States Gypsum Co., 438 U.S. 422, 450, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*). To establish a *prima facie* violation of section 2(a), a plaintiff must establish the existence of (1) price discrimination, and (2) injury to competition. See Robert M. Klein, *The Robinson-Patman Act: Jurisdictional Aspects and Elements*, 59 *Antitrust L.J.* 777 (1991). A *prima facie* violation, however, may be rebutted by one [**133] of the Robinson-Patman Act's two affirmative defenses: (1) "cost justification" or (2) "meeting a competitive price" (commonly known in this case as the "meeting competition" defense). *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*. If established, an affirmative defense eliminates the need to decide the issue of injury to competition, because a properly established defense renders such injury justifiable. Dunlop asserts [*1134] the meeting competition defense, ⁴⁰ contained in **HN13**[⁴¹] section 2(b) of the Act, which states:

that nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

[15 U.S.C. § 13\(b\) \(1975\)](#)(emphasis added). **HN14**[⁴²] Price discrimination under the Robinson-Patman Act "is merely a price difference" between the price for which a defendant sells to one buyer versus the price to which it sells to another. *Falls City, 460 U.S. at 443 n.10* (quoting *FTC v. Anheuser-Busch, Inc., [**134] 363 U.S. 536, 549, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*). Although the burden of establishing a factual basis for the defense falls on Dunlop, see *Falls City, 460 U.S. at 451*, all reasonable inferences must be drawn in favor of Dunlop because Nichols is the moving party. ⁴³

HN15[⁴⁴]

⁴⁰ Dunlop initially asserted, but has since withdrawn, a cost justification defense, which is therefore no longer an issue in this case.

⁴¹ As the moving party, Nichols has the burden of showing that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. See *Fed. R. Civ. P. 56(c)*.

The section 2(b) defense has two elements; both must be factually supported to send the defense to a jury. The two elements of a section 2(b) defense are as follows. First, "the seller, who has knowingly discriminated in price, [must] show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60, 89 L. Ed. 1338, 65 S. Ct. 971 (1945) (emphasis added). Second, "the seller must demonstrate that its price was a good-faith response to a competitor's lower price." *Reserve Supply*, 971 F.2d at 41 (citing *Falls City*, 460 U.S. at 451).

The determination of whether a seller acted in good faith does not lend itself to the application of a rigid standard. The Supreme Court has stated that the concept of good faith is

flexible and pragmatic . . . Rigid rules and inflexible absolutes are especially inappropriate in dealing with the § 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.

Gypsum, 438 U.S. at 454 (quoting *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963)). The [HN16](#) Supreme Court has, however, identified four factors that may be relevant to the determination of the seller's good faith. These include whether the seller (1) had received reports from other customers of similar discounts; (2) was threatened with a termination of purchases if the discount were not met; (3) made efforts to corroborate the reported discount [**136](#) by seeking documentary evidence or by appraising its reasonableness in terms of available market data; and (4) had past experience with the buyer. *Gypsum*, 438 U.S. at 454-55. We rely on the above standards in assessing whether Dunlop has successfully asserted an affirmative defense under section 2(b).

a. Background

Nichols moves for partial summary judgment pursuant to [Federal Rule of Civil Procedure 56](#) on Dunlop's section 2(b) defense, contending that Dunlop has not made a sufficient factual showing to demonstrate that the price discrimination was made in good faith to meet the equally low price of a competitor and that Dunlop had no procedures in place for verifying the existence of any alleged equally low price of a competitor. Pl.'s Mem. Supp. Mot. Part. Summ. Judg. at 4. "When a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial." *Id. at 250*. Because the question of whether the section 2(b) defense has been successfully asserted "demands [*1135](#) a 'fact-specific' inquiry," *Reserve Supply*, 971 F.2d at 43 (quoting *Gypsum*, 438 U.S. at 454-55), we now review the [**137](#) material facts presented by the parties in order to determine whether Dunlop has successfully demonstrated that there is a genuine issue for trial.

Dunlop contends that it has demonstrated "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Falls City*, 460 U.S. at 438 (citations omitted). In support of its contention, Dunlop provides deposition testimony and a supplementary affidavit from Patrick Logue, Dunlop's national sales manager from approximately 1987 to March 1993. Logue states that when distributors would report to him that they were being offered better discounts from Dunlop's competitors, Logue would attempt to obtain specific details about the offer directly from the distributor, but generally would accept the distributor's word that such discounts were in fact being offered. App. to Def.'s Rule 12(N) Resp., Tab 7, at 1288. Logue would consider his prior experience with the customer and his opinion of the customer's honesty and integrity in evaluating the customer's information. Def.'s Mem. Opp. Pl.'s Mot. Part. Summ. Judg. at 7. Where possible, [**138](#) Logue would refer to the competitors' price lists on file with Dunlop in an attempt to verify that the alleged competing discount was in line with the competitor's published prices. App. to Def.'s Rule 12(N) Resp., Tab 7, at 1288. These price lists, however, were sometimes outdated and, in any case, did not include the unofficial discounts frequently offered by tire manufacturers. *Id. at 1289*. Logue states that he was not aware of any other method of verification used to ensure that the discount he offered was necessary to meet competition. *Id.* After following these standard practices, Logue would determine whether meeting the competitive offer was consistent with Dunlop's business objectives. Def.'s Mem. Opp. Pl.'s Mot. Part. Summ. Judg. at 7. If so, he would seek to meet the competitive offer by offering additional discounts to these customers that he believed to

be equivalent to the competing offers. *Id.* at 8. Logue states that he believed that the failure to do so would result in a loss of business to Dunlop. *Id.*

Specifically, Logue states that he had conversations with Robert Nickell, president of Tucker/Rocky; Jeffrey Fox, president of Parts Unlimited; and James [**139] and Timothy Dodd, president and vice president, respectively, of Motorcycle Stuff, in which they discussed with him the prices and discounts that they were receiving from Dunlop's competitors that were more favorable than those received from Dunlop. App. to Def.'s Rule 12(N) Resp., Tab 1, PP 23-25, 29, 35-38, 48-50. In the case of Tucker/Rocky, Logue states that Nickell typically provided him with "some details about those programs and incentives," but generally refused to disclose further details when asked. *Id.* P 25.

Logue does not indicate, however, whether "some details" included specific numerical information as to prices or discounts offered by Dunlop's competitors. See *id.* In the case of Parts Unlimited, Logue states that "on several occasions when I tried to obtain specific information about specific competitive discounts from Mr. Fox, he informed me that it was not his practice to disclose such information between competitors. . . . It was not his practice to provide me with competitors' specific prices or all the other specific details about their discounts." *Id. P 37.*

Logue did, however, offer Parts Unlimited a year-long 5% discount when it opened a new warehouse [**140] in order "to compete aggressively for market share against Metzeler, Michelin and Bridgestone." Pl.'s Repl. Mem. Supp. Mot. Part. Summ. Judg. at 4 n.5. This is the sole instance in which Logue refers to specific competitors as the impetus for offering a discount on Dunlop tires. In the case of Motorcycle Stuff, Logue states that he "was not generally provided specific prices of competitors or various other details about . . . their discounts, despite my asking and re-asking about them." *Id. P 49.* In one instance, Logue granted Motorcycle Stuff a discount in July 1991, but "cannot now remember whether Mr. Dodd mentioned any specific competitors whose competition he was asking Dunlop to meet." Pl.'s Repl. [*1136] Mem. Supp. Mot. Part. Summ. Judg. at 3 n.4. Logue admits that there was one instance in which he met a price of \$ 30 offered by a competitor to Motorcycle Stuff, as opposed to a discount. App. to Def.'s Rule 12(N) Resp., Tab 15, at 1297. There is no other testimony where the specific level of Dunlop's competitor's discount was revealed or discussed. Furthermore, according to Logue, at no time did any of these three distributors threaten to terminate their business with Dunlop, but [**141] all three indicated that Dunlop's failure to provide additional discounts could result in a loss of sales of Dunlop tires through those distributors. *Id.* PP 26, 39, 51.

Dunlop also provides deposition testimony by Robert Nickell and Jeffrey Fox. Robert Nickell refers to "discussions [with Logue] to do with the fact that we were getting volume incentives from other tire manufacturers . . . I would have been negotiating to try to get similar type incentives or volume programs from Dunlop." App. to Def.'s Rule 12(N) Resp., Tab 7, at 413. He does not recall any specific occasions, however, on which Logue requested or received any documentation of the competing offers. *Id.* Similarly, Jeffrey Fox states that he and Logue discussed "on a continuous basis . . . what the water level is in this industry," but is unable to recall specific conversations or details. App. to Def.'s Rule 12(N) Resp., Tab 5, at 164. He does not refer to any instances in which he provided Logue with specific information about discounts from competitors. See *id.*

b. Analysis

Under the first prong of the *Falls City* test, Dunlop does not necessarily need to know the specific price offered by [**142] the competitor, but it must produce facts sufficient to enable a jury to determine the range of discount(s) offered by Dunlop's competitors, so that they can compare the discounts Dunlop offered to Tucker/Rocky and Parts Unlimited (but not Nichols) to "meet competition." Tucker/Rocky and Parts Unlimited would then need to testify at trial that they reported such a range of discounts. None of the defendants have offered that testimony; in fact, it is conspicuously absent. Failure to satisfy this element of the section 2(a) defense requires summary judgment in Nichols' favor.

Instead of concentrating on the objective requirements of a section 2(a) defense, both parties have focused on whether Dunlop demonstrated good faith in responding to a competitor's lower price, invoking the four *Gypsum*

factors.⁴² Dunlop relies on a number of cases in which courts have applied Gypsum's extremely flexible standard. See, e.g., *Falls City*, 460 U.S. at 439 ("In most situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in [**143] good faith to meet that price."); *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979) (holding that the defendant had successfully demonstrated good faith where the defendant had a long-standing business relationship with the customer and faced a credible threat of losing its account with the customer unless it made substantial concessions); *Reserve Supply*, 971 F.2d 37 (affirming district court's grant of summary judgment to the defendant manufacturer on the issue of good faith even though the ultimate discount did not meet, but rather beat, the competition, where the manufacturer had presented evidence of its long-term relationship with the customer, whom it believed to be trustworthy, and other customers had reported precisely the same discount from the manufacturer's competitor); *Cadigan v. Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974) (affirming summary judgment in favor of the defendant where the defendant relied on the buyer's uncorroborated reports that the defendant's competitors offered greater discounts and threatened to terminate business with the defendant if it failed to grant additional discounts); *Jones v. Borden Co.*, 430 F.2d 568 (5th Cir. 1970) (holding [**144] that a good faith defense was properly asserted where several buyers informed the manufacturer that the [*1137] manufacturer's price was uncompetitive and the manufacturer suffered substantial loss of sales prior to granting an additional discount); *Forster Mfg. Co. v. FTC*, 335 F.2d 47 (1st Cir. 1964) (noting that good faith defense does not require that the defendant know the identity of his competitor or have concrete proof of the amount of the competitive offer), cert. denied, 380 U.S. 906, 13 L. Ed. 2d 794, 85 S. Ct. 887 (1965); *McCaskill v. Texaco, Inc.*, 351 F. Supp. 1332 (S.D. Ala. 1972) (granting summary judgment to the defendant where customers provided the defendant with uncorroborated reports of greater discounts from the defendant's competitors), aff'd, 486 F.2d 1400 (5th Cir. 1973); *Krieger v. Texaco, Inc.*, 373 F. Supp. 108 (W.D.N.Y. 1972) (granting summary judgment to the defendant where a long-standing customer informed the defendant of competing offers and partially terminated business with the defendant until the defendant lowered its prices).

[**145] On the issue of good faith alone, Dunlop has relied heavily on Logue's subjective determinations, which were based on his business experience. Pat Logue testified at his deposition that Tucker/Rocky, Parts Unlimited and Motorcycle Stuff all informed him that Dunlop's discounts were uncompetitive and that Dunlop would lose sales as a result. Dunlop had long-standing business relationships with each of these distributors and believed them to be trustworthy. In addition, Logue states that it was his practice to request from the distributors documentation of these competing offers, even though such information was rarely, if ever, forthcoming. Logue also states that it was his practice to refer to the competitors' published price lists, if available to Dunlop, in order to confirm that the reported offers which no one now recalls were indeed in line with current market conditions. This evidence may have been sufficient to present a genuine issue of fact as to Dunlop's good faith under Gypsum's lenient standards for good faith, as applied by the Seventh Circuit in *Reserve Supply*, if other non-subjective facts about actual price ranges from competitors had been established.

The [**146] key issue in this case is whether Dunlop has successfully shown "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor," a necessary element to asserting a section 2(b) affirmative defense. *Staley*, 324 U.S. at 759-60. Nichols touches upon this issue tangentially in its assertion that Dunlop had no procedures in place for verifying the existence of any alleged equally low price of a competitor. See PI's Mem. Supp. Mot. Part. Summ. Judg. at 12-15. Dunlop, however, is unable to point to facts that would lead a reasonable and prudent person to believe that Dunlop was meeting the equally low price of a competitor and has not provided sufficient evidence that it was ever apprised or aware of what its competitors' prices or price levels were, as compared with Dunlop's prices. Furthermore, Dunlop, through the deposition testimony of Logue, Nickell and Jeffrey Fox, is unable to show that Logue (*i.e.*, Dunlop) ever knew, or even believed that he knew, the amount of the discounts offered by Dunlop's competitors. Absent such information, Dunlop had no way to determine [**147] that the lower price it granted to

⁴² Note that the "good faith" response is only one part of the test. The other part of the test regards the objective and verifiable evidence used by the manufacturer to come up with or calculate a discount level or range that would meet competition.

distributors who informed Logue that they were receiving discounts from competing manufacturers was "meeting" the equally low price of a competitor.

In each of the cases cited by Dunlop, the defendant had some knowledge of the nature of the offer presented by its competitor upon which to base its counter-offer. See [Great Atl. & Pac. Tea Co., 440 U.S. at 84](#) (noting that customer told the defendant that a \$ 50,000 improvement in its bid "would not be a drop in the bucket"); [Reserve Supply, 971 F.2d at 43](#) (noting that manufacturer's representative had contemporaneous notes of his conversation with customer indicating the *exact amount* of the competitor's discount); [Cadigan, 492 F.2d at 385-86](#) (stating that buyer told defendant the *exact amount* of the discounts offered by defendant's competitors); [Jones, 430 F.2d at 573](#) (noting that buyer told defendant that defendant's *price* was "generally five percent higher" than competitor's); [Forster, 335 F.2d at 54](#) (stating that several buyers informed [*1138] the defendant of the *exact nature of the competitive offer*, and the defendant conducted an independent investigation in order [**148] to confirm the offer); [McCaskill, 351 F. Supp. at 1337-38](#) (stating that buyers told defendant the *exact amount of the discounts offered by* defendant's competitors); [Krieger, 373 F. Supp. at 112](#) (noting that buyer told defendant the prices offered by defendant's competitors).

In addition, in [Glowacki v. Borden, 420 F. Supp. 348 \(N.D. Ill. 1976\)](#), a case we find analogous to the instant situation, Judge Grady denied the defendant's motion for summary judgment where the seller informed the defendant distributor that the defendants' prices were higher than those of a competitor, but the defendant failed to assert facts demonstrating that it had reason to believe that the prices it offered in response were no lower than those offered by its competitor. In this case, Dunlop offers no evidence that it was ever aware of even the approximate amount of the discounts offered by its competitors. Logue can recall no specific instance in which a distributor informed him of an exact amount of a competitor's discount, or even provided some sort of benchmark by which Logue could set a competitive discount on Dunlop tires. The competitors' price lists to which Logue referred were often [**149] outdated and did not include unofficial discounts, which were frequently offered by tire manufacturers such as Dunlop and its competitors.

Dunlop therefore has failed to demonstrate "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor," [Falls City, 460 U.S. at 438](#) (citations omitted). Because "the seller must show that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors," *id.* (quoting [Gypsum, 438 U.S. at 451](#)), to prevail, Dunlop has failed to produce sufficient factual support for the assertion of a section 2(b) defense, and has therefore failed to carry its burden on Nichols' Motion for Partial Summary Judgment. Its motion on the section 2(b) defense is, therefore, granted.

III. The State Law Claims

A. The Facts

The following facts undisputed facts relate to the state law claims alleged in plaintiff's Third Amended Complaint. In September 1992, Pat Logue, from Dunlop, told Ken Anderson, from Nichols, that the [**150] "prices" Nichols received from Dunlop were the same as those offered to other Dunlop distributors; that "there were no other prices." 12(N)(3)(b) Reply P 63. Logue also told Terry Baisley, from Nichols, that all distributors bought from the same price sheet. *Id.* In addition, there is no dispute that sometime in 1992 Logue told Nichols that it would not be terminated as a distributor. 12(N)(3)(b) P 64. At that time, Nichols operated as a Dunlop distributor under the 1992 Distributor Agreement, which ended December 31, 1992. *Id.* On December 28, 1992, Dunlop issued a Memorandum informing all of its distributors that it intended to terminate two or three of them in 1993. PX 16. Dunlop mailed a copy of this Memo with the 1993 Distributor Agreements to each of its distributors. Nichols received a copy of the Memo and the Agreement, which it signed on January 11, 1993. The 1993 Distributor Agreement contained a "termination" provision which provided that Dunlop had the option to terminate the agreement with five days notice. PX 1.

In addition to Dunlop's alleged misrepresentations, Nichols bases some of its state law claims upon its decision to open a second warehouse. Nichols began [**151] exploring the possibility of opening a second warehouse in Phoenix, Arizona, in March 1992. 12(N)(3)(b) P 66. Nichols leased the warehouse in September 1992. *Id.* Nichols

admits that Dunlop never asked for the Phoenix warehouse, nor did it require Nichols to obtain the warehouse as a condition of its right to distribute Dunlop tires under the relevant agreements. 12(M) P 419 The record also reflects that Nichols attempted to conceal its Phoenix plans. For instance, in September 1992, two days after Nichols leased the warehouse, Jack Jesse testified that in Las Vegas "we kind of told him [*1139] [Logue] with our laughter and humor" that Nichols was opening a Phoenix warehouse. 12(N)(3)(b) P 66. Nichols began to stock Dunlop tires in its Phoenix warehouse before it opened on January 14, 1993. *Id.* Dunlop attended the opening of the warehouse and agreed to ship Dunlop products there. *Id.* There is no evidence that Dunlop knew that Nichols had invested in the warehouse until it received Nichols' first purchase order. *Id.* The warehouse currently remains open. 12(N)(3)(b) P 67.

B. Claims Against Dunlop

1. Count VIII: Illinois Consumer Fraud Act

In Count VIII, plaintiff **[**152]** alleges that Dunlop intentionally misrepresented that: (1) Nichols received the same prices and discounts offered to the other distributors; and (2) Nichols would not be terminated as a Dunlop distributor, in violation of the Illinois Consumer Fraud Act ("Consumer Fraud Act" or "the Act"). [815 ILCS 505/1 et seq.](#) Compl. P 63.

HN17 [↑] Section 2 of the Act provides:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act,' approved August 5, 1965, in the conduct of any trade or commerce hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

[815 ILCS 505/2.](#)

Dunlop contends that Nichols is not a "consumer" under the Act **[**153]** and therefore lacks standing to bring this claim. In particular, Dunlop contends that the claim is defective because it does not involve Illinois trade or commerce or affect Illinois consumers. Nichols fails to specify allege an affect on trade or commerce in Illinois.

There is currently a split among both Illinois and federal district courts as to whether an effect upon Illinois consumers is required to properly bring a claim under the Act. [815 ILCS 505/2.](#)

Section 815 ILCS 501/(f) defines trade or commerce as:

the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, *and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State.* (emphasis added).

Some Illinois courts find that the Act is intended to "protect and benefit Illinois residents," [Lincoln Nat'l Life Ins. Co. v. Silver, 1991 U.S. Dist. LEXIS 13857 at *34-35 \(N.D. Ill. October 1, 1991\)](#). These courts construe the language "shall include any trade or commerce" to limit the reach of the Act's protection. See [Schwartz f**1541 v. Schaub, 818 F. Supp. 1214 \(1993\)](#) (Shadur, J.)(citing [Seaboard Seed Co. v. Bernis Co., Inc., 632 F. Supp. 1133 \(N.D. Ill. 1986\)](#)(Shadur, J.)). See also [Cange v. Stotler & Co., 913 F.2d 1204, 1210 \(7th Cir. 1990\)](#) (Act outlaws unfair methods of competition in the conduct of any trade or commerce which directly or indirectly affects the people of Illinois). For practical purposes, the holdings in these cases mean that a valid Consumer Fraud Act claim must include allegations of trade or commerce directly or indirectly affecting consumers in Illinois.

Conversely, some courts construe the language of the Act broadly and hold that the Act was not strictly intended to protect only Illinois consumers, but also to prohibit fraud in the conduct of any trade or commerce. See [Cirone-](#)

[Shadow v. Union Nissan of Waukegan, 1995 U.S. Dist. LEXIS 5232, No. 94 C 6723, 1995 WL 238680, *3 \(N.D. Ill. April 20, 1995\)](#) (Kocoras, J.)(holding that the statute, by its terms, does not limit its scope to the protection of Illinois residents); [Fry v. UAL Corp., 136 F.R.D. 626 \(N.D. Ill. 1991\)](#)(Holderman, J.)(same); [CPS Corp. v. Tkalitch, 1994 U.S. Dist. LEXIS 18320, 1994 WL 724834 \[*1140\] \(N.D. Ill. Dec. 22, 1994\)](#) (Pallmeyer, J.). [Duhl, 102 Ill. App. 3d \[**155\] at 495](#) (legislature clearly mandated that Illinois courts should liberally construe and broadly apply the Consumer fraud Act in order to eradicate all forms of deceptive and unfair business practices).

In the absence of a ruling by the Illinois Supreme Court on this issue, this Court must determine which construction of the Act to apply. This Court believes that [HN18](#) the Illinois Consumer Fraud Act, although intended to protect Illinois consumers, does not contain a geographic limitation. The Court also believes that the Illinois Supreme Court would construe the Act liberally to include all consumers whose allegations of fraud directly or indirectly affect trade or commerce in Illinois. The Seventh Circuit has held that if the Illinois Supreme Court were to face the question whether the Act requires injury to a particular consumer, or consumers generally, the Court would require a showing that a defendant's misconduct injured consumers generally." [First Comics, Inc. v. World Color Press, Inc., 884 F.2d 1033, 1040 \(7th Cir. 1989\)](#)(cited by [Cange, 913 F.2d at 1210](#)). Thus, both the definition of a consumer and the affect upon that consumer sweeps broadly and includes Nichols' general [\[*156\]](#) allegations of injury. Nichols is not only an Illinois corporation, but it does business in Illinois. Therefore, any injury to Nichols is either an injury or the functional equivalent of an injury to an Illinois consumer. Nichols therefore has standing to assert Count VIII.

The next question is whether a genuine issue of triable fact exists on the issues of price discrimination and termination. [HN19](#) To establish a claim under the Act, a plaintiff must allege and prove the following elements: (1) the misrepresentation or concealment of a material fact; (2) an intent by the defendant that the plaintiff rely on the misrepresentation or concealment; and (3) that the deception occurred in the course of conduct of any trade or commerce. [Celex, 877 F. Supp. at 1128; Siegel, 153 Ill. 2d at 542](#). In 1994, the Illinois Supreme Court also recognized that a plaintiff must show that the challenged conduct of the defendant proximately caused the damages alleged under the Act. See [Martin v. Heinold Commodities, Inc., 163 Ill. 2d 33, 58-59, 643 N.E.2d 734, 746-47, 205 Ill. Dec. 443 \(1994\)](#) (citing cases); [815 ILCS 505/2](#).

Nichols claims that Dunlop made two misrepresentations: First, sometime in 1992, Dunlop [\[*157\]](#) promised not to terminate Nichols (termination claim). Second, in September 1992, Pat Logue told Ken Anderson that Nichols was receiving Dunlop's best distributor prices and discounts on tires.

It is undisputed that Logue's statement about price was false (price discrimination claim). Therefore, the element of misrepresentation has been established. The question on price is whether this misrepresentation was material, and whether Dunlop intended for Nichols to rely on the misrepresentation. See [Ryan v. Wersi Elec. GMBH & Co., No. 94-2783, 1995 U.S. App. LEXIS 16048 \(7th Cir. June 28, 1995\)](#). With respect to materiality, there are genuine issues of material fact. A misrepresentation is material if the party to whom it was made would have acted differently had the party known the truth. *Id.* at *3. The determination of whether a misrepresentation is material involves factual determinations generally inappropriate for resolution on a summary judgment motion. [Foster v. Zeeko, 540 F.2d 1310, 694 \(7th Cir. 1976\)](#). Similarly, questions of intent are inappropriate for summary judgment. [Celex Group Inc. v. Executive Gallery, Inc., 877 F. Supp. 1114, 1128 \(N.D. Ill. 1995\)](#). In this [\[*158\]](#) case, the Court is unable to find, as a matter of law, that Nichols would not have brought this lawsuit sooner than it did had it known that Tucker/Rocky and Parts Unlimited were receiving discounts it did not receive. Moreover, genuine issues of fact regarding injury from price discrimination exist in this case which would preclude summary judgment on Count VIII.

With respect to termination, there are similar questions. The difference between the termination claim for fraud under the Act, and the claim alleged under common law, is that under common law reliance is an element; under the Act it is not. [Celex, 877 F. Supp. at 1128 \[*1141\]](#) (citing [Siegel v. Levy Organization Dev. Co., 153 Ill. 2d 534, 542, 180 Ill. Dec. 300, 607 N.E.2d 194 \(1992\)](#)). Whereas the Court can confidently say that Nichols could not reasonably rely, as a matter of law, on any promises not to terminate after January 11, 1993 (the date it signed the 1993 Distributor Agreement), we cannot say that Dunlop did not manifest an intent to deceive Nichols in 1992 when it made the alleged statements, nor can the Court say that these statements were not material misrepresentations, as those terms have been defined. *Ryan, supra* at *3. We therefore deny [\[*159\]](#) summary judgment, under both the theory of price and termination, on Count VIII.

2. Counts IX & X: Illinois Franchise Act Illinois

The key issue involved in resolving Counts IX and X is whether Nichols is a franchise under the Illinois Franchise Disclosure Act. 815 ILCS 705(3) (1)(1995) ("Franchise Act"). Whether Nichols has standing to bring a suit under the Franchise Act depends upon whether it satisfies the definition of a franchise.

A franchise is defined as a contract granting the right to engage in business and requiring the payment of a "franchise fee." [815 ILCS 705/3\(1\)](#). A franchise fee is any fee or charge (including payment for goods or services) that is required by the franchisor for the right to sell, resell, or distribute goods or services, and is paid directly or indirectly by the franchisee. [815 ILCS 705/3\(14\)](#).

A "franchise" thus requires a contract and a required fee. Nichols' contract with Dunlop did not characterize their relationship as a "franchise" nor did it require payment of a fee. 12(M) P 443 (the agreement did not require payment of a "franchise fee," "service fee," or "royalty fee"). Under Illinois law, a payment is not a "franchise fee," unless [\[**160\]](#) it fits precisely within the statutory definition. See [Account Services Corp. v. DAKCS Software Services, Inc., 208 Ill. App. 3d 392, 567 N.E.2d 381, 385, 153 Ill. Dec. 423 \(Ill. App. 1990\)](#). Nichols contends, however, that its maintenance of large inventories, its processing of customer returns, and its provision of its own products liability insurance (at Dunlop's request) operates as a franchise fee. This argument, however, is flawed because all the payments Nichols made to Dunlop pursuant to its distributorship agreement were *voluntary*. 12(M) P 443. Nichols was not required by Dunlop to maintain large inventories, nor can Dunlop's discount system be considered a "de facto" inventory requirement since Nichols admits it was able to sell off the inventory within six months without special promotions or discounts. Costs stemming from processing customer returns are simply costs associated with doing business and are, therefore, not a franchise fee. See [Bryant Corp. v. Outboard Marine Corp., 1994 U.S. Dist. LEXIS 18371, 1994 WL 745159 at *3 \(W.D. Wash. Sept. 29, 1994\)](#) (providing warranty administration work for the suppliers products does not constitute a franchise fee). Finally, Dunlop's request that Nichols provide products liability insurance [\[**161\]](#) is just that, a request, and not a requirement.

For these reasons, the Court finds that Nichols never paid a franchise fee to Dunlop and therefore has no standing to sue under the Act as "franchise." Summary judgment is therefore granted in favor of Dunlop as to Counts IX and X.

3. Count XI: Promissory Estoppel

The 1993 Distributorship Agreement signed by Nichols contained a clause which allowed Dunlop to terminate their relationship at any time, as long as Nichols was provided with five days notice. In Count XI, Nichols argues that, in spite of this provision, it reasonably and foreseeably relied upon Dunlop's promise, made in 1992, not to terminate Nichols as a Dunlop distributor. Nichols contends that this promise modified the contract and that Dunlop should be estopped from exercising the termination provision.

[HN20](#) [↑] In Illinois, the elements necessary to establish a claim of promissory estoppel are: (1) an unambiguous promise; (2) on which the promisee reasonably and justifiably relied; (3) which was foreseeable by the promisor; and (4) on which the promisee relied to his detriment. See [M. T. Bank Co. v. Milton Bradley Co., 945 F.2d 1404, 1408 \(7th Cir. 1991\)](#). New [\[**162\]](#) York law, which applies to the [\[*1142\]](#) contract claims in this case, applies the same elements. [Gellerman v. Deet, 164 Misc. 2d 715, 625 N.Y.S.2d 831, 832 \(1995\)](#) (citing [James King & Son, Inc. v. De Santis Constr., 97 Misc. 2d 1063, 413 N.Y.S.2d 78, 81 \(1977\)](#)).

Even if this Court were to accept Nichols' claim that Dunlop's oral promises modified the written distributor contract, Nichols' promissory estoppel claim must fail. Sometime in 1993, Logue promised Nichols that their relationship would not be terminated. At most, this promise could affect only the 1992 Distributor Agreement. In January 1993, Nichols signed a new Distributor Agreement. This agreement contained the termination clause with no mention of the oral promises. It also contained an integration clause. The 1993 contract supersedes the 1992 contract, whether the 1992 contract was modified or not. Further, there is no indication that the 1993 contract was similarly modified. Therefore, if Nichols' reliance on Dunlop's promises was actionable at all under the doctrine of promissory estoppel, it was actionable only under the 1992 contract. Dunlop terminated Nichols in 1993 pursuant to their 1993

agreement. Plaintiff's promissory estoppel claim must fail and [**163] summary judgment is granted for Dunlop on Count XI.

4. Count XII: Equitable Estoppel

Nichols also claims that Dunlop is equitably estopped from exercising its right to terminate Nichols under the terms of the 1993 contract because Dunlop made material misrepresentations with respect to price and termination. Unlike promissory estoppel, the doctrine of equitable estoppel is based upon an intended misrepresentation or the concealment of a material fact rather than a promise. *Derby Meadows Util. v. Inter-Continental*, 202 Ill. App. 3d 345, 559 N.E.2d 986, 995, 147 Ill. Dec. 646 (Ill. App. 1990). HN21[¹⁶] The elements necessary to assert a claim for equitable estoppel are: (1) words or conduct consisting of misrepresentations or concealment of material facts; (2) defendant must have actual or implied knowledge at the time the representations are made that they are untrue; (3) plaintiff does not know that the representations are untrue at the time that they are made; (4) the party estopped must intend or expect that his conduct or representations will be acted on by the plaintiff; (5) plaintiff relies on the representations in such a manner that he would be prejudiced if the party making the representations is allowed to deny [**164] the truth thereof. See *Derby Meadows Util.*, 559 N.E.2d at 995.

Nichols' equitable estoppel claim fails because Nichols cannot prove, as a matter of law, that it relied on Dunlop's 1992 statement that Nichols would not be terminated. Nichols cannot prove reasonable reliance because it read the December 28, 1992, Memorandum from Dunlop announcing the imminent termination of two or three distributors and signed the 1993 Distributorship Agreement which contained an express at will provision and an integration clause. Nichols also cannot prove reliance, as a matter of law, after it signed the 1993 contract because Dunlop made no additional assurances to Nichols regarding termination after January 11, 1993. The Court therefore grants summary judgment in favor of Dunlop on Count XII.

5. Count XIII: Equitable Recoupment

The equitable recoupment doctrine applies when a contract is terminated without just cause before the terminated party has the opportunity to recoup its losses. *Cox v. Doctor's Associates, Inc.*, 245 Ill. App. 3d 116, 200 (Ill. App. 1993). The doctrine "is designed to remedy the inequity which arises after a manufacturer requires a distributor to make a sizable [**165] investment in furtherance of the distributorship, terminates the relationship without just cause and leaves the distributor with substantial unrecovered expenses." *Id. at 200*. In some courts, the doctrine is cognizable only after it is shown that the contract in question is terminable at will. *Ag-Chem Equip. Co. v. Hahn, Inc.*, 480 F.2d 482 (8th Cir. 1973).

Nichols alleges that it made sizable investments, including leasing, improving and stocking the Phoenix warehouse to promote Dunlop goods in reliance on Dunlop's assurances that it would not be terminated. [*1143] Compl. P 81. Nichols also claims that Dunlop terminated its agreement with Nichols without just cause, leaving Nichols with substantial unrecouped investments. Compl. P 82.

Nichols equitable recoupment claim fails because there is no evidence that Dunlop "required" Nichols to establish a business in Phoenix. Rather, Nichols contends that Dunlop merely "encouraged" such action. Compl. P 15. Hence, Dunlop is not responsible for Nichols investments due to its termination as a Dunlop distributor, since Dunlop did not require Nichols to make such investments. Dunlop's Motion for Summary Judgment with respect to Count XIII [**166] is, therefore, granted.

6. Count XIV: Breach of Contract/Good Faith & Fair Dealing

Both Illinois and New York courts have declared that every contract implies good faith and fair dealing between its parties. *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 961 F.2d 1052, 1056 (2nd Cir. 1992); *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1443 (7th Cir. 1992). However, the covenant is not an independent source of contractual duties; rather, it "guides the construction of explicit terms in the agreement." *Beraha*, 956 F.2d at 1443. When a term in the contract grants a wide range of discretion, the party must "exercise that discretion reasonably, with proper motive and in a manner consistent with the reasonable expectations of the parties." *Id. at 1444* (citing

Dayan v. McDonald's Corp., 125 Ill. App. 3d 972, 466 N.E.2d 958, 972, 81 Ill. Dec. 156 (Ill. App. 1984)(emphasis in original).

On its face, this covenant appears to be at odds with the concept of at will contracts, which allow a party to exercise its discretion to terminate a contractual relationship for virtually any reason. However, since an at will contract expressly allows each party to terminate at any time, the parties have no **[**167]** reasonable expectation that it will be terminated only for cause. Beraha, 956 F.2d at 1444-1445. Therefore, the covenant is not breached when one party terminates an at will contract because the party's actions were in accord with the other's reasonable expectations. *Id.*

In this case, the 1993 contract entered into between Nichols and Dunlop stated: "In addition to the termination rights in paragraph 2, this agreement may be terminated with or without cause by either party upon five days' written notice addressed to the other party by mail or wire." 12(M) P 407. Nichols claims that Dunlop breached the implied duty of good faith and fair dealing when it terminated Nichols because it exercised the discretion provided by this clause in bad faith. However, since the contract expressly provided that Dunlop could terminate its distributor relationship with Nichols for any reason, Nichols could not have had a reasonable expectation that Dunlop would only terminate it for cause. Nichols' claim for breach of the implied covenant of good faith and fair dealing fails because Nichols does not allege that Dunlop exercised its discretion in any manner inconsistent with the reasonable expectations **[**168]** of the parties. Therefore, Dunlop's motion for summary judgment of Count XIV is granted.

7. Count XV: Fraud

HN22 [+] The elements of a cause of action for common law fraudulent misrepresentation are: (1) false statement of material fact; (2) known or believed to be false by the party stating it; (3) intent to induce the other party to act; (4) justifiable reliance by the other party on the misrepresentation; and (5) damage to the other party resulting from such reliance. Heider v. Leewards Creative Crafts, Inc., 245 Ill. App. 3d 258, 613 N.E.2d 805, 811, 184 Ill. Dec. 488 (Ill. App. 1993)(citing Soules v. General Motors Corp., 79 Ill. 2d 282, 402 N.E.2d 599, 601, 37 Ill. Dec. 597 (Ill. 1980)). Nichols bases its fraud claim against Dunlop upon two alleged misrepresentations. First, Nichols points to Logue's statement, made in 1992, that Nichols would not be considered for termination as a distributor. Second, Nichols alleges that Dunlop falsely represented that Nichols was getting the same discounts from Dunlop that other distributors were receiving.

With respect to Logue's 1992 statement regarding the possibility that Nichols would **[*1144]** be terminated as a distributor, the Court has already determined that the statement was superseded by the 1993 contract. **[**169]** After Nichols signed this contract on January 11, 1993, Nichols reliance on Logue's statement was unjustified. See Merex A.G. v. Fairchild Weston Systems, Inc., 810 F. Supp. 1356, 1372 (S.D.N.Y. 1993)(no justified reliance when oral promise contradicts an admitted, subsequent written executory agreement). Therefore, Nichols cannot recover for the damages it is seeking that result from events that occurred after the 1993 contract was signed, which primarily arise from the opening of the Phoenix warehouse. During that time, the 1993 contract was controlling.

There is a possibility that Nichols could have been damaged by its reliance on Logue's statement during the time between when the statement was made and when Nichols signed the 1993 contract. The reasonableness of a party's reliance, however, is determined at the time that the party acts upon the misrepresentation. Duran v. Leslie Oldsmobile Inc., 229 Ill. App. 3d 1032, 594 N.E.2d 1355, 1363, 171 Ill. Dec. 835 (Ill. App. 1992). A plaintiff's subsequent opportunity to become informed of the true facts contradicting a misrepresentation cannot render prior reliance unreasonable. *Id.* Thus, Nichols still must prove that its reliance during this time was reasonable.

[170]** Dunlop asserts that Nichols cannot prove that its reliance upon Logue's statements was reasonable because it was a promise of future conduct. As a general rule, promises of future conduct are not actionable in fraud. Wilsmann v. Stearns, 664 F. Supp. 386, 391 (N.D. Ill. 1987)(citing Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 371 N.E.2d 634, 641, 13 Ill. Dec. 699 (1977)). However, an exception to this rule exists when the false representation is part of a "scheme or device" used to accomplish the fraud. Wilsmann, 664 F. Supp. at 391.

913 F. Supp. 1088, *1144 1995 U.S. Dist. LEXIS 13278, **170

Nichols has alleged that the promise was part of a scheme. Whether or not a scheme actually existed in this case is a question of fact for the jury. See [Stamakis Indus., Inc. v. King, 520 N.E.2d 770 \(Ill. App. 1987\)](#).

In addition, Nichols must prove that its reliance upon Dunlop's statements regarding price was reasonable, and that Dunlop intended to deceive Nichols with these statements. This creates genuine issues of material fact that the jury must decide. See [Foster v. Zeeko, 540 F.2d 1310, 1319 \(7th Cir. 1976\)](#); [Fitzsimmons v. Best, 528 F.2d 692, 694 \(7th Cir. 1976\)](#); [Fisher v. Samuels, 691 F. Supp. 63, 69 \(N.D. Ill. 1988\)](#)(questions of reasonableness [**171] and intent involve factual determinations and are generally inappropriate for resolution on a motion for summary judgment). There are also genuine issues of material fact with respect to the evidence of damages, as expressed in the portion of this opinion dealing with the Robinson-Patman Act claims. Therefore, this Court will deny Dunlop's motion for summary judgment as to Count XV. However, Nichols' claim for fraud regarding the termination will be limited to the alleged damages which preceded the signing of the 1993 contract.

C. Claims against Tucker/Rocky and Parts Unlimited

1. Count XVI: Tortious Interference with Contract

[HN23](#) The elements that a plaintiff must allege and prove for a valid claim of tortious interference with contract include: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) that the defendant was aware of the contractual relationship; (3) an intentional and unjustified inducement of a breach of the contract which causes a subsequent breach by the third party; and (4) damages. [A-Abar Elec. Supply Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1404 \(7th Cir.\)](#) (quoting [Mannion v. Stallings & Co., 204 Ill. App. 3d 179, 561 \(**172\) N.E.2d 1134, 1139, 149 Ill. Dec. 438 \(Ill. App. 1990\)](#)), cert. denied, 113 S. Ct. 194 (1992). Nichols claims that Tucker/Rocky and Parts Unlimited unjustifiably induced Dunlop to breach its contract with Nichols.

Generally, if a contract at will is terminated, no breach has occurred. Therefore, most courts do not recognize tortious interference with contract claims that are based upon a contract at will. See [Prudential Ins. Co. of Am. v. Sipula, 776 F.2d 157, 162 \(7th Cir. 1985\)](#); [Belden v. InterNorth, Inc., 90 Ill. App. 3d 547, 413 N.E.2d 98, 102, 45 Ill. Dec. 765 \(Ill. App. 1980\)](#); [Restatement \(Second\) of Torts § 768 cmt. i](#) (1977); cf. [Prudential Ins. Co. of Am. v. Van Matre, 158 Ill. App. 3d 298, 511 N.E.2d 740, 744, 110 Ill. Dec. 563 \(Ill. App. 1987\)](#)(at will nature of contract does not relieve alleged tort-feasor of liability). In this case, the Court has already determined that Dunlop's termination of Nichols was not a breach of contract because the contract was terminable at will. Since there was no breach, Nichols' claim must fail.

In addition, Tucker/Rocky's and Parts Unlimited's actions are protected by the "competitor's privilege." Lawful competition is a justifiable reason for interfering with contractual relations. See [Von Matre, 511 N.E.2d at \(**173\) 744, Getschow v. Commonwealth Edison Co., 111 Ill. App. 3d 522, 444 N.E.2d 579, 584, 67 Ill. Dec. 343 \(1982\)](#). According the Restatement (Second) of Torts:

A competitor who intentionally causes a third party not to enter into a contract with another or not to continue a contract terminable at will does not interfere improperly if: (1) the relation concerns a matter involved in the competition between the actor and the other; and (2) the actor does not employ wrongful means; and (3) his action does not create or continue an unlawful restraint on trade; and (4) when a business relationship affords the parties only the hope of benefits, the parties must allow for the rights of others.

[Restatement \(Second\) of Torts § 768.](#)⁴³ We have already determined, in the section of this opinion dealing with Count I, that Tucker/Rocky and Parts Unlimited did not participate in conduct restraining trade. Therefore, these defendants' actions are protected by the competitor's privilege. Consequently, summary judgment is granted for Tucker/Rocky and Parts Unlimited as to Count XVI.

[**174] 2. Count XVII: Tortious Interference with Prospective Economic Advantage

⁴³ This section of the Restatement was adopted by Illinois courts in [Galinski v. Kessler, 134 Ill. App. 3d 602, 480 N.E.2d 1176, 1182, 89 Ill. Dec. 433 \(Ill. App. 1985\)](#).

HN24 [+] The elements of a claim for tortious interference with prospective economic advantage are: (1) the plaintiff's reasonable expectation of entering into a valid business relationship; (2) the defendant's purposeful interference and destruction of this legitimate expectancy;⁴⁴ and (3) that the defendant's actions caused harm to the plaintiff. *A-Abart Elec. Supply Inc., 956 F.2d at 1404* (quoting *Kurtz v. Illinois Nat'l Bank, 179 Ill. App. 3d 719, 534 N.E.2d 1007, 1012, 128 Ill. Dec. 562 (Ill. App. 1989)*). In cases where:

an individual with a prospective business relationship has a mere expectancy of future economic gain; a party to a contract has a certain and enforceable expectation of receiving the benefits of the contract. When a business relationship affords the parties no enforceable expectations, but only the hope of . . . benefits, the parties must allow for the rights of others. They therefore have no cause of action against a bona fide competitor unless the circumstances indicate unfair competition, that is, an unprivileged interference with prospective advantage.

A-Abart Elec. Supply, 956 F.2d at 1404-1405 [**175] (quoting *Belden Corp. v. InterNorth, Inc., 90 Ill. App. 3d 547, 413 N.E.2d 98, 102, 45 Ill. Dec. 765 (Ill. App. 1980)*).

There is no unfair competition in this case, given the Court's rulings on the antitrust claims. Nichols argues that Tucker/Rocky and Parts Unlimited interfered with its valid expectancies to continue its business dealings with Dunlop; to continue to sell Dunlop tires to its customers; to enter into a distributorship relationship with Metzeler; and, as to only Tucker/Rocky, to continue its relationship with its top salespeople, who were hired away from Tucker/Rocky [*1146] after Dunlop terminated Nichols. However, Nichols' claim fails because the competitor's [**176] privilege applies not only to claims of tortious interference with contract, but also to claims of tortious interference with prospective economic advantage. *id.* Tucker/Rocky and Parts Unlimited, and Nichols are all players in a very competitive market. The Court has determined that Tucker/Rocky and Parts Unlimited did not employ improper competitive strategies. Therefore, summary judgement is granted in favor of Tucker/Rocky and Parts Unlimited on Count XVII.

IV. Dunlop's Motion to Strike Nichols' Jury Demand

Given the rulings contained in this opinion, this Court hereby denies defendant Dunlop's Motion to Strike Nichols' jury demand. Dunlop's motion is entirely based on form language which is contained in the distribution agreement which existed between Dunlop and Nichols. This proviso was contained in paragraph two entitled "Terms" and stated as follows:

TERMS: The due date and terms of each shipment are indicated on the invoice and on the monthly statement of account. If the Distributor fails to make payment in accordance therewith, or if there is a change in the Distributor's credit worthiness, Dunlop may modify such due dates and terms, or refuse to make [**177] further shipments except for cash and the payment in full or the balance due in the Distributor's account, and if Dunlop so decides in such case, may terminate this Agreement without **ADVANCE NOTICE**. Distributor agrees to pay to [sic] the collection costs of any obligation due from it to Dunlop including attorney's fees, court costs and collection agency fees. In any dispute arising between Distributor and Dunlop, Distributor hereby waives trial by jury in any action, proceeding, counterclaim, whether at law or equity against Distributor or Dunlop, or in any manner whatsoever connected with this Agreement or the performance by Distributor under this Agreement. In the event that the balance shown owing on the Distributor's Statement of Account with Dunlop remains unpaid, in whole or in part, for 30 days or more after the due date shown on said statement and Dunlop institutes a court collection action against Distributor, Distributor agrees to additionally pay interest to Dunlop from said due date. The interest shall be paid at the maximum legal rate which may be charged by commercial banks in Distributor's jurisdiction on payable-on-demand business loans, equal in amount to the [**178] past due sum, made by express contract to borrowers similar to the Distributor.

⁴⁴ The interference must take the form of unfair competition such as fraud, intimidation, or disparagement. *A-Abart Elec. Supply Inc., 956 F.2d at 1404-1405*. This standard is more stringent than the one used in tortious interference with contract claims because a party's interest in prospective economic advantage receives less protection than its enforceable contract rights. *Id.*

Based on this language Dunlop asserts that Nichols has waived its fundamental constitutional right to a trial by jury. [HN25](#) Although the [Seventh Amendment of the United States Constitution](#) guarantees the right to a jury trial in civil cases, this right may be waived. [Stewart v. RCA Corp., 790 F.2d 624, 630 \(7th Cir. 1986\); Bonfield v. AAMCO Transmissions, Inc., 717 F. Supp. 589, 594 \(N.D. Ill. 1989\)](#). However, such a waiver must be made knowingly and voluntarily. [In re Reggie Packing Co., 671 F. Supp. 571, 573 \(N.D. Ill. 1987\)](#). Indeed, "as the right of jury trial is fundamental, courts indulge in every reasonable presumption against waiver." [Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S. Ct. 809, 812, 81 L. Ed. 1177 \(1987\)](#). The factors to consider in determining whether a contractual waiver of the right to jury trial was entered into knowingly and voluntarily include: (1) the parties' negotiations concerning the waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity [\[**179\]](#) to review the agreement. [Heller Financial, Inc. v. Finch-Bayless Equip. Co., 1990 U.S. Dist. LEXIS 6523, No. 90 C 1672, 1990 WL 77500 \(N.D. Ill. May 31, 1990\), reconsideration denied, 1990 U.S. Dist. LEXIS 8729, 1990 WL 103232 \(N.D. Ill. July 17, 1990\); Bonfield, 717 F. Supp. at 595-96; In re Reggie, 671 F. Supp. at 573-74.](#) The Court expressly finds that interpreting this clause to be a waiver of an important constitutional right would be unjust under the circumstances of this case.

First, the Court notes that the claims that will proceed to trial in this case are limited to claims that do not directly arise or have their basis in the Distributor Agreement. Instead, [\[*1147\]](#) this case will proceed to trial on Nichols' claims against Dunlop involving violations of the Robinson-Patman Act, the Illinois Consumer Fraud Act and common law fraud. Each of these claims are ultimately based on both statutory and common law and cannot be based on the parties' Distributor Agreement. Thus, despite the somewhat broad wording of the purported jury waiver, the Court finds that this jury waiver should be strictly construed against Dunlop, the drafter of the agreement, and that it does not apply to the claims remaining this case.

Moreover, even [\[**180\]](#) if this Court were to find that the alleged jury waiver applies to the claims remaining in this case, this Court would still fail to enforce the waiver because there is no evidence that this alleged waiver was ever the subject of any negotiations between the parties. Given the absence of any evidence of such negotiations this Court finds that the alleged jury waiver was inconspicuous and therefore invalid. [Whirlpool Financial Corp. v. Sevaux, 866 F. Supp. 1102, 1106 \(N.D. Ill. 1994\); Heller Financial, Inc. v. Finch-Bayless Equipment Co., 1990 U.S. Dist. LEXIS 6523, No. 90 C 1672, 1990 WL 77500 \(N.D. Ill. May 31, 1990\)](#). Finally, all of the circumstances surrounding the execution of the alleged jury waiver have led the Court to conclude that it was not undertaken in a knowing, voluntary and intelligent manner--elements which are necessary conditions for the waiver of any important constitutional right.

V. CONCLUSION

For the reasons given above, the Court directs the Clerk of the Court to enter summary judgment in favor of Dunlop, Tucker/Rocky, and Parts Unlimited and against Nichols on Counts I-VI (1-6) of the Third Amended Complaint. The Court further directs the Clerk to enter judgment in favor [\[**181\]](#) of Dunlop and against Nichols on Counts IX through XIV (9-14), and in favor of Tucker/Rocky and Parts Unlimited and against Nichols on Counts VII, XVI, and XVII (7, 16, 17) of the Third Amended Complaint. Finally, the Court directs the Clerk to enter partial summary judgment in favor of Nichols and against Dunlop on Dunlop's section 2(b) affirmative defense to Count VII of the Third Amended Complaint.

The Court denies Dunlop's motion for summary judgment with respect to Counts VII, VIII and XV (7, 8, and 15) of the Third Amended Complaint. The Court also denies Dunlop's Motion to Strike Nichols' jury demand.

ENTER:

/s/ Ruben Castillo

United States District Judge

September 5, 1995

Minute Order Form

Enter Memorandum Opinion and Order. Pursuant to Fed. R. Civ. P. 60(a), this Court hereby amends its Memorandum Opinion and Order dated August 10, 1995, to correct clerical mistakes contained therein. These corrections do not, in any way, alter the substantive rulings made in the opinion; they merely serve to correct typographical and other nonsubstantive oversights which the Court's subsequent review has revealed.

End of Document



Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.

United States District Court for the Northern District of California

September 6, 1995, Decided ; September 7, 1995, FILED

NO. C93 20613 RMW

Reporter

1995 U.S. Dist. LEXIS 21032 *; 1995-2 Trade Cas. (CCH) P71,254

SANTA CRUZ MEDICAL CLINIC, a professional partnership, and DERJJAN ASSOCIATES, INC., a corporation, Plaintiffs, v. DOMINICAN SANTA CRUZ HOSPITAL, a nonprofit corporation, Defendants.

Prior History: [Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp., 1994 U.S. Dist. LEXIS 21740 \(N.D. Cal., Oct. 25, 1994\)](#)

Disposition: [*1] Plaintiffs' summary judgment and partial summary judgment motions denied. Defendant's partial summary judgment motion on the tying and channeling claims granted and the motion on the exclusive dealing and concomitant state law claims denied.

Core Terms

patients, prices, inpatient, Declaration, geographic, outpatient, merger, hospital service, summary judgment, relevant market, partial summary judgment, Acquisition, concentration, substitutes, market power, Sherman Act, outmigration, plaintiffs', Clinic, facilities, surgical, antitrust, providers, contends, counters, cardiac, cluster, percent, genuine issue of material fact, tying arrangement

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Weight & Sufficiency

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 > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

[HN1](#) [] **Summary Judgment, Opposing Materials**

Summary judgment is proper when the pleadings, depositions, answer 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\(c\)](#). There is a genuine issue of material fact only when there is sufficient evidence such that a reasonable juror could find for the party opposing the motion. Entry of summary judgment is mandated against a party if, after adequate time for discovery and upon motion, the party 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 court, however, must draw all justifiable inferences in favor of the nonmoving parties, including questions of credibility and of the weight to be accorded particular evidence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Mergers & Acquisitions Law > Mergers > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

[HN2\[Conspiracy to Monopolize, Sherman Act](#)

Section 7 of the Clayton Act, [15 U.S.C.S. §18](#), prohibits acquisitions whose effect may be substantially to lessen competition or to tend to create a monopoly. Section 7 forbids mergers that are likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level. A merger with such effects would also violate [section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), which proscribes acquisitions which constitute a contract, combination or conspiracy in restraint of trade. Once the market structure in an industry reaches monopoly or near-monopoly status, [section 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#) applies.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN3 [down] Relevant Market, Geographic Market Definition

An analysis of an alleged § 7 of the Clayton Act, [15 U.S.C.S. §18](#), violation requires a determination of the relevant line of commerce, or product market, in which competition is to be allegedly lessened and the appropriate geographic market. Once the product and geographic markets have been defined, the next steps are to identify the firms in competition with the merging firms, compare pre- and post-merger concentration in the market and analyze other factors bearing on the likelihood of market power and collusion.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN4 [down] Per Se Rule Tests, Manifestly Anticompetitive Effects

Whether particular concerted conduct unreasonably restrains competition in violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), is determined under a "rule of reason" analysis, which is a case-by-case study in which the fact finder weighs all of the circumstances of a case. In analyzing a rule of reason claim under [§ 1](#) of the Sherman Act, a plaintiff must initially prove: (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; and (3) which actually injures competition. Proving injury to competition in a rule of reason case requires a claimant to prove the relevant market and to show the effects upon competition within that market.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN5 [down] Scope, Monopolization Offenses

The offense of monopolization under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. Monopoly power is the power to control prices or exclude competition in the relevant market, and exists whenever prices can be raised above the competitive market levels. In order to determine whether a defendant possesses monopoly power, the trier of fact must first determine the relevant market. Market power may be demonstrated by direct evidence of the injurious exercise of market power or circumstantially. To demonstrate

market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and to expansion.

[Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities](#)

[Mergers & Acquisitions Law > Antitrust > Horizontal Mergers](#)

[Mergers & Acquisitions Law > Merger Guidelines](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition](#)

[Mergers & Acquisitions Law > Antitrust > General Overview](#)

[HN6](#)[] Antitrust Actions, Facilities

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. For antitrust purposes, defining the product market involves the identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.

[Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities](#)

[Mergers & Acquisitions Law > Antitrust > Market Definition](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition](#)

[Mergers & Acquisitions Law > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers](#)

[HN7](#)[] Antitrust Actions, Facilities

The cluster market concept is to date the uniform approach to product market definition of the hospital merger case law. The relevant product market for hospitals has been described almost uniformly by the courts and enforcement agencies as the "cluster of services" focused on inpatient care.

[Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

[HN8](#)[] Relevant Market, Product Market Definition

Summary judgment is disfavored in antitrust cases. The process of defining the relevant market is a factual question that depends on the particular characteristics of the industry involved. The product market definition can be determined only after a factual inquiry into the commercial realities faced by consumers.

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview](#)

HN9 **Regulated Practices, Market Definition**

The geographic market of a product is determined by an examination of the geographic area in which competing companies sell their products. The geographic area is the region in which the seller operates, and to which the purchaser can practicably turn for supplies. Factors such as transportation costs, the availability of alternative suppliers, industry recognition, commercial realities of the industry and consumer convenience and preference are also relevant. The farther apart two hospitals are located, the more probable it is that they belong to different geographical markets. To determine relevant geographic market, a pragmatic factual approach, not a formal legalistic one should be enlisted. The relevant section of the country should correspond to the commercial realities of the industry and should be economically significant.

[Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

HN10 **Summary Judgment, Evidentiary Considerations**

The court may not weigh evidence or judge witness credibility on summary judgment.

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Mergers & Acquisitions Law > General Overview](#)

HN11 **Regulated Practices, Market Definition**

In order to quantify market concentration, it is necessary to calculate market shares, assess the degree of concentration in the market after the merger, and examine the extent to which the merger increased the level of concentration. In hospital cases, two measures of hospital market share are typically used: (1) hospital share of total inpatient discharges and (2) hospital share of beds.

[Antitrust & Trade Law > Sherman Act > Scope > General Overview](#)

[Antitrust & Trade Law > Clayton 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 > Clayton Act](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations](#)

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [L] Sherman Act, Scope

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different, or tied, product, or at least agrees that he will not purchase that product from any other supplier. Tying arrangements have long been considered per se unlawful under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#). To prove an illegal tie, a party must show: (1) a tying of two distinct products or services; (2) sufficient economic power in the tying product market to affect the tied market; and (3) an effect on a not insubstantial amount of commerce in the tied market. Some modicum of involuntariness or coercion is an essential to the existence of a per se illegal tie-in. In addition, the seller of the tying product must have an economic interest in the tied product for there to be per se illegality. When these prerequisites are met, tying arrangements are illegal without any requirement of unreasonable competitive effect.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

[**HN13**](#) [L] Antitrust & Trade Law, Sherman Act

An express refusal to sell the tying product without the tied product is the basis for an illegal tying arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > Trials > Entry of Judgments

Antitrust & Trade Law > Clayton Act > General Overview

[**HN14**](#) [L] Antitrust & Trade Law, Sherman Act

Separate availability will not preclude antitrust liability where a defendant has established its pricing in such a way that the only viable economic option is to purchase the tying and tied products in a single package. Antitrust liability may be predicated on pricing policies in which the only viable economic option is to purchase the tying product with the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

[**HN15**](#) [L] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

An exclusive dealing contract involves a commitment by a buyer to deal only with a particular seller. Exclusive dealing arrangements are unlawful only if they violate the rule of reason.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Contract Interpretation > General Overview

[**HN16**](#) [L] Contract Interpretation, Parol Evidence

A contract must be interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. The meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such meanings is admissible.

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Judges: RONALD M. WHYTE, United States District Judge

Opinion by: RONALD M. WHYTE

Opinion

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Santa Cruz Medical Clinic and Derjan Associates, Inc.'s ("Santa Cruz") motion for summary judgment/partial summary judgment and defendant Dominican Santa Cruz Hospital's ("Dominican") cross-motion for partial summary judgment came on for hearing on September 1, 1995. The court has read the moving and responding papers and heard the oral arguments of counsel. For the reasons set forth below, [*2] the court denies plaintiffs' motion for partial summary judgment and grants in part and denies in part defendant's cross-motion for partial summary judgment.

I. Background

This case involves antitrust claims arising from Dominican's acquisition of AMI Community Hospital of Santa Cruz ("Community"). Plaintiff Santa Cruz is a partnership of physicians and other medical practitioners, and plaintiff Derjan is a corporation that manages and provides some non-physician personnel services to the Clinic. Dominican is operated by a non-profit religious corporation of the same name, based in Santa Cruz. In March 1990, Dominican acquired Community. Within 90 days of the acquisition, Dominican ceased to operate Community as a general acute care hospital. It is now used for the provision of sub-acute health care services such as rehabilitation.

Plaintiffs filed suit against defendants for violation of [section 1](#) and [section 2](#) of the Sherman Act ([15 U.S.C. §§ 1 and 2](#)) and section 7 of the Clayton Act ([15 U.S.C. § 18](#)). Plaintiffs seek injunctive relief under Section 16 of the Clayton Act ([25 U.S.C. § 26](#)) for Dominican's alleged post-acquisition exclusionary conduct. Plaintiffs also [*3] allege violations of California state law (sections 16720 and 17200 of the Business & Professions Code.)

On August 3, 1995 plaintiffs moved for summary judgment/partial summary judgment against Dominican on the grounds that Dominican's acquisition of Community violated: (1) section 7 of the Clayton Act; (2) [section 1](#) of the Sherman Act; and (3) [section 2](#) of the Sherman Act. In the alternative, plaintiffs request partial summary judgment on the basis that (1) the relevant product market for assessing the Acquisition is the cluster of services known as acute care inpatient hospital services and (2) that the relevant geographic market for assessing the Acquisition is the area described in Exhibit 2 to the Declaration of Glenn A. Melnick ("Melnick") consisting of all zip codes in Santa Cruz County. Plaintiffs also request, in the alternative, summary adjudication on the grounds that the Acquisition is likely to create or enhance Dominican's market power or facilitate its exercise. In addition, plaintiffs request, in the

alternative, partial summary judgment on the grounds that Dominican, by acquiring Community, willfully acquired monopoly power.

On August 4, 1995, defendant moved for [*4] partial summary judgment on plaintiffs' claims of: (1) attempted tying in connection with Secure Horizons (Complaint P24(f)); (2) channeling (or "monopoly leveraging") of patients to allegedly affiliated companies (Complaint 24(d)); and (3) threatened exclusive dealing with respect to TakeCare's cardiac patients (Complaint P24(b)). Defendant correctly contends that, if these claims fail to survive summary judgment, plaintiffs' state law claims must also fail.

Plaintiffs have agreed to the dismissal of their channeling claim in light of the law in this circuit on "monopoly leveraging" set forth in [Alaska Airlines Inc. v. United Airlines, Inc., 948 F.2d 536, 546-49 \(9th Cir. 1991\)](#) that requires plaintiffs to demonstrate monopoly power in the ancillary services market.

B. Legal Standards

1. Summary Judgment

HN1[] Summary judgment is proper when the "pleadings, depositions, answer 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\(c\)](#). There is a "genuine" issue of material fact only when there [*5] is sufficient evidence such that a reasonable juror could find for the party opposing the motion. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). Entry of summary judgment is mandated against a party if, after adequate time for discovery and upon motion, the party 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 court, however, must draw all justifiable inferences in favor of the nonmoving parties, including questions of credibility and of the weight to be accorded particular evidence. [Masson v. New Yorker Magazine, 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 \(1991\)](#).

2. Merger Analysis

The focal point in analyzing mergers is **HN2**[] section 7 of the Clayton Act, which prohibits "acquisition[s]" whose "effect... may be substantially to lessen competition or to tend to create a monopoly." "The current understanding of section 7 is that it forbids mergers that are likely to 'hurt consumers, as by making [*6] it easier for the firms in the market to collude, expressly or tacitly, and thereby force price [sic] above or farther above the competitive level.'" [United States v. Rockford Memorial Corp., 898 F.2d 1278, 1282-83 \(7th Cir. 1990\)](#) cert. denied 498 U.S. 920, 112 L. Ed. 2d 249, 111 S. Ct. 295 (1990) quoting [Hospital Corporation of America v. FTC, 807 F.2d 1381, 1386 \(7th Cir. 1986\)](#) cert. denied 481 U.S. 1038, 95 L. Ed. 2d 815, 107 S. Ct. 1975 (1987). A merger with such effects would also violate [section 1](#) of the Sherman Act, which proscribes acquisitions which constitute a "contract, combination...or conspiracy...in restraint of trade." [898 F.2d at 1283](#). Once the market structure in an industry reaches monopoly or near-monopoly status, [section 2](#) of the Sherman Act applies. [Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 \(1911\)](#).

HN3[] An analysis of an alleged section 7 violation requires a determination of the relevant "line of commerce," or product market, in which competition is to be allegedly lessened and the appropriate geographic market. [United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1258 \(N.D.Ill. 1989\)](#) aff'd [898 F.2d 1278 \(7th Cir. 1990\)](#). Once the product and geographic markets have been defined, the next steps are to identify the firms in competition with the merging firms, compare pre- and post-merger concentration in the market and analyze other factors bearing on the likelihood of market power and collusion. [United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362, 10 L. Ed. 2d 915, 83 S. Ct. 1715 \(1963\)](#).

HN4[] Whether particular concerted conduct unreasonably restrains competition in violation of [Section 1](#) of the Sherman Act is determined under a "rule of reason" analysis, which is a case-by-case study in which "the fact finder weighs all of the circumstances of a case." [Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). The Supreme Court has identified certain discrete categories of restraints so manifestly anticompetitive in nature that they are illegal per se, dispensing with the need for case-by-case evaluation. [Id. at 50](#). Acquisitions are not a per se violation. In analyzing a rule of reason claim under [section 1](#) of the Sherman Act, plaintiff must initially prove: (1) an agreement or conspiracy among two or more persons or distinct [*8] business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition. [Oitz v. Saint Peter's Community Hosp., 861 F.2d 1440, 1445 \(9th Cir. 1988\)](#). Proving injury to competition in a rule of reason case requires a claimant to prove the relevant market and to show the effects upon competition within that market. [Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1300 \(9th Cir. 1982\)](#) cert. denied 459 U.S. 1009 at 1009-1010, 74 L. Ed. 2d 400, 103 S. Ct. 364 (1982).

HN5[] The offense of monopolization under [Section 2](#) of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#). Monopoly power is the "power to control prices or exclude competition...(footnote omitted)" in the relevant market, [United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 S. \[*9\] Ct. 994 \(1956\)](#), and exists whenever prices can be raised above the competitive market levels. [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n. 46, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). In order to determine whether defendant possesses monopoly power, the trier of fact must first determine the relevant market. [Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1392 \(9th Cir. 1984\)](#), cert. denied 469 U.S. 990 (1984). A determination of the relevant market typically requires an inquiry into the nature of the product and the geographical area of effective competition. [Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 364 \(9th Cir. 1988\)](#), cert. denied, 488 U.S. 870, 102 L. Ed. 2d 149, 109 S. Ct. 180 (1988). Market power may be demonstrated by direct evidence of the injurious exercise of market power or circumstantially. [Rebel Oil v. Atlantic Richfield Co., 51 F.3d 1421, 1434 \(9th Cir. 1995.\)](#) To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry [*10] and to expansion. *Id.*

C. Analysis

1. Product Market

In [Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#), the Supreme Court described the process of product market definition:

HN6[] 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. (footnote omitted).

"The process of defining the 'outer boundaries' of a product market remains more of an art than science, despite the increasing economic sophistication reflected in the documents such as the 1992 Horizontal Merger Guidelines..., the 1993 and 1994 Statements of Enforcement Policy relating to health care...the 1993 Horizontal Guidelines...and the economic formulas...." B. Reeves and L. Blumkin, *Acquisitions and Mergers*, 890 Practising Law Institute/Corporations 473 (1995).¹ "For antitrust purposes, defining the product market involves the identification

¹ The Department of Justice has set forth merger guidelines to assist the courts in establishing unifying principles. The merger guidelines examine the effect of a small, hypothetical, nontransitory price increase above prevailing or future price levels to determine relevant product market. (1992 Merger Guidelines § 1.11.) Generally the test employed is a five percent price

of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business. [*11] (citations omitted)." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1489 (9th Cir. 1991).²

[*12] Plaintiffs contend that the relevant product market is "general acute care inpatient services." (Declaration of Glenn A. Melnick, P3). Plaintiffs argue that the cluster of inpatient hospital services is a unique product and that non-hospital services are not substitutes. Plaintiffs' expert opines that outpatient services and long-term care services such as the care provided by nursing homes, behavioral medicine programs, home health agencies, and rehabilitation programs are not a reasonable substitute for inpatient hospital service. Plaintiffs rely on the declaration of Dr. Walter Alexander ("Alexander"), a member of the medical staff at Dominican, who states that "certain hospital services, affecting a substantial number of patients now and for the foreseeable future, can only be provided on an inpatient basis" and "he is unaware of any physician or hospital that treats" on an outpatient basis "non-surgical conditions [such] as heart attacks, acute strokes, diabetic acidosis and sepsis as well as illnesses and conditions requiring major surgical procedures such as those within the abdomen and thorax, to include heart, lung and intestinal surgery as well as major joint replacement [*13] and correction of peripheral vascular diseases." (Alexander Declaration P4).

Defendant contends that the relevant product market is "both inpatient and outpatient hospital services, including at least general acute care hospitals, all types of outpatient surgery centers, birthing centers and home health care companies." (Declaration of Thomas R. McCarthy, P19). Defendant's expert opines that outpatient hospital services, surgery centers, birthing centers and home health care companies can substitute for hospital services either through a direct supply response or by supply-side substitution.³ Defendant also relies on the declaration of Dr. Robert B. Keet ("Keet"), a practicing internist with privileges at Dominican, who states that "many conditions that previously required admission to a hospital can now be treated on an outpatient basis or in other alternative settings such as skilled nursing facilities." Keet points to "ophthalmic procedures" and procedures that utilize "endoscopic technology...such as gallbladder removals." (Keet Declaration, P3).

[*14] The reported hospital merger decisions employ an approach to product market definition that relies on the Supreme Court's "cluster of services" paradigm. The first cluster market was defined by the Court in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356-57, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963). In contrast with all previous product markets defined by the Court, the goods and services clustered into the commercial banking

increase that would persist for the foreseeable future. If buyers would switch to another product and defeat the price increase, that other product is added to the market. In this regard, the "market" is defined "solely on demand substitution factors i.e., possible consumer responses." (1992 Merger Guidelines § 1.0.) The merger guidelines are not binding on the courts. *FTC v. PPG Industries, Inc.*, 255 U.S. App. D.C. 69, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986)(the Department of Justice merger guidelines "are by no means to be considered binding on the court").

² One commentator argues that the difficulty in measuring market definition in health care cases is attributable to the structure and nature of the health care market and the dynamic changes that the health care market today is undergoing. He believes that the third-party payor system has made market definition difficult because it has eliminated both seller and buyer responsiveness to price, that the health care market lumps together a wide variety of services, some of which compete with each other and some of which do not, and that market definition must be based on historical data, but that, given the dynamic changes taking place in health care, the historical data often is not probative. Sylvia H. Walbolt, William McD. Miller III, Jeffrey Cross, Phillip A. Proger, *Problems of Access to Health Facilities and Equipment-New Competition for Limited Resources*, 55 Antitrust L.J. 599, 613-621 (1986)(comments by panelist Phillip A. Proger).

³ In assessing a possible product market of general acute-care inpatient hospital services, the focus is on the substitutability of alternative services that are competitive with inpatient care. According to economists, this question is divided into two inquiries. The first is to ask whether the consumers of inpatient care can easily turn to other services in lieu of inpatient care. If they can, then there is "demand substitution"; i.e., "inpatient care" is too narrow a definition, and the relevant product definition should embrace the substitute service. The second inquiry is whether suppliers of services other than inpatient care could easily modify their activities to provide inpatient care. If so, then there is "supply substitution" and these suppliers should also be counted as competitors in the market because, even if they do not currently supply the relevant product, they would if the price rose slightly. William J. Lynch, *Antitrust Analysis and Hospital Certificate-of-Need Policy*, The Antitrust Bulletin 61, 63-64 (Spring 1987).

market in *Philadelphia National Bank* were neither demand nor supply substitutes.⁴ [HNT](#)[↑] The cluster market concept is to date the uniform approach to product market definition of the hospital merger case law. See Gloria J. Bazzoli, David Marx Jr., Richard J. Arnold, Larry Manheim, *Federal Antitrust Merger Enforcement Standards: A Good Fit for the Hospital Industry*, 20 J. Health Pol. Pol'y & L. 137 (1995); J.R. Baker *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51(2) Law and Contemp. Probs. 93 (1989). The relevant product market for hospitals has been described almost uniformly by the courts and enforcement agencies in previous merger cases as the "cluster of services" focused on inpatient [*15] care. [American Medicorp, Inc v. Humana Inc.](#), 445 F. Supp. 589, 605 (E.D. Pa. 1977) ("short term acute care hospital services"); [United States v. Rockford Memorial Corp.](#), 898 F.2d 1278 (7th Cir. 1990) cert. denied 498 U.S. 920, 112 L. Ed. 2d 249, 111 S. Ct. 295 (1990) ("provision of inpatient services by acute-care hospitals"); [Hospital Corp. of America v. FTC](#), 807 F.2d 1381 (7th Cir. 1986) cert. denied 481 U.S. 1038, 95 L. Ed. 2d 815, 107 S. Ct. 1975 (1987); ("general acute care hospital services," excluding outpatient substitutes for the individual services comprising the cluster); [FTC v. University Health, Inc.](#), 938 F.2d 1206 (11th Cir. 1991) ("in-patient services by acute-care hospitals"). An exception to this product market definition occurred in [United States v. Carilion Health System](#), 707 F. Supp. 840 (W.D. Va. 1989) aff'd without op., 892 F.2d 1042 (4th Cir. 1989), a case in which the court defined the market more expansively to include outpatient services. However, the Fourth Circuit affirmed the district court's decision in an unpublished opinion.

[*16] In [Rockford, supra, 898 F.2d at 1284](#), Judge Posner considered and rejected defendant's argument that the market should include non-hospital providers:

The defendants point out correctly that a growing number of services provided by acute-care hospitals are also available from nonhospital providers. But the force of the point eludes us...For many services provided by acute-care hospitals, there is no competition from other sorts of providers. If you need a kidney transplant, or a mastectomy, or if you have a stroke or a heart attack or a gunshot wound, you will go (or be taken) to an acute-care hospital for inpatient treatment. The fact that for other services you have a choice between inpatient care at such a hospital and outpatient care elsewhere places no check on the prices of the services we have listed, for their prices are not linked to the prices of services that are not substitutes or complements... The defendants do not argue for the broader market on the basis of substitutability in supply—that is, the ability of a provider of outpatient services to switch to inpatient services should the price of the latter rise as a result of collusive pricing, making such [*17] services more profitable.

In the instant case, defendant acknowledges that it cannot justify a broader market on the basis of demand substitutability, but defendant does argue for a broader market based on substitutability in supply. Defendant's expert opines that while a patient may not be willing to trade a hernia operation for a hysterectomy, a hospital can easily shift its facilities from the production of one service to the other. He also submits that outpatient surgery facilities and physician's offices provide direct competition through supply-side substitution for a large share of a general acute care hospital's business and that alternative providers have significantly affected the economic behavior of general acute care hospitals and will continue to do so. (McCarthy Declaration P14). He points to Dominican and Community's addition of cardiovascular surgery in the late-1980s as evidence of the ease with which a general acute care hospital can add or subtract service lines. He also states that five outpatient facilities in the Santa Cruz-Watsonville area are now capable of performing many of the services which even recently were only performed as inpatient surgery and [*18] that California has no binding Certificate-of-Need law, which generally requires significant regulatory approval before entry into new services is allowed. (McCarthy Declaration P14).

⁴ In [United States v. Grinnell Corp.](#), 384 U.S. 563, 573, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966), decided under Sherman Act § 2, the Court defined a cluster market of central station protective services. *Grinnell* established that the cluster approach is not limited to market definition under the Clayton Act, the statute enforced in *Philadelphia National Bank*. The protective service clusters in *Grinnell* are supply substitutes although they are not demand substitutes. Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51 SPG Law & Contemp. Probs. 93, n. 159 (1989).

HN8[] Summary judgment is disfavored in antitrust cases. *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1171 (9th Cir. 1988). The process of defining the relevant market is a factual question that depends on the particular characteristics of the industry involved. *Oahu Gas, supra*, 838 F.2d at 363. The product market definition "can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) citing *Grinnell, supra*, 384 U.S. at 572.

Plaintiffs recognize that the reported hospital merger decisions do not resolve the issue of product market on summary judgment. However, they rely on the court's statement in *Rebel Oil, supra*, 51 F.3d at 1436 that summary judgment is proper in the face of conflicting expert declarations when economic factors dictate a particular result or when undisputed record facts contradict or render an expert opinion [*19] unreasonable. In urging the court to grant partial summary judgment in the instant case, plaintiffs echo Judge Posner's reasoning. They contend that economic factors dictate the conclusion that there is a core of inpatient hospital services that are not reasonably interchangeable. (Alexander Decl. P4).

Defendant does not dispute the existence of such a core of services that can only be performed on an inpatient basis. However, defendant contends that this fact is not dispositive of the issue of relevant product market. Defendant argues that inpatient services that are unique to a hospital cannot be viewed as a discrete entity but are, in fact, inseparable from other surgical procedures because hospital services are not priced on a malady by malady basis but in broadly inclusive categories such as "medical/surgical", "ICU/CCU" and "TCU." (Supplemental Declaration of McCarthy listing rates of compensation) Therefore, defendant contends, the entire category of medical/surgical is impacted by the supply-side substitution of surgical procedures that are now increasingly performed at free-standing surgical clinics or other outpatient facilities. As a result, defendant argues, the fact that [*20] a patient has a "choice between inpatient care at...a hospital and outpatient care elsewhere [for many surgical procedures] places...a check on the prices of...[inpatient services because] their prices are...linked to the prices of services that are not substitutes or complements." *Rockford, supra*, 898 F.2d at 1278.

Defendant also contends that the court should not rely on hospital merger decisions from the last decade because these cases fail to take into account the dramatic technological advances in the field of medicine in the last ten years. Defendant bolsters its argument with American Hospital Association statistics that show an increase in outpatient surgery from 24 percent to 55.3 percent between 1983 and 1993. (McCarthy Decl. P151). Therefore, defendant argues, outpatient facilities and surgi-centers have the actual and potential ability to deprive hospitals of significant levels of business and, because of the historical pricing structure of hospitals in the area, these facilities can have a dramatic impact on the price of all services in the medical/surgical category.

Eight years ago, a commentator wrote that "most economists who study the hospital industry consider [*21] inpatient acute care the product definition most relevant for analysis of hospital competition..." and that the exclusion of freestanding ambulatory surgical centers and similar facilities are "a practical concession to lack of data and an empirical judgment that such facilities are currently of minor quantitative importance." W. Link, *Antitrust Analysis and Hospital Certificate-of-Need Policy*, 32 Antitrust Bulletin 63, 75 (Spring 1987). Today, there is evidence that the technological landscape has changed dramatically in the medical field. There is a genuine issue of material fact as to whether services that can be performed at a hospital or an alternative facility place a check on the prices of the core of inpatient services, whether the price of inpatient services at Dominican is linked to the price of services that are not substitutes and whether the supply-side substitution of alternative providers has a significant effect on the economic behavior of hospitals.

2. Geographic Market

HN9[] The geographic market of a product is determined by an examination of the geographic area in which competing companies sell their products. The geographic area is the region in which [*22] "the seller operates, and to which the purchaser can practicably turn for supplies.' (citations omitted)." *Philadelphia Nat'l Bank, supra*, 374 U.S. 321, 359 (1963). Factors such as transportation costs, the availability of alternative suppliers, industry

recognition, commercial realities of the industry and consumer convenience and preference are also relevant.⁵ [*23] The farther apart two hospitals are located, the more probable it is that they belong to different geographical markets. *Rockford, supra* 898 F.2d at 1285 ("People want to be hospitalized near their families and homes, in hospitals in which their own--local--doctors have hospital privileges.") To determine relevant geographic market, "a pragmatic factual approach," not a "formal legalistic one" should be enlisted. *Brown Shoe, supra*, 370 U.S. at 336. The relevant "section of the country" should "correspond to the commercial realities" (footnote omitted) of the industry and should be "economically significant." *Id. at 336-37.*⁶

Plaintiffs argue that the relevant geographic market is a market consisting of all zip codes in Santa Cruz. Defendant contends that the relevant geographic market includes Santa Cruz County, Santa Clara County and Northern Monterey County.

Plaintiffs rely on a study of patient origin and destination data known as the Elzinga-Hogarty test and on testimony from local purchasers. In a hospital context, the Elzinga-Hogarty test focuses on patient travel. *U.S. v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1266 (N.D.Ill. 1989) aff'd. 898 F.2d 1278 (7th Cir. 1990). The test consists of two separate measurements - Lifo and Lofi. A Lofi or "little out from the inside" statistic signifies the percentage of patients in an area's hospitals who reside in the area (rather than outside the area). A substantial number of patients from outside the area that travel into an area for hospitalization could act as a check on the exercise of market power by hospitals inside the area. A "Lifo" or "little in from out" statistic signifies the percentage of hospital patients from a particular area who remain in that area for hospital services. This statistic is useful in determining whether patients in a particular area make substantial use of hospitals outside the area. If so, that implies that hospitals outside the area could act as a check on the exercise of market power inside the area. Ideally, an area should be defined where few patients leave an area and few patients enter an area to obtain hospital services. "In other words, the Lofi and Lifo figures should ideally yield at least percentages of 90% or greater." *U.S. v. Rockford Memorial Corp.*, 717 F. Supp. 1251, [*25] 1267 (N.D.Ill. 1989) aff'd. 898 F.2d 1278 (7th Cir. 1990). Lifo and Lofi figures equal to, or greater than, 90% represent a "strong" market while a 75% figure represents a "weak" market. *Id.* The authors of the Elzinga-Hogarty test conclude that the "strong" standard is most appropriate for identification of the relevant market. Elzinga & Hogarty, "The Problems of Geographic Market Delineation Revisited: the Case of Coal," 23 *Antitrust Bulletin* 1 (1978).

Plaintiffs' expert applied the Elzinga-Hogarty test to the proposed Santa Cruz County market. His results show a LOFI percentage of 92.9% (percentage of patients in the market who reside in the market) and a Lifo percentage of 84.8% (percentage of patients who reside in the market and receive their care in the market). The results indicate approximately 16% outmigration. Plaintiffs contend that these figures indicate a highly self-contained market with almost no immigration and relatively little outmigration. Defendant cites the fact that approximately one in six patients have chosen to obtain their hospital care in one of the many hospitals located in Santa Clara County or North Monterey County as proof that plaintiffs' [*26] proposed market is too small.

⁵ According to one commentator, the most important factor limiting the geographic scope of markets for the services offered by hospitals is the unwillingness of patients to patronize hospitals far from their residences. The longer the distance a patient must travel, the farther his or her friends and relatives must also travel to visit him and the farther his or her physicians must travel. Long distances between home and hospital are disfavored because a patient may be forced by physical affiliations to switch doctors if he or she wishes to select a distant hospital. Physician preferences and affiliation are likely to count strongly in the patient's decision. Third party payers may also create financial incentives for patients to favor hospitals in a narrow geographic area. Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51-SPG Law & Contemp. Probs. 93 (Spring 1988).

⁶ The Merger Guidelines hypothesize a "small but significant and nontransitory" price increase imposed by a hypothetical monopolist of the relevant product at the location of the merging parties. (1992 Horizontal Merger Guidelines § 1.21.) If enough buyers would switch to alternative sellers, so as to make the hypothetical price increase unprofitable, the location of the alternate sellers would be included in the geographic market. The process is designed to identify a region within which such a hypothetical monopolist could profitably impose at least a "small but significant and nontransitory" increase in price.

"The...underlying question is whether the other hospitals that the immigrating patients turn to can effectively discipline or constrain the merging hospitals by offering ... [16%] of the defendant's inpatient base an alternative. If this is the case, then the...market is too small." *U.S. v. Rockford Memorial Corp., 717 F. Supp. 1251, 1264 (N.D.III. 1989)* aff'd *898 F.2d 1278 (7th Cir. 1990)*. Although the Elzinga-Hogarty test is a useful tool "for eliminating certain geographic areas from consideration as relevant markets...[it is not] an infallible guide to resolve the market..." *U.S. v. Rockford Memorial Corp., 717 F. Supp. 1251, 1271-1272 (N.D.III. 1989)* aff'd *898 F.2d 1278 (7th Cir. 1990)*. Other evidence is also relevant. If the reason for outmigration is "lack of adequate hospitals in the surrounding area, the smaller Lifo-Lofi cutoff (i.e. less than 90%) may be appropriate since the very reason the patients are immigrating into an area proves that the surrounding firms are not relevant competition with the ability to constrain an exercise of market power by the market participants." *Id. at 1272.*⁷

[*27] Plaintiffs contend that hospitals outside Santa Cruz County should be excluded from the market because some of the outmigration is attributable to tertiary⁸ or specialty care not available in Santa Cruz or reasons of perceived quality. Defendant counters that almost all of the outmigration is for care that is available locally. As discussed below, the parties offer conflicting evidence as to whether the outmigration is attributable to services not available at Dominican and to perceived quality differences.

Plaintiffs rely on the deposition testimony of John [*28] Petersdorf, Dominican's Chief Financial Officer, to support their contention that some of the outmigration is attributable to specialist care or reasons of perceived quality. (Petersdorf Depo., 27:12-14; 233:24-235:8; Puntillo Decl. Exhibit A.) In addition, plaintiffs' expert opines that the dispersal of outmigration among many hospitals, including the more distant specialized teaching hospitals of Stanford Medical Center and University of California at San Francisco, suggests substantial outmigration for specialty care not available at Dominican or for reasons of perceived quality. (Melnick Decl. P11.) Defendant counters with statistical evidence that ninety-seven percent of the outmigration is for treatment that was available locally and that over 11 percent of the patients residing in Santa Cruz County chose to use four Santa Clara County hospitals: Stanford, Kaiser-Santa Clara, Good Samaritan and O'Connor Hospital. (McCarthy Decl., PP2-28.)

Plaintiffs argue that it is extremely unlikely that patients will switch to hospitals outside the Santa Cruz area in sufficient numbers in response to price because there is little or no overlap in the medical staff of Dominican and the staff [*29] of hospitals outside the relevant market. Defendant counters that 12 percent of physicians (41 in number) who have privileges at Dominican also have privileges at hospitals in Santa Clara or Monterey County. (McNaughton's Decl. P3, Exhibit B, Dominican's Answers to Interrogatories Nos. 8-18). Defendant also relies on the affidavit of Dr. Keet. Dr. Keet states that the fact that "most physicians who hold privileges at Dominican Hospital do not also hold privileges at other hospitals does not prevent physicians from referring patients to those hospitals" because "in many, if not most, instances the physicians who diagnose an illness or condition for which inpatient care is an alternative is [sic] a general practitioner or internist who is not the surgeon or other specialist providing inpatient care." (Keet Declaration P4).

⁷ One commentator explains why the Elzinga Hogarty percentage should be adjusted for overinclusiveness:

Markets based on patient flows [the Elzinga Hogarty approach] may overstate the geographic markets relevant to antitrust merger analysis when the product market includes hospital services that are not perfect substitutes. In this case, those patients with strong preferences for obtaining services at distant hospitals such as many tertiary care patients... [may be willing to travel] even if most patients are unwilling to travel. A hospital market that includes these distant institutions will therefore encompass a region larger than the smallest region in which a hospital cartel could successfully collude....Distant hospitals can be excluded from the market even if a fraction of patients from the market obtain care there, so long as those patients traveling long distances obtain quantitatively different services from the services available nearby.

Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51-ZPG Law & Contemp. Probs. 93 (Spring 1988).

⁸ Tertiary care involves complex and specialized treatments, such as complex surgery or the treatment of severe illnesses. It is usually provided by teaching hospitals. Sylvia H. Walbolt, William McD. Miller III, Jeffrey Cross, Phillip A. Proger, *Problems of Access to Health Facilities and Equipment-New Competition for Limited Resources*, 55 Antitrust L.J. 599, 616 (1986)(comments by panelist Phillip A. Proger) 55 Antitrust L.J. 599, 616 (1986).

Plaintiffs also offer the deposition testimony and declarations of representatives of large purchasers of inpatient services in Santa Cruz County who state that they have no alternative but to offer a health plan that includes Dominican to employees.⁹ Gregory Dougherty, Senior Vice President of Human Resources for Santa Cruz Operations, Incorporated testified [*30] at deposition:

Q. ...And if Dominican Hospital were to...increase its prices by five percent, what would SCO's options be?

A. Ultimately we'd have to comply with the price increase.

Q. What if they raise their prices by 10 percent, would your answer be the same?

A. Probably.

Q. Fifteen percent?

A. Probably the same.

(Dougherty Depo. 16:12-22, Puntillo Decl. Exhibit D.)

Defendant counters with a declaration by Norman Lezin ("Lezin"), Chairman of Salz Leathers Corporation, that "in the event that Dominican Hospital were to impose a significant non-transitory price increase upon us, we could and would take steps to shift our employees from Dominican Hospital to Watsonville Hospital, Santa Clara County Hospitals, Salinas Valley Hospital, and/or Natividad Medical [*31] Center." (Lezin Decl. P4). The steps he identifies are: (1) encouraging employees to use those alternatives; (2) providing more liberal co-payments or deductibles; or (3) omitting Dominican Hospital as an option to employers. *Id.* Plaintiffs contend that this declaration is not "worth a grain of salt" even on summary judgment because Lezin is on the Board of Directors of Dominican. However, this argument fails because [HN10](#)[↑] the court may not weigh evidence or judge witness credibility on summary judgment. [*Syufy Enterprises v. American Multicinema Inc.*, 793 F.2d 990, 994 \(9th Cir. 1986\)](#) cert. denied 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987). Plaintiffs also contend that the declaration does not create a triable issue of fact because Lezin does not dispute the evidence that Dominican has the power to raise prices, and he does not define a significant non-transitory price increase. This argument also does not dictate that the declaration be ignored. Although Lezin does not dispute the testimony that Dominican has the power to raise prices, he does testify that he would shift to a hospital outside the area in response to a price increase by Dominican. The fact that he [*32] fails to define a significant non-transitory price increase goes to the weight of the evidence.

Defendant also points to Santa Cruz Medical Clinic's own policy of referring cardiac patients to Good Samaritan Hospital rather than Dominican, the higher-priced provider, and to deposition testimony by Barbara Lovero ("Lovero"), TakeCare's Contract Manager, that TakeCare required Santa Cruz County members to get non-emergency cardiac care at Good Samaritan Hospital as evidence that purchasers have the ability to meet a price increase with incentives that will push subscribers to alternative providers. (Lovero Depo., 141:19-24, Ulmer Declaration ("Q. Where did TakeCare members from Santa Cruz County get their non-emergency cardiac inpatient care during that three-year period [1990-1993]?....A. They had to go to Good Sam.")) Plaintiffs counter that defendant's argument commits the *Cellophane* fallacy.¹⁰ Plaintiffs contend that Dominican has already exercised

⁹ See eg. Dougherty Depo. 14:13-17, Puntillo Decl., Exhibit D ("Q. For the Santa Cruz employees and their dependents...would you offer a plan that would not include Dominican Santa Cruz Hospital? A. I cannot conceive of that.)

¹⁰ The *Cellophane* Fallacy is described in a law review article:

The prevailing price for cellophane [in [*United States v. E.I. du Pont Nemours & Co.*, 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#)]¹¹ was arguably supracompetitive and...at that price consumers regarded a number of other flexible wrapping materials as good substitutes for cellophane...If consumers regarded these other products as good substitutes for cellophane at the prevailing, supra-competitive prices, then they probably would not have regarded them as good substitutes if cellophane were priced competitively. By charging a supra-competitive price, then, du Pont (the producer of cellophane) had already exercised most or all of its market power, i.e., it had raised the price of cellophane until other flexible wrapping materials were regarded as good substitutes.... The Court, then mistakenly interpreted du Pont's inability to raise its prices further as an indication that du Pont had no market power at all, rather than as an indication that du Pont had already exhausted its market power.

Gene C. Schaerr, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 Yale Law Journal 670, 677-78 n. 52 (1984-85).

monopoly power and raised its prices so that Santa Cruz Medical Center and TakeCare regard a Santa Clara hospital, Good Samaritan, as a good substitute. According to plaintiffs, a market that includes Santa Clara County would [*33] be overinclusive and lead to an understatement of Dominican's market power. However, plaintiffs' argument is unavailing in the summary judgment context because there is a genuine issue of material fact as to its factual premise: Dominican's supracompetitive pricing. Dominican's expert opines that there is no evidence of monopoly pricing by Dominican and that Dominican has consistently been within the mainstream of hospital pricing, both before and after the Acquisition. He bases his opinion on price and profitability studies of a group of approximately 75 urban and small urban hospitals in central and northern California. (McCarthy Declaration PP 69-75.) In contrast, Lovero states that Dominican's rates are generally higher than the rates that TakeCare was able to negotiate with other comparable hospitals in the San Francisco/San Jose metropolitan area in 1993. (Lovero Declaration P5). Moreover, the court cannot examine the performance of the entire market until it has defined a geographic market. In the instant case, there is a genuine issue of material fact as to the definition of the relevant geographic market.

[*34] Defendant also contends that the court must assess commercial realities such as the trading connections and the actual distance between Santa Cruz and Santa Clara Counties. Defendant's expert opines that there are connections between San Jose and Santa Cruz on the basis that *inter alia* "the travel distance is well within reach despite the topographic feature of a mountain range between Santa Cruz and San Jose [because it] is 31 miles between the cities and only 45 miles to Stanford University Medical Center...[and] Good Samaritan and O'Connor are less than 30 miles away...." and "as evidence that the distance is not too great, 17,693 residents of Santa Cruz County commute to their jobs in Santa Clara County." (McCarthy Declaration, P43) Although geographic proximity is a relevant factor, the distance itself is not dispositive of the issue because of the effect that the "topographic feature of a mountain range" and the commute may have on the perception of Santa Cruz residents in the context of health care.

The court finds that there are genuine issues of material fact as to the relevant geographic market.

4. Concentration

HN11 [↑] In order to quantify market concentration, [*35] it is necessary to calculate market shares, assess the degree of concentration in the market after the merger and examine the extent to which the merger increased the level of concentration. In hospital cases, two measures of hospital market share are typically used: (1) hospital share of total inpatient discharges and (2) hospital share of beds. A statistical index, the Herfindahl-Hirschmann Index ("HHI") is then used to calculate market concentration. The HHI is calculated by squaring the market share of each firm in the market and then adding the squares. A market is highly concentrated if the HHI is above 1800, moderately concentrated if it is between 1000 and 1800, and unconcentrated if it is below 1000.¹¹ Other factors are

Schaerr argues that a monopoly price enlarges the geographic market because it expands the geographic area from which other sellers of the product and its substitutes could profitably transport their goods to customers of the merging firms. He explains:

Suppose, for example, that widgets are produced in cities A,B, and C, and are sold for \$ 1 in all three cities. Suppose also that it costs \$ 1 to transport one widget from any city to any other, and that at prevailing prices it is not profitable for any producer to sell outside the city in which its widget plant is located. In this situation, each city is a separate geographical market. Now suppose that producers in city B form a cartel and in so doing raise the prices of widgets to \$ 2.01. This makes it profitable for producers in cities A and C to transport widgets to city B, so that any market including producers in city B also includes producers in cities A and C. If producers in city B now merge, the relevant market will include cities A and C as well as city B.

Schaerr, *Cellophane Fallacy*, *supra*, at 676, n. 42. Schaerr contends that "such overstatement of the size of the market leads to understatement of the market power of the merging firms, and therefore to understatement of the anti-competitive consequences of the merger. (footnote omitted)" *Id.* at 677.

The *Cellophane* fallacy is not without its critics. Judge Posner of the U.S. Court of Appeals for the Seventh Circuit has rejected this theory. See R. Posner, *Antitrust Law: An Economic Perspective* 128-29 (1976).

also relevant. The most important is ease of entry into the relevant market. "One reason concentration in the relevant market may not inherently lead to collusive or anti-competitive behavior is when existing competitors or new competitors could easily enter the market and provide enough capacity to defeat an exercise of market power." *U.S. v. Rockford Memorial Corp., 717 F. Supp. 1251, 1281 (N.D. Ill. 1989)* aff'd. *898 F.2d 1278 (7th Cir. 1990)*. Factors [*36] that suggest the likelihood of collusion or the profitability of the market are also considered.

The court has found that there is a genuine issue of material fact as to the definition of the relevant geographic market. Having so concluded, the court does not reach the issue of market share or market concentration. Absent a relevant geographic market, market share and [*37] market concentration cannot be calculated. In addition, the court need not decide the viability of defendant's efficiencies or failing firm defense.

D. Tying

Plaintiffs contend that, with the Secure Horizons Health Plan, Dominican has exploited its monopoly power by tying the sale or price of inpatient hospital services to the purchase of physician services from Dominican's affiliated group of doctors, Physicians Medical Group of Santa Cruz ("PMG").¹² Plaintiffs argue that this pattern and practice harms them because it interferes with the competitive processes in the physician services' market in which plaintiffs compete, and denies them the opportunity to compete fairly and freely with PMG for managed care contracts, now and in the future. Defendant counters that plaintiffs have failed to present any evidence to show the existence of a tie -- that is, Dominican's refusal to sell its hospital services unless the purchasers also agree to buy physician services from PMG. Defendant contends that the "alleged" tie is a pricing provision that does not require the health plans to use PMG, but gives favorable pricing if they do. Defendant argues that, as a matter of law, such [*38] a provision cannot establish a tie.

[*39] *HN12* [↑]

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* quoting *Northern P.R. Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. Tying arrangements have long been considered *per se* unlawful under section 1 of the Sherman Act. *Northern P. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. To prove an illegal tie, a party must show: (1)

¹¹ Given a product market of inpatient services and a geographic market of Santa Cruz County, plaintiffs' data indicates that Dominican had a market share in excess of 45% prior to acquisition and that, post-acquisition, Dominican controls approximately 70% of the market. The HHI prior to the transaction was in excess of 3500 and after the acquisition, the HHI value is in excess of 6400. (Melnick Declaration PP13 & 14). Defendant's relevant product market of hospital and non-hospital providers and geographic market of Santa Cruz, Northern Monterey and Santa Clara Counties produces an HHI index in the 1200 to 1300 range. (McCarthy Decl. P59.)

¹² In its opposition to defendant's motion for partial summary judgment, plaintiffs have, for the first time, alleged tying arrangements with health plans other than Secure Horizons. Defendants object on the basis that, after discovery is closed and in the middle of dispositive motions, plaintiffs should not be permitted to throw in any surprise theories they choose. Plaintiffs claim that the "including but not limited to" language in the complaint permits them to allege tying arrangements with other health plans. Defendant counters that the language relates to other forms of monopoly exploitation, not to tying arrangements with other health plans. Paragraph 24 of the complaint provides: "After the Acquisition, DOMINICAN has engaged in willful acts to maintain, extend and exploit its monopoly power, acts which include, but are not limited to, the following...." Plaintiffs proceed to enumerate six forms of monopoly exploitation. Paragraph 24(f), the only paragraph that refers to tying, provides: "attempting to leverage its monopoly power in the acute care market by negotiating an agreement with a Medicare HMO, Secure Horizons, tying the purchase of hospital services to the purchase of exclusive physician services from PSI [PMG]." The court sustains defendant's objection to the new allegations. It is unfair to defendants to permit plaintiffs, on the eve of trial, to allege tying arrangements with health plans other than Secure Horizons without having sought leave to amend their complaint. The court expresses no opinion as to whether Dominican has exploited its monopoly power by tying the sale of Dominican's services to the purchase of physicians' services from PMG with respect to PruCare, LifeGuard or any health plan other than Secure Horizons.

a tying of two distinct products or services; (2) sufficient economic power in the tying product market to affect the tied market; and (3) an effect on a not insubstantial amount of commerce in the tied market. *Bhan v. NME Hosp. Inc.*, 929 F.2d 1404, 1411 (9th Cir.) cert. denied, 502 U.S. 994, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991). "Some modicum" of involuntariness or coercion is an...essential to the existence of a *per se* illegal tie-in." *Foremost ProColor, Inc. v. Eastman Kodak* [*40] Co., 703 F.2d 534, 540 (9th Cir. 1983) cert. denied 465 U.S. 1038, 79 L. Ed. 2d 712, 104 S. Ct. 1315 (1984). In addition, "the seller of the tying product must have an economic interest in the tied product for there to be *per se* illegality." *Robert's Waikiki U-Drive Inc. v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984). When these prerequisites are met, tying arrangements are illegal without any requirement of unreasonable competitive effect. *Id.* Conduct which does not meet the requirements of the *per se* prohibition may still constitute a violation of [section 1](#) of the Sherman Act under the "rule of reason" test. *Id.*

Typically, [HN13](#)[¹³] an express refusal to sell the tying product without the tied product is the basis for an illegal tying arrangement. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). It is clear that Dominican's pricing provision in the Secure Horizon contract is not an express, contractual tying arrangement because purchasers are not explicitly *required* to purchase one service, PMG, in order to purchase another service, Dominican. ¹³ "Where the buyer is free to take either [*41] product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern P. R. Co. v. United States*, 356 U.S. 1, 6 n.4, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). If the desirable, tying product "is truly available without the condition that other products be purchased with it, its alternative sale as part of a package cannot logically be a device to force the purchase of the 'tied' products." *Ways & Means, Inc. v. Ivac Corp.*, 506 F. Supp. 697, 701 (N.D.Cal. 1979) aff'd 638 F.2d 143 (9th Cir. 1981) cert. denied 454 U.S. 895, 70 L. Ed. 2d 210, 102 S. Ct. 394 (1981). In the instant case, Dominican offered its service without PMG.

[*42] [HN14](#)[¹⁴]

Separate availability will not preclude antitrust liability where a defendant has established its pricing in such a way that "the only viable economic option is to purchase the tying and tied products in a single package." *Ways & Means, supra*, 506 F. Supp. at 701. In *United States v. Loew's Inc.*, 371 U.S. 38, 54-55, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962), the district court found movie distributors guilty of conditioning licenses for popular films upon acceptance of a package containing inferior releases. The judgment enjoined defendants from "entering into any agreement...in which the differential between the price or fee for such feature film when sold or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [sic] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films." *371 U.S. at 43*. The Supreme Court affirmed.

Subsequent cases have recognized that antitrust liability may be predicated on pricing policies in which the only viable economic option is to purchase the tying product with the tied product. In *Ways & Means, supra* 506 F. Supp.

¹³ The provision at issue states:

C. PacificCare [Secure Horizons] agrees that the cost of all medical and hospital services provided to Secure Horizons members who have selected Physician [sic] Medical Group of Santa Cruz will amount to at least eighty-six percent (86%) of premium through 1994, 85% in 1995, 84% in 1996 and 1997...In the event the cost of medical and hospital services does not amount to the above percentages, the excess will be paid to Physicians Medical Group of Santa Cruz.

....

E. PacificCare and Hospital agree that the reimbursement provisions contained in this Attachment A apply only to Secure Horizons members who select Physicians Medical Group of Santa Cruz. Hospital agrees to consider other physician entities in the future based upon separate compensation provisions. (McNaughton Declaration, Exhibit I).

Although the provision deals generally with the cost of services, there is no evidence of the actual effect of the provision. Plaintiffs fail to explain whether this requirement provides a substantial cost saving to Secure Horizons when its members select PMG, and if so, by how much the cost for members who do not select PMG exceeds the cost for members who select PMG. In any event, both parties characterize the provision as a pricing concession, and neither party disputes the fact that Dominican may be purchased separately from PMG.

at 699, IVAC introduced [*43] a new marketing approach called the "Temperature System Program," or "TSP." Under TSP, IVAC users agreed to purchase probe covers and thermometers at a package price; however, IVAC never refused to sell thermometers separately outside the TSP program. *Id.* The court granted summary judgment in favor of defendants. The court reasoned that separate purchase of thermometers and probe covers was a viable alternative because approximately 25% of all purchases of electronic thermometers were made outside the TSP program. *Id. at 702.*

In the instant case, plaintiff has also failed to allege and adequately demonstrate the existence of, or threat of an illegal tying arrangement because the evidence submitted in no way indicates that the purchase of physicians' services from Santa Cruz Medical Clinic was considered unfeasible or was not seriously contemplated. In fact, there is evidence that PacificCare had a full contract with Santa Cruz from 1989 through 1994, that Santa Cruz terminated the full contract for "business purposes" in favor of an agreement limited to employees of a single employer, and that Pacific Care wished to continue to contract with Santa Cruz. (Boss Depo 43:24 - [*44] 45:13, Rosch Decl., Exhibit 4.)¹⁴ Therefore, plaintiff has failed to demonstrate that Santa Cruz was not a viable option.

The court finds that, as a matter of law, Dominican's contract with Secure Horizons does not constitute an unlawful tying arrangement. Having so concluded, the court need not decide whether Dominican had sufficient power in the tying product market of inpatient hospital services to affect a substantial amount of trade [*45] in the tied product market of physician services or whether Dominican has an economic interest in PMG.¹⁵

E. Exclusive Dealing

HN15 [+] An exclusive dealing contract involves a commitment by a buyer to deal only with a particular seller. Exclusive dealing arrangements are unlawful only if they violate the rule of reason. *Morgan Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1488-90 (9th Cir. 1991)*. Plaintiffs allege that Dominican is "threatening to require TakeCare to require SANTA CRUZ to refer all cardiac patients to Dominican." (Complaint, P24(b)). Plaintiffs base this allegation on a contract provision that states:

In exchange for cardiac per diems, PMG [Santa Cruz Medical Clinic]¹⁶ agrees to refer all cardiac cases to Hospital [Dominican], as their preferred hospital, for which Dominican has clinical capability to provide services.

(Lovero Decl., [*46] Exhibit 2).

The provision at issue is a term in a bilateral contract between TakeCare and Dominican. Although the original contract was proposed as a trilateral one to which Santa Medical Clinic would be a signatory, (Lovero Decl., Exhibit 1), Dominican signed a bilateral contract with TakeCare. Defendant argues that the provision has no legal effect because the contract does not bind Santa Cruz Medical Clinic. Plaintiffs counter that the provision requires TakeCare to require Santa Cruz to deal exclusively with Dominican. Lovero states that she "would not have agreed to the paragraph [at issue]...but for the fact that TakeCare had no competitive alternative available to it in SantaCruz and because it was necessary that TakeCare have [*47] a contract with DOMINICAN" (Lovero Decl. P6). Plaintiffs contend that the provision must have meaning because Dominican has never felt it necessary to rescind or delete it. Defendant counters that it has never rescinded or deleted the provision because the provision

¹⁴ In deposition testimony, Wayne Boss, plaintiffs' Rule 30(b)(6) spokesperson on the subject of plaintiffs' tying claim, stated that Health Net "had a much better penetration of patient enrollees in the major employers in Northern California than Pacific Care [sic] did, [and] we felt it was appropriate to pursue the Health Net relationship for the commercial product, and entered into agreements with both Health Net and TakeCare to establish a Medicare at risk program through their plans rather than through Secure Horizons." (Boss Depo. 60:10-17, Rosch Decl., Exhibit 4.)

¹⁵ Plaintiffs rely only on a *per se* tying theory and do not attempt to prove their theory on a rule of reason basis.

¹⁶ Both parties recognize that the term PMG is used in the contract provision not to refer to Physicians Medical Group of Santa Cruz, but rather as an abbreviation for the generic term "physicians medical group." The specific PMG referred to here is Santa Cruz Medical Clinic.

had no meaning. To withstand summary judgment, plaintiffs must show a genuine factual issue as to whether Dominican and TakeCare had an agreement to restrain competition in a relevant market.

HN16 [↑] A contract must be interpreted as to give effect to "the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (citations omitted)." *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 38, n.5, 69 Cal. Rptr. 561, 442 P.2d 641 (1968). The meaning of a writing can only be found by "interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. (citations omitted)." *Pacific Gas, supra*, 69 Cal. 2d at 38-9. If the court decides, after considering this evidence, "that the language of a contract, in the light of all the circumstances, is 'fairly susceptible of either one of the two interpretations [*48] contended for...,' extrinsic evidence relevant to prove either of such meanings is admissible. (citations omitted.)" *Pacific Gas, supra*, 69 Cal. 2d at 40.

In the instant case, the meaning of the provision is unclear, and it is reasonably susceptible of either of the two interpretations contended for. The provision may be a remnant of a trilateral contract that was intended to have no legal effect. On the other hand, the provision may have been retained in the bilateral contract because it was intended as an obligation on the part of TakeCare to require Santa Cruz Medical Clinic to refer all cardiac patients to Dominican.¹⁷ Therefore, extrinsic evidence relevant to prove either of such meanings is admissible. There are a number of factual issues to resolve with respect to the actual negotiation of the provision and the intent of the parties at the time of contracting. As a result, there is a genuine issue of material fact as to whether the provision constituted an agreement to restrain competition. Even if the court could decide, as a matter of law, that the interpretation of the provision urged by plaintiff is the only one to which the language is reasonably susceptible, there [*49] is a genuine issue of material fact as to the relevant market. Therefore, the court cannot decide, on a summary judgment motion, whether the alleged exclusive dealing arrangement could impair competition in a defined relevant market.

D. Conclusion

The court denies plaintiffs' summary judgment and partial summary judgment motions. The court grants defendant's partial summary judgment motion on the tying and channeling claims and denies the motion on the exclusive dealing and concomitant state law claims.

DATED: [*50] 9/6/95

RONALD M. WHYTE

United States District Judge

End of Document

¹⁷ Neither party argues that TakeCare or Dominican is currently requiring Santa Cruz Medical Clinic to refer all cardiac patients to Dominican. It is undisputed that it is Santa Cruz Medical Clinic's policy to refer cardiac patients to Good Samaritan Hospital except in emergencies. Santa Cruz contends that Dominican has refrained from enforcing the provision because of the instant lawsuit. Dominican maintains that the provision is unenforceable because Santa Cruz is not a party to the contract.

Gunderson v. University of Alaska

Supreme Court of Alaska

September 8, 1995, Decided

No. 4255, Supreme Court No. S-6570

Reporter

902 P.2d 323 *; 1995 Alas. LEXIS 105 **

TIMOTHY C. GUNDERSON, d/b/a ALASKA CONTRACT MOTOR EXPRESS, Appellant, v. UNIVERSITY OF ALASKA, FAIRBANKS, and ALASKA RAILROAD CORPORATION, Appellees.

Prior History: [**1] Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Richard D. Savell, Judge. Superior Court No. 4FA-93-2161 Civil.

Disposition: AFFIRMED.

Core Terms

protest, coal, sham, misrepresentation, immunity, sole source, bids, procurement, antitrust, unloading, lawsuit, baseless, transportation, judicial process, anti trust law, summary judgment, superior court, power plant, hoppers, courts

LexisNexis® Headnotes

Public Contracts Law > Dispute Resolution > General Overview

Public Contracts Law > Bids & Formation > General Overview

HN1[

[Alaska Stat. § 36.30.699](#) provides: In [Alaska Stat. §§ 36.30.560-36.30.695](#), "interested party" means an actual or prospective bidder or offeror whose economic interest may be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract; whether an actual or prospective bidder or offeror has an economic interest depends on the circumstances.

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

[**HN2**](#) Standards of Review, De Novo Review

An appellate court reviews de novo a trial court's grant of summary judgment. Summary judgment is affirmed if the evidence in the record fails to disclose a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In reviewing the record, the court draws all reasonable inferences in favor of the non-moving party.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN3**](#) Antitrust & Trade Law, Sherman Act

Attempts to influence legislative and executive officials are beyond the scope of the Sherman Act.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[**HN4**](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine includes attempts to influence adjudicatory proceedings before administrative agencies and the courts. It would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Torts > Business Torts > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[**HN5**](#) Noerr-Pennington Doctrine, Sham Exception

Conduct protected from antitrust liability under the Noerr-Pennington doctrine is also shielded from business tort and [42 U.S.C.S. § 1983](#) claims.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[**HN6**](#) Exemptions & Immunities, Noerr-Pennington Doctrine

A party will be subject to federal antitrust liability if its efforts to influence governmental action are a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

902 P.2d 323, *323 1995 Alas. LEXIS 105, **1

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

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HN7 **Noerr-Pennington Doctrine, Sham Exception**

The filing of a single lawsuit may, in certain circumstances, constitute an abuse of the judicial process for the purposes of the Noerr-Pennington doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN8 **Exemptions & Immunities, Noerr-Pennington Doctrine**

There is a two-part test for determining whether a particular lawsuit constitutes a "sham." First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under the second part of the definition of sham, a court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon. The two-tiered process requires a plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability. Of course, even a plaintiff who defeats a defendant's claim to Noerr immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN9 **Exemptions & Immunities, Noerr-Pennington Doctrine**

Allegations of fraud and misrepresentation in the judicial process will only block Noerr-Pennington immunity when such allegations go to the core of a lawsuit's legitimacy.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN10 **Exemptions & Immunities, Noerr-Pennington Doctrine**

A successful lawsuit is, by definition, a reasonable effort at petitioning for redress and, therefore, not a sham.

Counsel: Lloyd I. Hoppner, Hoppner & Paskvan, P.C., Fairbanks, and Wallace M. Rudolph, Tacoma, Washington, for Appellant.

James Sarafin, Wohlforth, Argetsinger, Johnson & Brecht, Anchorage, for Appellee University of Alaska, Fairbanks. William R. Huprich, Alaska Railroad Corporation Office of the General Counsel, Anchorage, and Gary Foster, Law Office of Gary Foster, Fairbanks, for Appellee Alaska Railroad Corporation.

Judges: Before: Moore, Chief Justice, Rabinowitz, Matthews, Compton and Eastaugh, Justices.

Opinion by: MOORE

Opinion

[*324] OPINION

MOORE, Chief Justice.

This case arises out of a sole source contract issued by the University of Alaska, Fairbanks campus, (UAF) to Timothy Gunderson, d/b/a/ Alaska Contract Motor Express [*2] (Gunderson). UAF cancelled the contract after Alaska Railroad Corporation (ARRC) filed a formal protest, asserting that the sole source contract violated state law. See [AS 36.30.300](#) (providing that a sole source procurement may not be awarded if a reasonable alternative source exists). Gunderson then sued both UAF and ARRC under a variety of theories. On motion by ARRC, the superior court dismissed Gunderson's claims against ARRC, ruling that ARRC was immune from suit under the *Noerr-Pennington* doctrine. See [Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920, 1926 \(1993\)](#) (under *Noerr-Pennington* doctrine, those who petition the government for redress are generally immune from antitrust and related liability).

In this appeal, Gunderson asserts that the *Noerr-Pennington* doctrine does not bar his claims against ARRC. He also asserts that the court improperly entered final judgment in favor of ARRC under Alaska Civil Rule 54(b). However, because we consider the issues raised in Gunderson's appeal appropriate for discretionary review under Alaska Appellate Rule 402(b), we need not consider whether the superior court [*3] erred in entering final judgment. See Alaska R. App. P. 402(b)(2) (providing that discretionary review is appropriate where an order or decision involves an important question of law on which there is substantial ground for difference of opinion and immediate review may materially advance the ultimate termination of the litigation).

I. FACTS AND PROCEEDINGS

In 1992 Gunderson submitted an unsolicited proposal to UAF, offering to truck coal to UAF from the Usibelli Coal Mine and to deliver this coal directly into coal hoppers at the UAF power plant in Fairbanks. Up to that time, the coal had been transported by ARRC and delivered in railcars to a siding next to the power plant. This method of delivery required UAF employees to unload coal into the hoppers: a difficult, dangerous and time-consuming job.

UAF officials determined that Gunderson's proposal qualified as a "unique offer" under UAF procurement regulations and awarded Gunderson a five-year sole source contract. The contract set a price of \$ 8.25 per ton and estimated a need for 60,500 tons per year, bringing the total contract price to just under \$ 500,000 per year.

Upon learning of this contract, ARRC filed [*4] a formal written protest with UAF. See [AS 36.30.560](#) (providing that an interested party may protest a contract award). It asserted that the sole source contract violated both state and university procurement codes and requested that UAF cancel the contract and publicly solicit competitive bids for the job.

UAF's Chief Procurement Officer, Charles Hill, denied ARRC's protest on the ground that ARRC lacked standing to protest UAF's award of the sole source contract because ARRC was not an "interested party" as defined in [AS 36.30.699](#).¹

¹  [AS 36.30.699](#) provides:

In [AS 36.30.560 -- 36.30.695](#), "interested party" means an actual or prospective bidder or offeror whose economic interest may be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract; whether an actual or prospective bidder or offeror has an economic interest depends on the circumstances.

[*325] ARRC appealed this decision and requested a hearing before an [**5] independent hearing officer as authorized by [AS 36.30.590](#). Gerald Neubert, University Architect and Acting Chief Procurement Officer for Protest, subsequently notified ARRC that a hearing would be held for the limited purpose of determining whether ARRC was an "interested party" capable of delivering and unloading coal into the UAF hoppers. The Pre-Hearing Order framed the scope of the hearing as follows:

In order to show that it has standing to maintain an appeal, ARRC has the burden of proving, by a preponderance of the evidence, that at the time the University of Alaska awarded Contract 93-0012 to [Gunderson], ARRC was able to economically provide *all* services required under the . . . contract and was willing to do so.

The parties who will participate in this limited hearing are ARRC and the University of Alaska. [Gunderson] is *not* a party.

Hearing Officer Neubert issued written findings of fact and conclusions of law shortly after the hearing. He found, in part:

11. In 1992, ARRC had equipment and manpower available at its Fairbanks rail yard to move coal cars from the UAF rail siding to the UAF power plant hoppers and to unload those coal cars. It [**6] also had the ability to subcontract these services.
12. In 1992, ARRC would have been willing to bid on a UAF proposal to provide coal transportation and unloading services to the UAF power plant using its own personnel and equipment. ARRC would have been capable of performing such services.
13. In 1992, ARRC routinely submitted bids or proposals to customers who solicited bids or proposals for transportation and related services. ARRC routinely entered into volume or "requirements" transportation contracts with customers at rates below those contained in ARRC's published tariffs.
14. If UAF had advertised for bids or proposals for coal transportation/unloading services, ARRC would have submitted a bid or proposal to provide such services.
15. UAF's award of a sole source contract to [Gunderson] has substantially affected ARRC's economic interests by depriving ARRC of an opportunity to earn in excess of \$ 2.5 million over the term of the contract. ARRC has an economic interest in the UAF coal delivery contract.

Based on these findings, the hearing officer concluded that ARRC was an "interested party" under [AS 36.30.699](#) because it had the capability to [**7] transport and unload coal into the hoppers of the UAF power plant without the assistance of UAF personnel or equipment. He then ruled:

[AS 36.30.300](#) allows a sole source procurement if there is only one source for the required procurement. If there is a reasonable alternative source, a sole source procurement may not be awarded. Because ARRC was a reasonable alternative source for the delivery and unloading of coal, it was improper, as a matter of law, for UAF to award a sole source contract to [Gunderson]. The ARRC protest was legally sufficient and should have been upheld.

UAF subsequently issued a request for proposals for coal transportation and unloading services. Nine companies, including ARRC and Gunderson, submitted bids. UAF awarded the contract to Royal Contractors, the lowest bidder.² Gunderson filed a formal protest with UAF, requesting that UAF cancel the contract with Royal Contractors and reinstate his contract. UAF denied this protest.

[**8] In August 1993 Gunderson sued both UAF and ARRC under a variety of theories.³ In the fourth count of his complaint, Gunderson asserted the following claims against ARRC:

² Royal Contractors bid \$ 7.57 per ton. Gunderson submitted the third lowest bid, at \$ 8.18 per ton. ARRC bid \$ 10.20 per ton, the fifth lowest bid.

[*326] [ARRC] has a monopoly of coal shipments into Fairbanks and generally into interior Alaska. [ARRC], in an attempt to maintain its monopoly, filed a frivolous protest against the issuance of the UAF contract to Gunderson. In the hearing that was subsequently held pursuant to the protest (a hearing in which UAF barred Gunderson from participating), [ARRC] misrepresented the facts and misrepresented its intention to bid a competitive price with Gunderson. The misrepresentation by [ARRC] was for the purpose of injuring Gunderson, and excluding the trucking industry from competing with [ARRC] for the hauling of coal in [the] interior of Alaska. These acts by [ARRC] constitute a common law tort of interference with Gunderson's contractual relationship with UAF; constitute a common law tort of interference with Gunderson's prospective advantage with UAF and other coal consumers in interior Alaska; and constitute a violation of Article [A.S. §§ 45.50.471](#), 501, 531 and [A.S. §§ 45.50.562, 45.50.576](#); or, [*9] in the alternative, a violation of [42 U.S.C. 1983](#). As a result of these common law torts and statutory violations, Gunderson has been damaged in a sum or sums to be proved at trial and is entitled to have these damages tripled pursuant to the appropriate statutory remedies.

ARRC moved to dismiss these claims under Civil Rule 12(b)(6), arguing, *inter alia*, that the *Noerr-Pennington* doctrine barred Gunderson's claims against ARRC. The superior court granted ARRC's motion, ruling that ARRC was immune from suit under the *Noerr-Pennington* doctrine. Because the court considered materials outside the pleadings in dismissing Gunderson's claims, it treated ARRC's motion as a motion for summary judgment. On motion by ARRC, the court then entered final judgment in favor of ARRC under Alaska Civil Rule 54(b). [*10] This appeal followed.

II. STANDARD OF REVIEW

HN2 We review de novo the superior court's grant of summary judgment. [Kollodge v. State, 757 P.2d 1024, 1026 n.4 \(Alaska 1988\)](#). "Summary judgment is affirmed if the evidence in the record fails to disclose a genuine issue of material fact and the moving party is entitled to judgment as a matter of law." [Dayhoff v. Temsco Helicopters, Inc., 772 P.2d 1085, 1086 \(Alaska 1989\)](#). In reviewing the record, we draw all reasonable inferences in favor of the non-moving party. *Id.*

III. DISCUSSION

The *Noerr-Pennington* doctrine evolved out of two United States Supreme Court cases: [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#), and [United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#). In these decisions, the Court held that **HN3** attempts to influence legislative and executive officials were beyond the scope of the Sherman Act, reasoning that Congress did not intend federal **antitrust law** to regulate political activities or to infringe on the First Amendment rights of petition and association. [Noerr, 365 U.S. at 136-38](#); [Pennington, 381 U.S. at 669-70](#); see generally John P. Ludington, Annotation, *Application of Doctrine Exempting From Federal Antitrust Laws Joint Efforts to Influence Legislative or Executive Action*, 17 A.L.R. Fed. 645 (1973).

In [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#), the Court extended **HN4** the *Noerr-Pennington* doctrine to include attempts to influence adjudicatory proceedings before administrative agencies and the courts. [Id. at 510](#).

It would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

[Id. at 510-11.](#)

³ Gunderson raised the following causes of action against UAF: (1) breach of contract; (2) breach of duty of confidentiality and expropriation of intellectual property; and (3) due process violations.

In his brief, Gunderson concedes that the *Noerr-Pennington* doctrine protects the right of a party to invoke the legal process "without fear that such action would be considered [*327] a tortious interference with prospective advantage or a violation of the [**12] State's antitrust laws."⁴ However, Gunderson goes on to argue that ARRC subverted the legal process by presenting false and misleading evidence at the April 1992 hearing. For this reason, Gunderson argues that ARRC engaged in a "sham" protest designed to destroy Gunderson's contractual relationship with UAF.⁵

[**13] The United States Supreme Court has observed that [HN6](#)[↑] a party will be subject to federal antitrust liability if its efforts to influence governmental action are "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*; see also *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511-13, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*.

In *California Motor*, a group of California truckers instituted a series of state and federal proceedings in an effort to defeat an application for in-state operating rights filed by a group of out-of-state truckers. The out-of-state truckers subsequently filed a civil action, alleging that the California truckers had violated federal antitrust laws. In holding that the district court had erred in dismissing their complaint under the *Noerr-Pennington* doctrine, the Supreme Court observed:

Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. [**14] One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

Id. at 513.

In the wake of *California Motor*, many courts have held that [HN7](#)[↑] the filing of a single lawsuit may, in certain circumstances, constitute an abuse of the judicial process for the purposes of the *Noerr-Pennington* doctrine. See, e.g., *Aydin Corp. v. Loral Corp. 718 F.2d 897, 903 (9th Cir. 1983)* (holding that a single action is sufficient to invoke the sham exception); *Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386, 389 (9th Cir. 1983)* (holding that a single baseless suit may be held to constitute a sham so long [**15] as some abuse of process is alleged); *First Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, 520-21 (D. Minn. 1979)*, aff'd, *636 F.2d 195 (8th Cir. 1980)*, cert. denied, 450 U.S. 1042, 68 L. Ed. 2d 240, 101 S. Ct. 1761 (1981) (holding that the filing of a single action may constitute a "sham" under the *Noerr-Pennington* doctrine if the action involved unethical [*328] conduct). See

⁴ Thus Gunderson concedes that the *Noerr-Pennington* doctrine applies to his state **antitrust law** claims under [AS 45.50.562-.596](#) (Alaska Restraint of Trade Act). He also concedes that the *Noerr-Pennington* doctrine may bar a party from bringing related business tort and [§ 1983](#) claims. See *Video Int'l Prod. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988)*, cert. denied, *491 U.S. 906, 105 L. Ed. 2d 697, 109 S. Ct. 3189 (1989)* (holding that [HN5](#)[↑] conduct protected from antitrust liability under the *Noerr-Pennington* doctrine is also shielded from business tort and [§ 1983](#) claims).

⁵ On appeal, Gunderson also contends that ARRC's protest falls within the "sham" exception because he was improperly excluded from the April 1992 hearing in violation of his due process rights. However, Gunderson did not present this argument to the trial court or include this issue in his points on appeal. Therefore it is waived. See *Moran v. Holman, 501 P.2d 769, 769-70 (Alaska 1972)* (this court will not consider on appeal arguments which were not raised before the trial court or which were not included in statement of points on appeal).

In any case, Gunderson makes no attempt to argue that ARRC affirmatively sought to exclude Gunderson from the hearing or that ARRC was involved in any way in the hearing officer's decision. As ARRC points out, in the absence of any such connection, Gunderson's exclusion from the hearing process has no bearing on its right to *Noerr-Pennington* immunity.

generally Glenn A. Guarino, Annotation, "Sham" Exception to Application of *Noerr-Pennington Doctrine*, Exempting from Federal Antitrust Laws Joint Efforts to Influence Governmental Action, 71 A.L.R. Fed. 723 (1985).

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993), the Supreme Court established [HN8](#)[↑] a two-part test for determining whether a particular lawsuit constitutes a "sham."

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception [\[**16\]](#) must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," *Noerr, supra*, 365 U.S. at 144, 81 S. Ct. at 533 (emphasis added), through the "use [of] the governmental process--as opposed to the *outcome* of that process--as an anticompetitive weapon," *Omni*, 499 U.S. 365 at 380, 111 S. Ct. 1344 at 1354 (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Of course, even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

[113 S. Ct. at 1928](#) (footnote omitted). [\[**17\]](#) However, the Court in *Columbia Pictures* expressly declined to decide whether the *Noerr-Pennington* doctrine immunizes parties who commit fraud and misrepresentation in bringing an action.

In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport*, 404 U.S. at 512-513, 92 S. Ct. at 613. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. Cf. *Fed. Rule Civ. Proc. 60(b)(3)* (allowing a federal court to "relieve a party . . . from a final judgment" for "fraud . . . , misrepresentation, or other misconduct of an adverse party"); *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 176-177, 86 S. Ct. 347, 349-350, 15 L. Ed. 2d 247 (1965); *id. at 179-180, 86 S. Ct. [**18] at 351-52* (Harlan, J., concurring).

[113 S. Ct. at 1929 n.6.](#)

On appeal, Gunderson does not argue that ARRC's protest was "objectively baseless." Rather, he asserts, as he did below, that ARRC misrepresented its ability and intention to bid a competitive price at the April 1992 hearing. Citing footnote six of *Columbia Pictures*, Gunderson argues that ARRC's alleged misrepresentations at the hearing suffice to make its protest a "sham" without regard to the objective merit of its protest or ARRC's motivation. In other words, Gunderson contends that where a party engages in misrepresentation or fraud during the judicial process, the two-part *Columbia Pictures* test does not apply.

As the superior court observed, the Ninth Circuit recently considered and rejected this very argument. See *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993), cert. denied, 513 U.S. 818, 130 L. Ed. 2d 32, 115 S. Ct. 77 (1994). In *Liberty Lake*, a property developer sued a number of business [\[*329\]](#) competitors, alleging that they had conspired to mount a frivolous environmental challenge to the developer's plans to market a tract of land as a regional shopping center. *Id. at 156*. The district [\[**19\]](#) court granted summary judgment in favor of the defendants, ruling, *inter alia*, that the defendants were immune from suit under the *Noerr-Pennington* doctrine. *Id.*

On appeal, the Ninth Circuit affirmed, holding that the environmental challenge was not "objectively baseless" under *Columbia Pictures* and that the defendants were entitled to *Noerr-Pennington* immunity. *Id.* at 157-58. The court rejected the developer's contention that the defendants' alleged fraud and misrepresentations in the course of the litigation sufficed "to make the litigation sham without regard to the objective merit of the lawsuit or its proponents' motivation." *Id.* at 158.

As we read the Court's footnote 6, however, it does no more than reserve the issue of whether antitrust liability may be premised on a litigant's deceptive conduct which goes to the core of a lawsuit's legitimacy, such that it is not "genuine," either in the sense of "having the reputed or apparent qualities or character" (i.e., objectively "genuine") or being "sincerely and honestly felt or experienced" (i.e., subjectively "genuine"). *Id.* at 158, 113 S. Ct. at 1929 (quoting Webster's Third New International [**20] Dictionary 948 (1986)).

Following its reservation of the question whether "fraud or other misrepresentations" may amount to "sham," the Court cited as analogous authority *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965), which held that a patent procured by intentional fraud on the Patent Office could form the basis for a federal antitrust claim, *id. at 176-77, 86 S. Ct. at 349-50*; Justice Harlan's *Walker Process* concurrence which emphasized that the Court's holding reached only "deliberate fraud," *id. at 179-80, 86 S. Ct. at 351-52* (Harlan, J., concurring); and Rule 60(b)(3), which allows a party to obtain relief from judgment because of its opponent's "fraud . . . misrepresentation, or other misconduct."

In a case involving a fraudulently-obtained patent, that which immunizes the predatory behavior from antitrust liability (the patent) is, in effect, a nullity because of the underlying fraud. Similarly, Rule 60(b)(3) enables a party to set aside an otherwise valid judgment on the ground that it resulted from an opposing party's fraudulent behavior or misrepresentation to the court. See Charles [**21] Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2860, at 188-89 (1973). Read in context with the entire [*Columbia Pictures*] opinion, footnote 6 does not obviate application of the Court's two-part test for determining sham litigation in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.

Id. at 158-59 (footnote omitted).

We find the Ninth Circuit's reading of *Columbia Pictures* persuasive. [HN9](#) Allegations of fraud and misrepresentation in the judicial process will only block *Noerr-Pennington* immunity when such allegations go "to the core of a lawsuit's legitimacy." *Id.* at 158. In this case, Gunderson's complaint charged ARRC with misrepresenting "the facts and . . . its intention to bid a competitive price with Gunderson" in its protest. Even assuming the truth of this charge, these misrepresentations do not go to the heart of ARRC's protest. ARRC challenged the sole source contract award to Gunderson on the ground that it was capable of providing the delivery and unloading services offered by Gunderson. See [AS 36.30.300](#) (providing [**22] that a sole source procurement is permitted only when there is one source for the required good or service). Gunderson has never argued that ARRC is not capable of providing these services. As noted by ARRC, the fact that ARRC prevailed in its protest and that nine companies ultimately submitted bids demonstrates the protest's legitimacy.⁶ See [Columbia Pictures, 113 S. Ct. at 1928](#) (noting that [HN10](#) a successful lawsuit is "by definition a reasonable effort at petitioning for redress and therefore not a sham").

[**23] We therefore conclude that the superior court properly granted summary judgment in favor of ARRC.⁷

⁶ In a related argument, Gunderson contends that the superior court improperly "assumed" that the sole source contract was illegal under [AS 36.30.300](#). Essentially, Gunderson is arguing that UAF should be able to award a sole source contract to a business which comes up with an innovative service, even if other businesses are equally capable of providing the proposed service. However, this argument has no bearing on whether ARRC is entitled to *Noerr-Pennington* immunity. Even if the superior court were to ultimately conclude that UAF could properly award Gunderson a sole source contract in these circumstances, ARRC would still be entitled to immunity as long as there was a legitimate basis for its protest. See [Columbia Pictures, 113 S. Ct. at 1928 n.5](#) (noting that a losing lawsuit does not prove that the litigation was a sham).

AFFIRMED.

End of Document

⁷ Because we conclude that the *Noerr-Pennington* doctrine bars Gunderson's claims, we need not address the other grounds raised by ARRC for affirming the superior court's dismissal.



Maric v. St. Agnes Hosp. Corp.

United States Court of Appeals for the Second Circuit

January 20, 1995, Argued ; September 13, 1995, Decided

Docket No. 94-7569

Reporter

65 F.3d 310 *; 1995 U.S. App. LEXIS 25974 **; 1995-2 Trade Cas. (CCH) P71,119

RADOSLAV MARIC, Plaintiff-Appellant, v. ST. AGNES HOSPITAL CORP.; ROBERT J. STACKPOLE; ROBERT J. STANLEY, VINCENT DU VIGNEAUD, JR., M.D.; VINCENT NICOLAIS, M.D.; JOEL GREENSPAN, M.D.; MICHAEL PANIO, M.D.; DONALD N. COHEN, M.D.; VITO MARRERRO, M.D.; BARNEY D. NEWMAN, M.D.; ADRIENNE WEISS-HARRISON, M.D.; ELLIOT MOSHMAN, M.D.; GERALD CAMPANA, M.D.; WILLIAM ZAROWITZ, M.D.; VIRGINIA PELLIGRINO, Defendants-Appellees.

Subsequent History: [**1] Certiorari Denied February 20, 1996, Reported at: [1996 U.S. LEXIS 999](#).

Prior History: Appeal by plaintiff from an order of summary judgment before the United States District Court for the Southern District of New York (Brieant, J.) dismissing plaintiff's antitrust claim on the grounds that a conspiracy to restrain trade had not been shown and dismissing plaintiff's state law claims without prejudice.

Disposition: Affirmed.

Core Terms

district court, conspire, antitrust claim, antitrust, state law claim, patient, staff privileges, summary judgment, Sherman Act, recommended, Obstetrics, conspiracy, birthing, staff

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > 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](#) [] Antitrust & Trade Law, Clayton Act

Under the Clayton Act, [15 U.S.C.S. § 15\(a\)](#), a plaintiff who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may recover treble damages. In order to defeat a motion for summary judgment, a plaintiff must create a genuine issue of material fact that (1) defendants violated the antitrust laws and (2) the violation caused him actual injury.

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 > Sherman Act > General Overview

[HN2](#) Sherman Act, Claims

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ,or with foreign nations, is declared to be illegal. The Sherman Act, [15 U.S.C.S. § 1](#). In order to establish a claim under [15 U.S.C.S. § 1](#), a plaintiff must therefore show (1) a contract, combination, or conspiracy; (2) in restraint of trade; (3) affecting interstate commerce.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

[HN3](#) Summary Judgment, Motions for Summary Judgment

In regard to the plaintiff's burden at the summary judgment stage to show an antitrust conspiracy, the mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred. A plaintiff must prove the defendants illegally conspired. This means that a plaintiff -- to withstand defendants' summary judgment motion -- must present evidence that casts doubt on inferences of independent (not combined) action or proper conduct by defendants.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

[HN4](#) Jurisdiction, Jurisdictional Sources

Although a district court retains the discretion to exercise pendent jurisdiction and entertain state law claims once all federal claims have been dismissed, generally if the federal claims are dismissed before trial, the state claims should be dismissed as well.

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RICHARD E. DONOVAN, Kelley Drye & Warren (Roy W. Breitenbach, of counsel), New York, New York, for Defendants-Appellees St. Agnes Hospital Corp., Robert J. Stackpole, Robert J. Stanley, Vincent du Vigneaud, Jr., M.D., Vincent Nicolais, M.D., Donald M. Cohen, M.D., Vito Marrero, M.D., and Virginia Pelligrino.

WAYNE M. RUBIN, Rende, Ryan & Downes, New York, New York, for Defendants-Appellees Barney D. Newman, M.D., Adrienne Weiss-Harrison, M.D., Elliot Moshman, M.D., Gerald Campana, M.D., and William Zarowitz, M.D.

Judges: Before: WALKER, LEVAL, and CALABRESI, Circuit Judges.

Opinion by: WALKER

Opinion

[*311] WALKER, *Circuit Judge*:

Plaintiff Dr. Radoslav Maric, a licensed obstetrician and gynecologist, filed this suit alleging, among other claims, that defendants [*2] conspired to deny him hospital privileges in order to prevent him from opening a birthing center that would compete with their practices. He contended that this conduct constituted a violation of the antitrust laws, namely the Sherman Act, [15 U.S.C. § 1](#), and was thus actionable under the Clayton Act, [15 U.S.C. §§ 15, 26](#). The United States District Court for the Southern District of New York (Charles L. Brieant, *District Judge*) granted summary judgment in favor of defendants on the antitrust claim and dismissed the remaining state law claims without prejudice. We affirm.

BACKGROUND

On July 1, 1989, Dr. Maric joined the Northeast Permanente Medical Group, P.C. ("NPMG"), a professional corporation that provides physician services to a health maintenance organization, Kaiser Foundation Health Plan of New York ("Kaiser"). As NPMG and Kaiser required, Maric soon after obtained staff privileges at St. Agnes Hospital ("St. Agnes").

After several months at St. Agnes, Dr. Maric told the President of St. Agnes, defendant Dr. Robert J. Stanley, that he wanted to open a birthing center that would feature a method of childbirth in which delivery occurred under water, an idea that [*3] he had entertained for the better part of ten years. According to Dr. Maric's complaint, Dr. Stanley promised his cooperation and signed a non-disclosure agreement on behalf of the hospital.

On November 26, 1989, Lori Cherry, a Kaiser subscriber, entered St. Agnes complaining of abdominal pain. She was five months pregnant. After Ms. Cherry lost consciousness, stopped breathing, and had no pulse, Dr. Maric and an internist were summoned. Dr. Maric arrived at the hospital at 11:30 p.m. and examined Ms. Cherry. By that time, she had spontaneously started breathing again and regained blood pressure but remained in a semicomatose state. Dr. Maric concluded that her condition was not related to her pregnancy and, after discussing the case with the internist, left the hospital at approximately 1:00 a.m. Unfortunately, Dr. Maric's conclusion was wrong. His patient died a few hours later from a ruptured ectopic tubal pregnancy.

As New York law required, the hospital reported Ms. Cherry's death to the New York State Department of Health ("DOH"), which initiated an investigation into the incident. In addition, the case was taken up at a number of meetings of various hospital committees at [*4] St. Agnes, including the Executive Committee, the Emergency Department, the Morbidity and Mortality Committee, the Medical Board, the Board of Trustees Quality Assurance Committee, and the Medical Peer Review Committee. On December 20, 1989, the Medical Peer Review Committee referred the matter to the Obstetrics and Gynecology Department, which held a peer review meeting on February 13, 1990. The Department concluded that Dr. Maric's management of the case was deficient principally because he failed to order certain tests, neglected to obtain a surgical consultation, and left the patient before a diagnosis was reached.

On March 22, 1990, Dr. du Vigneaud, the Director of the Department of Obstetrics and Gynecology and a defendant, presented the peer review's findings to the Board of Trustees Quality Assurance Committee. He recommended that Dr. Maric be informed that his cases would be monitored by the Obstetrics and Gynecology Department until further notice. The Quality Assurance Committee, concerned that these corrective measures might be inadequate in light of the seriousness of the case, ordered further review of the matter before recommending corrective action to the Board [**5] of Trustees.

In early April, 1990, while the foregoing review was underway, Dr. Maric informed Dr. du Vigneaud that he intended to purchase an existing obstetrics and gynecology practice to use as his birthing center. Under New York law, such a center must have [*312] procedures to transfer a patient to a hospital no more than twenty minutes away in case of complications. 10 NYCRR § 754.2(e). New York law also requires the director of such a center to have either obstetrical privileges at the hospital or a formal agreement with the hospital for the provision of necessary care. 10 NYCRR § 754.5(a)(1)-(2).

Meanwhile, following meetings on April 11 and 19 at which Ms. Cherry's death was discussed, the Quality Assurance Committee recommended that the hospital monitor Dr. Maric's and the internist's cases for a period of six months, and on April 24 the hospital sent Dr. Maric a letter to that effect. On May 4, less than two weeks later, another incident occurred that called plaintiff's professional judgment into question. A woman who was approximately twelve weeks pregnant was admitted to the hospital exhibiting signs of a possible miscarriage. Although both the duty nurse and the [**6] patient's husband called Dr. Maric repeatedly, he refused to come to the hospital. He claimed that he had been summoned by the woman earlier and had waited at the hospital for her but she had not shown up, and that in any event he was not needed.

On May 10, the State Department of Health cited St. Agnes for its treatment of Ms. Cherry. The deficiencies included Dr. Maric's failure to order certain tests and his decision to leave the hospital despite the patient's rapidly deteriorating condition. Faced with this assessment of the earlier incident and Dr. Maric's behavior on May 4, the Board of Trustees summarily suspended plaintiff's hospital privileges on May 17, 1990. NPMG then terminated him for failure to maintain staff privileges at St. Agnes.

Thereafter, Dr. Maric requested, pursuant to the hospital's by-laws, that an ad hoc committee be formed to review his suspension. The committee, comprised of Drs. du Vigneaud, Donald Cohen, and Michael Panio -- all defendants in this action -interviewed Dr. Maric and examined the facts of the case before reaching an independent conclusion that summary suspension was appropriate. Dr. Maric then asked for and was given permission to [**7] present his case at an upcoming Medical Board meeting. The Board, after hearing Dr. Maric, recommended that the suspension be rescinded and that he instead be put on probation for one year, conduct all work under strict supervision, and receive a letter of reprimand. The Board of Trustees accepted this recommendation.

Dr. Maric filed suit in December of 1993. He alleged that the restrictions placed on him by the hospital forced him to abandon his plans for a birthing center, and that the hospital, its administrators, and the various doctors serving in its departments and on its committees had conspired to restrict his staff privileges, thus constituting a group boycott in violation of the Sherman Act and actionable under the Clayton Act. He also pressed a state law claim for intentional interference with contract and prospective contractual relations. On May 11, 1994, the district court granted the defendants summary judgment on plaintiff's antitrust claims and dismissed the state law claim without prejudice. Plaintiff appeals.

DISCUSSION

As the foregoing recitation of facts makes clear, the hospital, faced with what was at the least questionable conduct on the part of Dr. Maric, [**8] followed a course of action that was reasoned, responsible, and attentive not only to its own interests but also to those of the public and Dr. Maric. Perhaps due to poor advice of counsel or an inability to perceive that his personal ambitions must at times yield to the hospital's interest in the health and safety of its patients, Dr. Maric has chosen to respond with a baseless antitrust claim that only serves to deplete the resources of the defendants and the courts. The district court correctly concluded that this antitrust claim cannot survive summary judgment.

I. The Antitrust Claim

The first count of Maric's complaint asserts a claim under the Clayton Act. [HN1](#) Under § 4 of the Clayton Act, [15 U.S.C. § 15\(a\)](#), a plaintiff "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble [*313] damages. In order to defeat a motion for summary judgment, Dr. Maric must create a genuine issue of material fact that (1) defendants violated the antitrust laws and (2) the violation caused him actual injury. See [New York v. Hendrickson Bros., Inc.](#), [840 F.2d 1065, 1076](#) (2d Cir.) (citing [J. Truett Payne Co. v. Chrysler Motors](#) [*9] [Corp.](#), [451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 \(1981\)](#)), cert. denied, [488 U.S. 848](#) (1988). Dr. Maric has failed to demonstrate a genuine issue of material fact as to the violation of the antitrust laws.

The antitrust violation that Dr. Maric alleges is that defendants violated [§ 1](#) of the Sherman Act. Under [§ 1](#), "every [HN2](#) 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](#). In order to establish a claim under [§ 1](#), a plaintiff must therefore show (1) a contract, combination, or conspiracy; (2) in restraint of trade; (3) affecting interstate commerce. See [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). Plaintiff has failed to meet the first of these requirements.

The district court, drawing on *Capital Imaging*, concluded that, as employees of St. Agnes, the staff doctors and administrators did not have the legal capacity to conspire under the Sherman Act. The *Capital Imaging* decision, in holding that member physicians of an independent practice association are legally [*10] capable of conspiring with each other, noted that "the doctors are not staff physicians employed by the HMO on a salaried basis, that is, they are not agents of the HMO." [996 F.2d at 544](#). While this passage could be read to suggest, as the district court held, that staff physicians who are agents of an organization like an HMO or a hospital cannot conspire with the HMO or each other for antitrust purposes, we have not explicitly decided this issue.

We need not decide whether the individual defendants in this case, at least some of whom presumably are full-time staff physicians at the hospital, have the legal capacity to conspire together or with the hospital under [§ 1](#) of the Sherman Act. It is abundantly clear to us that, even assuming the legal capacity to conspire, no conspiracy has been shown.

In *Capital Imaging*, we described [HN3](#) the plaintiff's burden at the summary judgment stage to show an antitrust conspiracy:

The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred. A plaintiff must prove the defendants illegally conspired. . . . This means that a plaintiff -- to withstand defendants' summary [*11] judgment motion -- must present evidence that casts doubt on inferences of independent (not combined) action or proper conduct by defendants.

[996 F.2d at 545](#); see also [International Distribution Ctrs. v. Walsh Trucking Co.](#), [812 F.2d 786, 793](#) (2d Cir.) ("At a minimum, . . . the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." (internal quotations omitted)), cert. denied, [482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188](#) (1987); [Brenner v. World Boxing Council](#), [675 F.2d 445, 451](#) (2d Cir.), cert. denied, [459 U.S. 835, 74 L. Ed. 2d 76, 103 S. Ct. 79](#) (1982).

We do not have the slightest doubt that defendants acted properly when they decided to limit Dr. Maric's staff privileges. Several different committees and departments within the hospital investigated and reviewed the circumstances leading to Lori Cherry's death, and all of the evidence points inexorably to the conclusion that the various staff members charged with scrutinizing plaintiff's behavior did so with care and reasoned deliberation. There is no credible dispute that this lengthy review process yielded serious, legitimate [*12] concerns as to plaintiff's conduct. The hospital's ultimate decision to allow Dr. Maric to maintain his staff privileges under

supervision instead of suspending or revoking them, under these circumstances, was generous towards the plaintiff. Without further evidence of action on the part of defendants that suggests "commitment to a common [*314] end" other than their professed goal of maintaining the standards of medical care at the hospital, the sole fact that some of the defendants may in the future have faced some competition from Dr. Maric's hypothetical birthing center is insufficient to create a genuine issue of material fact as to the existence of a conspiracy to restrain trade. See *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.), cert. denied, 429 U.S. 885, 50 L. Ed. 2d 166, 97 S. Ct. 236 (1976).

While this case might well be a candidate for sanctions in light of the baseless nature of plaintiff's antitrust claim and the waste of resources that it has generated, because the issue of sanctions has not been raised, we will confine ourselves to affirming the district court's dismissal. Accordingly, we hold that the district court correctly granted summary judgment to defendants [*13] on plaintiff's antitrust claim.

II. Remaining State Law Claims

After dismissing Maric's antitrust claim, the district court then dismissed the remaining state law claims without prejudice. HN4[] Although a district court retains the discretion to exercise pendent jurisdiction and entertain state law claims once all federal claims have been dismissed, see *Enercomp, Inc. v. McCorhill Publishing*, 873 F.2d 536, 545 (2d Cir. 1989), generally "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well," *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966); see *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 72 (2d Cir.), cert. denied, 425 U.S. 974, 48 L. Ed. 2d 798, 96 S. Ct. 2173 (1976). We are unable to fault the district court in doing so here.

CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

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Tricom, Inc. v. Elec. Data Sys. Corp.

United States District Court for the Eastern District of Michigan, Southern Division

September 14, 1995, Decided ; September 14, 1995, FILED

Case No. 92-76374

Reporter

902 F. Supp. 741 *; 1995 U.S. Dist. LEXIS 15415 **; 36 U.S.P.Q.2D (BNA) 1778 ***; 1995-2 Trade Cas. (CCH) P71,188

TRICOM, INC., Plaintiff, v. ELECTRONIC DATA SYSTEMS CORPORATION, Defendant.

Core Terms

software, license, mainframe, patent, antitrust, customer, monopoly, holder, lease, partial summary judgment, time sharing, third party, restrictions, alleges, anti trust law, tied product, Sherman Act, competitor, designers, terminals, products, mall

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 > 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 as to any material fact and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). The central inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] Summary Judgment, Burdens of Proof

After adequate time for discovery and upon motion, [Fed. R. Civ. P. 56\(c\)](#) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial.

902 F. Supp. 741, *741 1995 U.S. Dist. LEXIS 15415, **15415 36 U.S.P.Q.2D (BNA) 1778, ***1778

Computer & Internet Law > Internet Business > Licensing > Patent Assignments & Transfers

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN3 Licensing, Patent Assignments & Transfers

Under patent and copyright law, a party may not be compelled to license its proprietary software to anyone.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Computer & Internet Law > Internet Business > Licensing > Patent Assignments & Transfers

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

HN4 Conveyances, Licenses

The refusal to license copyrighted software is valid business justification.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN5 Price Fixing & Restraints of Trade, Tying Arrangements

A party may not use patent or copyright law to support a tie over non-patented or non-copyrighted products. A patent or copyright holder may impose only legitimate restrictions on the use of a patent or copyright which do not enforce a tie.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN6 Inequitable Conduct, Anticompetitive Conduct

A patent holder may reasonably restrict the use of its patented product. However, a restriction may not attempt to extend the scope of the monopoly permitted by the patent to non-patented products.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Ownership > Conveyances > General Overview

HN7 Ownership & Transfer of Rights, Assignments

There are limits on the control a patent holder may exercise over his licensee. Among other restrictions, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell or not to purchase, use or sell another article of commerce not within the scope of his patent monopoly. A patentee may not lawfully exact, as the condition of a license, that unpatented materials used in connection with his invention be purchased.

Computer & Internet Law > Intellectual Property Protection > Copyright Protection > General Overview

Copyright Law > ... > Civil Infringement Actions > Online Infringement > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > General Overview

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

HN8 Intellectual Property Protection, Copyright Protection

Copying for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to computer's random access memory.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN9 Price Fixing & Restraints of Trade, Tying Arrangements

A copyright holder's right to enforce its copyright is limited by antitrust laws, like the laws against tying. A copyright owner may not enforce its copyright to violate the antitrust laws or indeed use it in any manner violative of the public policy embodied in the grant of a copyright. A copyright holder may impose only legitimate restrictions on the use of the copyright which do not enforce a tie.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN10 Intellectual Property, Bad Faith, Fraud & Nonuse

Under antitrust law, a party may not condition the right to use software on the purchase from it of CPU time.

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FOR ELECTRONIC DATA SYSTEMS CORPORATION, a Texas corporation, defendant: Gregory M. Kopacz, Dykema Gossett, Detroit, MI. Gail M. O'Brien, Duvin, Cahn, Troy, MI.

Judges: Nancy G. Edmunds, U.S. District Judge

Opinion by: Nancy G. Edmunds

Opinion

[*1779] [*742] OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT OR IN THE ALTERNATIVE TO EXCLUDE CERTAIN DAMAGE CLAIMS**

This matter came before the court on Defendant's July 10, 1995, motion for partial summary judgment or in the alternative to exclude certain damage claims. For the reasons stated below, the motion is granted in part and denied in part.

I. Facts

The court summarized the essential facts of this case in its October 5, 1994, order as follows:

"Plaintiff, Tricom Inc., brought this antitrust action against Electronic Data Systems Corporation ("EDS"), a wholly-owned subsidiary of General Motors Corporation ("GM"). Both Tricom and EDS sell computer hardware, software, data processing services, and support services. Tricom and EDS provide these products and services to customers, including engineering companies that do computer assisted design and computer assisted manufacturing. Their engineering customers provide design work for manufacturers of automobiles, aircraft, and other products.

There are hundreds of software programs available for use by engineering **[**2]** and design companies. Three are at issue in this case: CGS, CATIA, and CADAM. These software products are part of a category of software known as "CAD/CAM CAE" products. The acronym stands for computer assisted design, computer assisted manufacturing, and computer assisted engineering.

CGS (an acronym for Corporate Graphics System) is software developed and owned by GM and EDS, and EDS is the exclusive supplier of CGS software. On some of its projects, GM requires outside engineering and design vendors to use the CGS software. CGS is used primarily for body surface design.

There are three ways engineering or design companies seeking to use CGS can obtain access to that software from EDS. First, a customer can have computer terminals which are able to access the mainframes at the EDS Information Processing Center installed at its own site (referred to as "mainframe CGS"). Second, a customer can go to an EDS Design Center and use the computers there on an hourly basis. Third, a customer can license a "workstation" version of CGS to be installed on computers at the customer's office. Workstation CGS did not become available until the second quarter of 1991.

TriCom alleges antitrust **[**3]** violations by EDS as follows:

1. Illegal tying in violation of [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#);
2. Illegal tying in violation of section 3 of the Clayton Act, [15 U.S.C. § 15](#);

3. Illegal monopoly in violation of [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#); and
4. Illegal attempted monopoly in violation of [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#).

TriCom alleges that EDS conditions the leasing of its CGS software upon the lease or purchase of certain tied products, thereby depriving TriCom of the opportunity to compete in the lease or sale of the tied products. Tricom further alleges that EDS used its [*743] monopoly power over CGS to engage in various anti-competitive acts."

....

"In Counts I and II of the Complaint, Tricom alleges that EDS engaged in an illegal restraint of trade under [section 1](#) of the Sherman Act and section 3 of the Clayton Act by virtue of certain tying arrangements. A tying arrangement is an agreement by a seller to sell one product [the tying product] only on the condition that the buyer also purchase a different product [the tied product]. Tricom alleges that EDS leases CGS in a package that requires the lessee [**4] to also lease or purchase of the following tied products: 1) CATIA software; 2) CADAM software; 3) telecommunications lines linking the customer to the EDS mainframe computer facility; 4) computer hardware such as graphics terminals, keyboards, monitors, multiplexors, and graphics controllers and associated peripheral devices; and 5) CPU time (time sharing) of 40 hours per week for 50 weeks regardless of whether the time is actually used."

In this, its July 10, 1995, motion for partial summary judgment or in the alternative to exclude certain damage claims, EDS contends that Tricom improperly asserts a refusal to deal claim, that such a claim grossly inflates Tricom's damages, and that the court should grant partial summary judgment and should dismiss such a claim or, in the alternative, that the court should exclude [***1780] Tricom's damage study allegedly based on such a claim.

II. Standard of Review

HN1[] Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Fed.R. Civ. P. 56\(c\)](#). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission [**5] 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 \(1986\)](#). **HN2**[] After adequate time for discovery and upon motion, [Rule 56\(c\)](#) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. [Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#).

III. Analysis

Part of the parties' dispute centers around whether Tricom actually is asserting a refusal to deal claim. According to EDS, Tricom claims that EDS should be required to license its CGS software to Tricom and to third parties.

Tricom's pleadings are ambiguous. On one hand, Tricom states that it never abandoned its refusal to deal claim. "Tricom never waived EDS's liability for refusing to license CGS." Response, pp. 1-2. "Tricom made it clear that its claims included . . . **both** the EDS's tying CGS software to CPU time sharing . . . **and** EDS's 1991 refusal to grant Tricom a CGS license." Response, pp. 5-6 (bold in original). "Tricom [*6] also seeks an injunction remedying EDS's 1991 refusal to deal with Tricom." Final Pretrial Order, p. 3. On the other hand, Tricom states that its claim is not based on an alleged right to obtain a license to CGS. "Tricom's damage calculation is based on its share of lost sales of each of the tied products, including mainframe CPU time, from October 31, 1988, through the date of trial. No CGS license (direct or indirect) is required, and Tricom's damage calculation does not require it to 'use' CGS." Response, p. 2.

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Assuming that Tricom asserts a claim that EDS should be compelled to license CGS to Tricom and to third parties, EDS is entitled to summary judgment on such a claim. [HN3](#)[↑] Under patent and copyright law, EDS may not be compelled to license its proprietary software to anyone. [Genentech, Inc. v. Eli Lilly and Co., 998 F.2d 931, 949 \(Fed. Cir. 1993\)](#), cert. denied, 114 S. Ct. 1126 (1994) (university was free to grant licenses on an exclusive or nonexclusive basis; decision to withhold license alone did not form the basis of antitrust claim); [SCM Corp. v. Xerox Corp., 645 F.2d 1195 \(2d Cir. 1981\)](#), cert. denied, 455 U.S. 1016, 72 L. Ed. 2d 132, 102 S. Ct. [\[*744\]](#) 1708 (1982) [**7] (Xerox's refusal to license its photocopying patent is permissible under patent laws); [Data General Corp. v. Grumman Systems Support Corp., 36 F.3d 1147 \(1st Cir. 1994\)](#) [HN4](#)[↑] (refusal to license copyrighted software is valid business justification; antitrust claim dismissed).¹ Thus, partial summary judgment is granted, and Tricom's claim that EDS should be compelled to license CGS to Tricom and to third parties is dismissed.

[**8] The dispute between the parties, however, is more complex. Tricom claims that EDS impermissibly ties the sale of CGS software to the sale of CPU time on EDS's mainframe computer. Tricom is a competitor in the market for sale of CPU time on a mainframe. Thus, Tricom implies that it should be permitted to run on Tricom's mainframe CGS software licensed or otherwise sold to designers.

EDS misconstrues this claim as either 1) a claim that EDS must grant Tricom a license to use CGS or 2) a claim that EDS must grant third parties a license to use CGS on Tricom's mainframe, with the result that Tricom would run CGS as an "indirect licensee." Tricom's claim is that when EDS chooses to permit the use of CGS software, it should not be permitted to limit which mainframe the software is used on. Tricom wants [\[***1781\]](#) to compete in the market which provides CPU time to CGS software users. Tricom does not seek to "use" CGS software or to resell it to designers.

EDS further claims if it were forced to license CGS, it would be permitted to place reasonable restrictions on its use, thereby prohibiting its use on the Tricom mainframe. EDS cites [Corsearch, Inc. v. Thomson & Thomson, 792 F. Supp. 305 \(S.D.N.Y. \[\\[*91\\] 1992\\)\]\(#\)](#) in support of this proposition because in that case, the defendant licensed a trademarked database to plaintiff with the restriction that the database could not be used by third parties, operated on more than one computer at a time, operated on a multiple computer processing unit, or operated in a multi-site arrangement. [Id. at 313](#). The defendant later terminated the license. *Corsearch* does not address the issue of whether the trademark holder had the right to restrict the use of the trademarked database in this manner nor did the court address whether the license restrictions were reasonable. The court merely found that the trademark holder had the right to terminate its license to the plaintiff and the termination did not violate the Sherman Act. [Id. at 322-23](#).

The issue of what use restrictions would be reasonable is not an issue currently before the court.² Moreover, [HN5](#)[↑] EDS may not use patent or copyright law to support a tie over nonpatented or noncopyrighted products. A patent or copyright holder may impose only legitimate restrictions on the use of a patent or copyright which do not enforce a tie. In [Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 704 \[\\[*101\\] \\(Fed. Cir. 1992\\)\]\(#\)](#), the court held that a

¹ EDS also argues that Tricom should be judicially estopped from making a refusal to deal claim. The doctrine of judicial estoppel bars a party who has "successfully and unequivocally" argued a position in a prior court proceeding from taking an inconsistent position in a later proceeding. [Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 \(6th Cir. 1982\)](#). The requirement that the party must have "successfully" asserted a prior position means that the party must have been successful in persuading the first court to expressly adopt the position. [Id. at 599](#). In other words, judicial estoppel does not prevent a party from contradicting itself, it only bars the party from contradicting itself where a court previously adopted the party's prior position. [Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214, 1217-18 n.3](#). (6th Cir. 1990). The issue of whether Tricom asserted a refusal to deal claim was not previously expressly presented to the court, and thus the court did not expressly adopt any parties' position on the issue. Thus, judicial estoppel does not apply.

² This issue may come up at trial in the context of whether EDS has a business justification for tying its software to its mainframe and whether the tie is the least restrictive means for achieving its business purposes. See [Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342 \(9th Cir. 1987\)](#), cert. denied, [488 U.S. 870, 102 L. Ed. 2d 148, 109 S. Ct. 179 \(1988\)](#) (business justification is defense only if there was no less restrictive means to satisfy the legitimate business objective).

[**HN6**](#) patent holder may reasonably restrict the use of its patented product. However, the court also noted that a restriction may not attempt to extend the scope of the monopoly permitted by the patent to [\[*745\]](#) nonpatented products. *Id.* (citing [Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 516, 61 L. Ed. 871, 37 S. Ct. 416 \(1917\)](#)).

In *Motion Picture Patents* a license notice was attached to patented movie projectors, stating that the purchaser had the right to use the machine only with motion picture films that were leased from the patentee. The defendant used a patented projector with films leased from other sources. The Court condemned the patentee's tie-in as illegal, since it extended the "scope of its monopoly" to materials which were not part of the patented invention.

Id. "The Supreme Court has also emphasized that [HN7](#) there are limits on the control a patent holder may exercise over his licensee. among other restrictions, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell or not to purchase, use or sell another article of commerce not within the scope [\[**11\]](#) of his patent monopoly." [Miller Insituform v. Insituform of N. Am., Inc., 830 F.2d 606 \(6th Cir. 1987\)](#), cert. denied, 484 U.S. 1064, 98 L. Ed. 2d 988, 108 S. Ct. 1023 (1988). "[A] patentee may not lawfully exact, as the condition of a license, that unpatented materials used in connection with his invention be purchased exclusively from him." [Barber-Colman Co. v. National Tool Co., 136 F.2d 339 \(6th Cir. 1943\)](#).

At oral argument on this motion, EDS claimed that Tricom may not operate CGS software on [\[**12\]](#) its mainframe without violating EDS's copyright because in order to operate the CGS software, Tricom must load it onto the mainframe. This constitutes "copying" under copyright law. [MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 \(9th Cir. 1993\)](#), cert. dismissed, 114 S. Ct. 671 (1994) [HN8](#) (copying for purposes of copyright law occurs when computer program is transferred from permanent storage device to computer's random access memory). Accord [Advanced Computer Services of Mich., Inc. v. MAI Systems Corp., 845 F. Supp. 356 \(E.D. Va. 1994\)](#). EDS overlooks the fact that, as discussed above, [HN9](#) a copyright holder's right to enforce its copyright is limited by antitrust laws, like the laws against tying. A copyright owner may not enforce its copyright to violate the antitrust laws or indeed use it in any "manner violative of the public policy embodied in the grant of a copyright." [Lasercomb America, Inc. v Reynolds, 911 F.2d 970, 978 \(4th Cir. 1990\)](#). Again, a copyright holder, like EDS, may impose only legitimate restrictions on the use of the copyright which do not enforce a tie.

Tricom alleges that EDS improperly extends its allowed monopoly power under copyright law over [\[**13\]](#) its software to CPU time sharing on its mainframe, a market where [\[**1782\]](#) EDS does not have permissible monopoly power. [HN10](#) Under antitrust law, EDS may not condition the right to use CGS software on the purchase of CPU time from EDS.³

EDS also argues that CPU time (access to EDS's mainframe) is not a product separate from CGS software. The court discussed this issue at length in its October 5, 1994 order and determined that Tricom had presented a fact question for trial. EDS moved to reconsider, and the court denied the motion on October 28, 1995. Even if [\[**14\]](#) this second request to reconsider was valid and timely, EDS has not provided new grounds in support of such request.

EDS also argues that the statute of limitations bars Tricom's claim. The court discussed this issue at length in its August 15, 1994, order and determined that each contract that a customer signed with EDS constituted a new independent act which allegedly caused a new and independent antitrust injury to Tricom. Thus, Tricom is entitled to sue under the antitrust laws for the injury it suffered as a competitor in the market for sales of CPU time, telecommunications lines, hardware, and access to CATIA and CADAM during the limitations period.

³ It should also be noted that Tricom does not seek to deprive EDS the value of its copyright. If EDS chooses to license its software to a designer, EDS sets the price for the license. Tricom merely claims that it should be able to compete with EDS in selling CPU time to the designer to enable the designer to use the software. Every designer who comes to Tricom wishing to use CGS on Tricom's mainframe would have to obtain the right to use the CGS software from EDS.

[*746] EDS also claims that Tricom lacks standing because it has not suffered an antitrust injury due to the fact that Tricom is not a competitor in the software licensing market. EDS points out that Tricom does not have a right to obtain CGS so that it can resell it to its own customers. For example, in *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343 (5th Cir.), cert. denied, 449 U.S. 870, 66 L. Ed. 2d 90, 101 S. Ct. 208 (1980), shopping mall owners sought to force an electric company to provide electricity to [*15] only one mall hookup so that the mall owners could resell the electricity to mall tenants. The purpose of antitrust laws is to protect competition. Accordingly, where the mall owners sought to act as mere noncompetitive middlemen, they did not suffer an antitrust injury and they lacked standing to sue. Accord *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, 949 F.2d 874 (6th Cir. 1991), cert. denied, 503 U.S. 938, 117 L. Ed. 2d 623, 112 S. Ct. 1480 (1992). EDS further argues that Tricom lacks standing because it is not a design vendor.

Cases like *Alameda* and *Hypoint* are not applicable to this case. Tricom's claim is not based on a right to compete in licensing CGS to designers. Nor is Tricom's claim based on a right to use CGS as a designer. Tricom claims that it is a competitor in the market for providing mainframe CPU time sharing, telecommunications lines, related hardware, and access to CATIA and CADAM software. Its antitrust injury lies there.

EDS also contends that Tricom is not a competitor in time sharing services for CGS users because EDS monopolizes this market. This contention obviously begs the question. Tricom seeks to compete in this market. Its antitrust [*16] injury results from EDS's tying of CGS software to CPU time sharing.

IV. Conclusion

For the reasons set forth above, Defendant's July 10, 1995, motion for partial summary judgment or in the alternative to exclude certain damage claims is GRANTED IN PART AND DENIED IN PART as follows:

IT IS ORDERED THAT Tricom's claim that EDS should be compelled to license CGS to Tricom and to third parties is dismissed.

IT IS ORDERED THAT Tricom's claim that EDS impermissibly ties the sale of CGS software to the sale of CPU time on EDS's mainframe computer, implying that it should be permitted to run CGS licensed or otherwise sold to designers on Tricom's mainframe remains and Tricom's damage study may be introduced as evidence.

Nancy G. Edmunds

U.S. District Judge

Dated: SEP 14 1995



Blue Cross & Blue Shield United v. Marshfield Clinic

United States Court of Appeals for the Seventh Circuit

August 9, 1995, Argued ; September 18, 1995, Decided

Nos. 95-1965, 95-2140

Reporter

65 F.3d 1406 *; 1995 U.S. App. LEXIS 26339 **; 1995-2 Trade Cas. (CCH) P71,120

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN and COMPCARE HEALTH SERVICES INSURANCE CORPORATION, Plaintiffs-Appellees, Cross-Appellants, v. MARSHFIELD CLINIC and SECURITY HEALTH PLAN OF WISCONSIN, INC., Defendants-Appellants, Cross-Appellees.

Subsequent History: [\[**1\]](#) As Amended on Denial of Rehearing October 13, 1995, Reported at: [1995 U.S. App. LEXIS 29056](#). Certiorari Denied March 18, 1996, Reported at: [1996 U.S. LEXIS 1949](#).

Prior History: Appeals from the United States District Court for the Western District of Wisconsin. No. 94 C 137 S. John C. Shabaz, Judge.

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Core Terms

Clinic, patients, insureds, monopolist, prices, competitors, north central, contracts, anti trust law, subscribers, markets, plans, medical services, facilities, monopoly, percent, monopoly power, fee-for-service, terminal, reimbursement, affiliated, damages, high prices, preferred-provider, overcharged, buyers, region, staff, physician's services, Sherman Act

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN1**](#) **[] Antitrust & Trade Law, Sherman Act**

In defining a market, one must consider substitution both by buyers and by sellers.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Regulated Practices, Market Definition

The definition of a market depends on substitutability on the supply side as well as on the demand side. Even if two products are completely different from the consumer's standpoint, if they are made by the same producers, an increase in the price of one that is not cost-justified will induce producers to shift production from the other product to this one in order to increase their profits by selling at a supracompetitive price.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Monopolies & Monopolization, Actual Monopolization

Fifty percent is below any accepted benchmark for inferring monopoly power from market share.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Inferences & Presumptions > General Overview

HN4[] Monopolies & Monopolization, Actual Monopolization

When dealing with a heterogeneous product or service, a reasonable finder of fact cannot infer monopoly power just from higher prices--the difference may reflect a higher quality more costly to provide--and it is always treacherous to try to infer monopoly power from a high rate of return.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Utility Companies > Rates > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Antitrust Issues > Monopolization

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN5[Energy & Utilities, State Regulation

A natural monopolist that acquires and maintains its monopoly without excluding competitors by improper means is not guilty of "monopolizing" in violation of the Sherman Act, [15 U.S.C.S. § 2](#), and can therefore charge any price that it wants, for the antitrust laws are not a price-control statute or a public utility or common-carrier rate regulation statute.

Governments > Courts > Judicial Precedent

HN6[Courts, Judicial Precedent

The court is not authorized to abrogate doctrines that have been endorsed and not yet rejected by the Supreme Court.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN7[Purchasers, Direct Purchasers

Only the direct purchaser from an allegedly overcharging defendant has standing to maintain an antitrust suit.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN8[Antitrust & Trade Law, Sherman Act

Market division violates the Sherman Act, [15 U.S.C.S. § 1](#).

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Judges: Before POSNER, Chief Judge, and BAUER and KANNE, Circuit Judges.

Opinion by: POSNER

Opinion

[*1408] POSNER, *Chief Judge*. Blue Cross & Blue Shield United of Wisconsin ("Blue Cross" for short), and its subsidiary, CompCare Health Services Insurance Corporation, a health maintenance organization (HMO), brought suit last year under [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#), against the Marshfield Clinic and its HMO subsidiary, Security Health Plan of Wisconsin, Inc. After a two-week trial, the jury brought in a verdict for both plaintiffs that, after remittitur, trebling, and addition of attorneys' fees, produced a judgment just short of \$ 20 million to which the judge then added a sweeping injunction that we have stayed pending the decision of the defendants' appeal, which we have heard on an expedited schedule. (The plaintiffs filed a cross-appeal, but it was dismissed by agreement of the parties.) The speed with which this complex case was brought to trial is as commendable as it is unusual.

The two plaintiffs [**2] have distinct though overlapping claims. CompCare, Blue Cross's HMO, claims that the Marshfield Clinic--a nonprofit corporation owned by the 400 physicians whom it employs--has a monopoly which it acquired and has maintained by improper practices that have excluded CompCare from the HMO "market" in the counties of north central Wisconsin in which the Marshfield Clinic and its HMO subsidiary (Security) operate. This is a [section 2](#) monopolization charge. Blue Cross claims that Marshfield, partly through its own monopoly power and partly by collusion with other providers of medical services, charged supracompetitive prices to patients insured by Blue Cross. This is a [section 2](#) monopolization charge combined with a [section 1](#) price-fixing and division-of-markets charge.

[*1409] Although Marshfield is a town of only 20,000 people in a largely rural region, the Marshfield Clinic is the fifth largest physician-owned clinic in North America, with annual revenues in excess of \$ 200 million. The Clinic has its main office in Marshfield but it has 21 branch offices scattered throughout the 14 counties of north central Wisconsin. Oddly, we cannot find in the record, nor were counsel able to inform us [**3] at argument, what percentage the 400 physicians employed by the Clinic comprise of all the physicians in the 14 counties. We do know that the Clinic employs all the physicians in Marshfield itself and in several other towns--but one of these towns has only one physician--and all the physicians in one entire county--but a county that has only 12 physicians. Security, the Marshfield Clinic's HMO subsidiary, serves its subscribers through the physicians employed by the Clinic plus almost 900 other physicians with whom Security has contracts. These contracts are not exclusive--the physicians are free to work for other HMOs as well as to practice fee-for-service medicine--and in fact work for Security generates only 6 percent of these physicians' total income. (CompCare argues that the 6 percent figure is found only in a study and testimony excluded from evidence, but our reading of the objection to the testimony and the ruling on that objection is that not the figure, but only the witness's effort to characterize it as insignificant, was excluded.) In nine of the 14 counties in the north central region, Security has more than 90 percent of all subscribers to HMOs.

Compcare persuaded the jury that HMOs constitute a separate market, much as banks are a separate market from currency exchanges; and if there is a reasonable basis for this finding in the evidence, we are bound to accept it regardless of what we might think as an original matter. But we have searched the record in **[**4]** vain for evidence that under contemporary principles of antitrust law would justify such a finding. An HMO is not a distinctive organizational form or assemblage of skills, as is plain from the fact that the physicians retained by Security, whether they are employees of the Marshfield Clinic or completely independent, to serve its subscribers serve other patients on a fee-for-service basis. An HMO is basically a method of pricing medical services. Instead of having the patient pay separately for each medical procedure, the patient pays a fixed annual fee for all the services he needs and the HMO undertakes to provide those services with the physicians with whom it has contracts. The different method of pricing used by the HMO has, of course, consequences both for the practice of medicine and for the allocation of the risk of medical expenses. The method of pricing gives the HMO an incentive to minimize the procedures that it performs, since the marginal revenue it derives from each procedure is zero. Hence HMOs are thought to reduce "waste" and to encourage preventive care, although those hostile to the HMO concept believe that the principal effect is merely to reduce the amount of **[**5]** medical care that patients receive. The risk-shifting feature of the concept lies in the fact that if a subscriber incurs above-average medical expenses, the excess cost is borne by the HMO rather than by the subscriber (or by his insurer, or more likely by both because of copayment and deductible provisions in the insurance policy), while if he incurs below-average medical expense the difference enures to the benefit of the HMO rather than to him or his insurer (or, again, both). To control the upside risk that it incurs, the HMO provides medical services through physicians with whom it has contracts specifying their compensation, rather than merely reimbursing some percentage of whatever fee they might happen to charge for their services. This means that the HMO must be able to line up enough physicians with whom to contract to provide its subscribers with a more or less complete menu of medical services. Compcare complains that Security's contracts with physicians require them to refer their patients to the Clinic rather than to "independent" physicians. But that is of the essence of an HMO: the subscriber must take the service offered by the physicians whom the HMO has enlisted.

[6]** Compcare's principal argument is that Security has enlisted such a large fraction of the physicians in the 14-county north central region that Compcare cannot find enough "independent" physicians to be able to offer HMO services competitive with Security's--hence Security's huge market shares in 9 of the 14 counties. Supposing this is true--as **[*1410]** seems unlikely since Security's almost 900 independent physicians are available to join other HMOs, along with an unknown number of physicians neither employed by the Marshfield Clinic nor retained by Security-- it has monopolistic significance only if HMOs constitute a market separate from other contractual forms in which many of the same physicians sell their services. Of this we cannot find any evidence.

HN1 In defining a market, one must consider substitution both by buyers and by sellers, IIA Phillip E. Areeda, John L. Solow & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application P 530a (1995), and let us start with buyers. The record shows, what is anyway well known, that individuals, and their employers, and medical insurers (the real "buyers" of medical services, according to the plaintiffs) regard **[**7]** HMOs as competitive not only with each other but also with the various types of fee-for-service provider, including "preferred provider" plans (generally referred to as "PPOs," for "preferred provider organization") under which the insurer offers more generous reimbursement if the insured patronizes physicians who have contracts with the insurer to provide service at low cost to its insureds. HMOs, though they have made great strides in recent years because of the widespread concern with skyrocketing medical costs, remain relative upstarts in the market for physician services. Many people don't like them because of the restriction on the patient's choice of doctors or because they fear that HMOs skimp on service since, as we said, the marginal revenue of a medical procedure to an HMO is zero. From a short-term financial standpoint-- which we do not suggest is the only standpoint that an HMO is likely to have--the HMO's incentive is to keep you healthy if it can but if you get very sick, and are unlikely to recover to a healthy state involving few medical expenses, to let you die as quickly and cheaply as possible. HMOs compensate for these perceived drawbacks by charging a lower price **[**8]** than fee-for-service plans.

We do not wish to associate ourselves with the critics of HMOs. All that is important to our consideration of this appeal is that many people believe--whether rightly or wrongly is of no moment--that HMOs are not an unalloyed blessing; and this means that the price that an HMO can charge is constrained not only by competition from other

HMOs but also by competition from forms of medical-services contracting that are free from the perceived perverse incentive effects of the HMO form. As far as we know or the record shows, even in areas where there is only one HMO most of the people in its service area do not subscribe to it even if its prices are lower than those of fee-for-service providers.

We do not understand Compcare to be contending that insurance companies cannot find enough physicians in the north central region willing to sign contracts with them to staff preferred-provider plans. This has a dual significance. Such plans are particularly close substitutes for HMOs, since they use the insurer's clout with physicians to drive down price. And if, as the record shows, they are feasible even in areas supposedly dominated by the Marshfield Clinic, and [**9] even without including any physicians employed by the Clinic, it is impossible to understand what barrier there could be to the formation of HMOs. All that is needed is an array of physicians who among them provide a broad range of medical services, and the same thing is needed for a preferred-provider plan. Ability to create a preferred-provider plan therefore implies ability to create an HMO, and so implies in turn that if Security raised its prices above competitive levels, and if people had a strong preference for HMOs over preferred-provider plans despite the similarities between the two systems for providing medical care, the operators of those plans would convert them to HMOs. If so, those plans are part of the same market with HMOs. So Blue Cross and Blue Shield of Indiana argued in [Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325 \(7th Cir. 1986\)](#), and we accepted its argument. [Id. at 1331-37](#).

As we said earlier, [HN2](#)[[↑]] the definition of a market depends on substitutability on the supply side as well as on the demand side. Even if two products are completely different from the consumer's standpoint, if they are made by the same producers an increase in the [**10] price of one that is not cost-justified will [*1411] induce producers to shift production from the other product to this one in order to increase their profits by selling at a supracompetitive price. [SBC Communications Inc. v. FCC, 56 F.3d 1484, 1493-94 \(D.C. Cir. 1995\)](#); cf. [Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., supra, 784 F.2d at 1335](#). The services offered by HMOs and by various fee-for-service plans are both provided by the same physicians, who can easily shift from one type of service to another if a change in relative prices makes one type more lucrative than others.

We thus do not believe that a reasonable jury, confronting the record compiled in the district court, could find that HMOs constitute a separate market. (We emphasize "record compiled in the district court." Terms such as "HMO" and "PPO" are used to refer to a variety of different types of plan, which may vary in respects crucial to antitrust liability.) Nor, if we examine a more plausible market such as all physician services in north central Wisconsin and thus shift our focus from Compcare, the HMO, to the Marshfield Clinic itself, is there any basis in the record for treating the Clinic not as the alliance of 400 physicians that is the Marshfield Clinic but instead as the almost 1300 physicians who are either employed by the Clinic or have contracts with Security. The 900 independent contractors derive [**11] only a small fraction of their income from those contracts, as we have seen, and the contracts do not forbid them to join other HMOs or otherwise compete with Security or with the Marshfield Clinic.

It is true that because of the sparsity of the physician population in north central Wisconsin the physicians employed by the Clinic have a large share of the market for physician services, since, for primary care anyway (an important qualification--people will go a long way for a liver transplant), that market is a local one. Remember, there is one entire county in which all the physicians are employed by the Clinic. We do not understand Compcare to be arguing that *this* is the market that the Clinic monopolized; the damages to Compcare from being excluded (if it was excluded--we do not know) from that tiny market would be tiny. Compcare paints with a broader brush, drawing a dizzying series of concentric circles around the Clinic's offices and counting the physicians who can serve people living in the circles. It would have been much simpler and we suppose just as good--having in mind the desirability of avoiding a hunt for the snark of delusive exactness--to have treated the counties [**12] as the markets. But whatever the precise method chosen, Compcare is unable to show that in what it chooses to regard as the relevant geographic market or series of linked geographic markets for physician services the Marshfield Clinic employed 50 percent or more of the physicians serving the market. And [HN3](#)[[↑]] 50 percent is below any accepted benchmark for inferring monopoly power from market share, [United States v. Rockford Memorial Corp., 898 F.2d 1278, 1285 \(7th Cir. 1990\)](#); [Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 201-02 \(3d Cir. 1992\)](#); [Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 694 n. 18 \(10th Cir. 1989\)](#); [United States v. Aluminum](#)

Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (L. Hand, J.), and the Clinic has given us no reason for lowering the mark. CompCare is able to derive larger shares only by defining submarkets of specific, very narrowly defined medical procedures, called "Diagnostic Related Groups," such as circumcision of a male 17 years old or older, circumcision of a male under 17, hysterectomy, and reconstructive surgery for the uterine system, in a few of which (14 out of 494, according to CompCare's expert witness) the physicians [**13] employed by or under contract with Marshfield Clinic performed most of the procedures in north central Wisconsin. As the examples we have given show, classification in a DRG is unrelated to the conditions of supply. Many, no doubt most, physicians perform or are capable of performing more than one procedure, and are therefore part of the market even if at present not active in it. If the Clinic overprices a particular procedure, other physicians capable of performing that procedure will have an added incentive to do so, knocking down the excessive price.

CompCare also asked the jury to infer monopoly power directly from the Clinic's high prices, and high rate of return, relative to the prices and rates of return of its competitors. But HN4[¹⁴] when dealing with a heterogeneous [*1412] product or service, such as the full range of medical care, a reasonable finder of fact cannot infer monopoly power just from higher prices--the difference may reflect a higher quality more costly to provide--and it is always treacherous to try to infer monopoly power from a high rate of return. Taking the second point first, not only do measured rates of return reflect accounting conventions more than they do real [**14] profits (or losses), as an economist would understand these terms, Susan Rose-Ackerman, "Unfair Competition and Corporate Income Taxation, 34 Stan. L. Rev. 1017, 1025 n. 28, 1031 n. 43 (1982); Michael Boudin, "Forensic Economics," 97 Harv. L. Rev. 835, 837 (1984), but there is not even a good economic theory that associates monopoly power with a high rate of return. Firms compete to become and to remain monopolists, and the process of competition erodes their profits. Conversely, competitive firms may be highly profitable merely by virtue of having low costs as a result of superior efficiency, yet not sufficiently lower costs than all other competitors to enable the firm to take over its market and become a monopolist. As for high prices, one of the complaints against HMOs, remember, is that they skimp on service. One HMO may charge higher prices than other HMOs (and Security does charge higher prices) not because it has a monopoly but because it is offering better service than the other HMOs in its market. CompCare itself stresses the quality of the Marshfield Clinic's doctors, as part of its argument that it cannot succeed unless the Clinic is forced to join it. Generally you must [**15] pay more for higher quality.

So Security is not a monopolist of HMO services, because, subject to our earlier qualification, HMOs are not a market; and the Marshfield Clinic, its parent, is not a monopolist either because it does not control its independent contractors and once they are excluded, the Clinic (which is to say the physicians who own and are employed by it--who are the firm, functionally speaking) does not have a monopoly of physician services in the north central region or in any parts of the region other than parts too small to support more than a handful of physicians. If the Marshfield Clinic is a monopolist in any of these areas it is what is called a "natural monopolist," which is to say a firm that has no competitors simply because the market is too small to support more than a single firm. If an entire county has only 12 physicians, one can hardly expect or want them to set up in competition with each other. We live in the age of technology and specialization in medical services. Physicians practice in groups, in alliances, in networks, utilizing expensive equipment and support. Twelve physicians competing in a county would be competing to provide horse-and-buggy medicine. Only as part of a large and [**16] sophisticated medical enterprise such as the Marshfield Clinic can they practice modern medicine in rural Wisconsin.

We are mindful that a concept of essential or bottleneck facilities has been used from time to time to require a natural monopolist to cooperate with would-be competitors. E.g., Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973); MCI Communications Corp. v. AT&T Corp., 708 F.2d 1081, 1132-33 (7th Cir. 1983). The principal case remains the old St. Louis terminal case. United States v. Terminal Railroad Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912). A consortium of 14 of the 24 railroads that shipped freight across the Mississippi River at St. Louis got control of the terminal facilities at each side of the river. The Supreme Court, while assuming that the operation of these facilities as a single entity was the most efficient way to operate them (that is, they comprised a natural monopoly), held that the Sherman Act required the consortium to provide access to the terminal facilities to the 10 other railroads on nondiscriminatory terms. The decision, along with the rest of the decisions in the essential-facilities line, has been criticized as having nothing to do with the purposes [**17] of antitrust law. E.g., Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and*

Its Practice § 7.7 (1994); Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 *Antitrust L.J.* 841 (1990); Scott D. Makar, "The Essential Facilities Doctrine and the Health Care Industry," 21 Fla. St. U.L. Rev. 913 (1994). Had the terminal facilities been owned by a firm unaffiliated with any railroad, the firm could have charged whatever prices it wanted, including prices that discriminated against some of the users (monopolists frequently price discriminate), because the antitrust laws do not regulate **[*1413]** the prices of natural monopolists.

HN5 A natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of "monopolizing" in violation of the Sherman Act, National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1023-24 (8th Cir. 1985); United States v. Aluminum Co. of America, supra, 148 F.2d at 430, and can therefore charge any price that it wants, Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., supra, 784 F.2d at 1339; Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 296-98 [**18] (2d Cir. 1979), for the antitrust laws are not a price-control statute or a publicutility or common-carrier rate-regulation statute.

And the charging of a high price is, so far as potential competitors are concerned, an attracting rather than an excluding practice. Consumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors, as required by *Terminal Railroad Ass'n*. Similarly, if the practice of medicine in some sparsely populated county of north central Wisconsin is a natural monopoly, consumers will not be helped by our forcing the handful of physicians there to affiliate with multiple HMOs. Those physicians will still charge fees reflecting their monopoly.

HN6 We are not authorized to abrogate doctrines that have been endorsed and not yet rejected by the Supreme Court--as we acknowledged, indeed emphasized, with specific reference to the "essential facilities" doctrine, in Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 376 (7th Cir. 1986)--but we do not understand Compcare to be trying to pin the tail on the naturalmonopoly donkey. Its argument is not that the Marshfield Clinic "owns" some tiny **[**19]** natural monopolies scattered throughout its market area, to which it must admit Compcare, but that the Clinic itself is an essential facility that any HMO may demand access to on equal terms, like the excluded railroads in the terminal case. To be an essential facility, however, a facility must be essential. The terminal association controlled 100 percent of a market, assumed to be properly defined, consisting of terminal services at St. Louis. The Clinic does not control 100 percent--or even 50 percent--of any properly defined market. It did have a monopoly market share of the HMO "market," but we have held that that is not a proper market; and likewise the DRGs. Nor can the Clinic's market share be levered up to 100 percent by the argument that the Clinic's reputation is so superb that no one will sign up with an HMO or preferred-provider plan that does not have the Clinic on its roster. The suggestion that the price of being "best" is to be brought under the regulatory aegis of antitrust law and stripped of your power to decide whom to do business with does not identify an interest that the antitrust laws protect. "The successful competitor, having been urged to compete, must not **[**20]** be turned upon when he wins." United States v. Aluminum Co. of America, supra, 148 F.2d at 430.

Since monopoly power was not proved, we need not evaluate the practices by which the Clinic acquired or maintained it. But we will not conceal our skepticism that they are exclusionary in an invidious sense. Compcare argues that the Clinic refused to allow its employees to "cross-cover" with "independent" physicians, in the sense of physicians not employed by or affiliated by contract with the Clinic (that is, agree to care for another physician's patients when that physician is on vacation or otherwise unavailable in exchange for a reciprocal agreement by the other physician), discouraged hospitals that its staff controlled from joining HMOs that compete with Security, and restricted staff privileges at those hospitals of "independent" physicians. All these practices are ambiguous from the standpoint of competition and efficiency. Hospitals are not public utilities, required to grant staff privileges to anyone with a medical license. The Marshfield Clinic's reputation for high quality implies selectivity in the granting of staff privileges at hospitals affiliated with the Clinic. Physicians **[**21]** employed by the Clinic, which has its own HMO, are hardly to be expected to steer their patients to another HMO, as they would be doing if they used their control of hospital staffs to induce the hospital to join another HMO. **[*1414]** And given the extensive network constituted by the physicians either employed by or contracting with the Clinic, they would have little occasion to "cross-cover" with other physicians and would be reluctant to do so if, as is completely consistent with Compcare's version of the "essential facilities" doctrine, the Clinic maintains a reputation for high quality by being selective about the physicians to whom it entrusts its customers. But the important point is that, even if these practices are as we doubt

tortious interferences with Compcare's business, they do not constitute monopolizing in violation of [section 2](#) of the Sherman Act in the absence of acceptable proof, here lacking, of monopoly power.

We turn to Blue Cross's case. Blue Cross claims that it was overcharged by the Clinic. Many of the individuals whom Blue Cross insures in north central Wisconsin are customers of the Marshfield Clinic, paying for the services they receive from the Clinic on a fee-for-service [\[**22\]](#) basis. (The Clinic's doctors devote only a small part of their time to Security's HMO clientele.) Blue Cross pays the Clinic directly the portion of the fee that Blue Cross has agreed with its insureds to cover. The Clinic seeks to head off Blue Cross's claim at the pass, arguing that since the Clinic's fee-for-service contracts are with the patients themselves--it has no contract with Blue Cross--only the patients have "standing" (a term here not used in the jurisdictional sense, [*Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 n. 31, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#)) to complain about the alleged overcharging.

If the patients paid the entire fees to the Clinic and then were reimbursed in whole or part by Blue Cross, the Clinic would be right: only the patients could sue. The Supreme Court has been emphatic that [HNT](#)[↑] only the direct purchaser from an allegedly overcharging defendant has standing to maintain an antitrust suit. [*Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 111 L. Ed. 2d 169, 110 S. Ct. 2807 \(1990\)](#); [*Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#). But here the money went directly from Blue Cross to the Clinic, and although the two entities were not linked by any overarching [\[**23\]](#) contract, each payment and acceptance was a separate completed contract. We do not think more is required to establish Blue Cross's right to sue to collect these overcharges. [*Pennsylvania Dental Ass'n v. Medical Service Ass'n*, 815 F.2d 270, 276-77 \(3d Cir. 1987\)](#); [*Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1455 \(11th Cir. 1991\)](#); cf. [*Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 926 \(1st Cir. 1984\)](#). It would be cumbersome, to say the least, for patients of the Marshfield Clinic to organize into a class action to recover money that the patients never paid and that if they received in a judgment or settlement they would have to share with Blue Cross; for Blue Cross could seek and probably obtain restitution of moneys paid by mistake to the insureds because paid for expenses that the insureds had not in the end incurred. 2 George E. Palmer, *The Law of Restitution* § 11.2(d), p. 491 (1978); [*Home Ins. Co. v. Honaker*, 480 A.2d 652 \(Del. 1984\)](#); [*Ticor Title Ins. Co. v. Graham*, 576 N.E.2d 1332, 1336-37 \(Ind. App. 1991\)](#).

Against this it can be argued that if Blue Cross reimburses an insured for say 80 percent of a \$ 100 charge that should have been only \$ 50, Blue Cross has lost [\[**24\]](#) \$ 40 but the insured has lost \$ 10 and so there is still a basis for a class action. Still, in this example anyway it is Blue Cross that bears the lion's share of the loss, as well as being able to proceed on its own without the aggregation of separate plaintiffs required for a class action; and the class action would enable a full recovery of the damages inflicted by the defendant only if the class members received a tremendous windfall--only, that is, if the class is allowed to recover \$ 40 rather than \$ 10 (and the entire \$ 50 will of course be trebled). It can further be argued that the insured might pay the whole \$ 50, because Blue Cross would reduce the percentage that it reimburses in order to shift the cost of the monopolist's overcharge to the hapless insureds. But the insureds may not be hapless--may in fact be members of the employees' group insurance plan of a large employer with plenty of insurance options. We need not pursue these issues. Blue Cross paid [\[*1415\]](#) Marshfield Clinic directly, in accordance with Blue Cross's contractual obligations to its insureds, and if it paid too much because the Clinic violated the antitrust laws then it ought to be allowed to sue to recover [\[**25\]](#) these damages.

We note a tension between Blue Cross's claim and Compcare's. Blue Cross claims that the Clinic overcharged. The higher its prices, the greater the opening for competitors, such as Compcare. Even if Compcare could not get a foothold in the HMO "market," it could, of course, provide medical services through other means, such as a preferred provider plan; and the higher the prices charged by the Marshfield Clinic, the more attractive such a plan offered by Compcare would be to employers and other purchasers of medical plans. To put the point differently, Blue Cross has a dual role in this case, as a buyer of medical services from Marshfield Clinic and, through its Compcare subsidiary, as a competitor of the Clinic. As a competitor its interest is in the Clinic's charging high prices, but as a buyer its interest is in the Clinic's charging low prices. Damages to Compcare are windfalls to Blue Cross, and vice versa. The damages awarded by the jury to the two plaintiffs (since they are economically one entity) should have been netted against each other rather than aggregated.

But that is a detail, since Compcare, for the reasons discussed earlier, was not entitled to recover [**26] any damages at all. Forget Compcare, then, and think of Blue Cross solely as a purchaser of medical services. Insofar as it paid high prices because the Marshfield Clinic was a monopolist, its claim must fail because the Clinic was not shown to be an illegal monopolist; a lawful monopolist can charge what it wants. But Blue Cross also claims that the Clinic colluded with competitors to raise prices above competitive levels. That claim is independent of the Clinic's being a monopolist.

Two forms of collusion are charged, with various furbelows and arabasques that can be ignored. The first is collusion between the Clinic and its affiliated (as distinct from employed) physicians. Here the tension between the two plaintiffs' cases again comes to the surface, since it will be recalled that Compcare in its case treats the affiliated physicians as a part of the Clinic, and a firm cannot collude with itself. Forget all that; the only evidence of collusion is that the Clinic, when buying services from the affiliated physicians either directly or through Security, would not pay them more than what these physicians charge their other patients. This is said to set a floor underneath these physicians' [**27] prices, since if they cut prices to their other patients their reimbursement from the Clinic will decline automatically. This is an ingenious but perverse argument. "Most favored nations" clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. The Clinic did this to minimize the cost of these physicians to it, and that is the sort of conduct that the antitrust laws seek to encourage. It is not price-fixing. [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2589-90 \(1993\); Hospital Corp. of America v. FTC, 807 F.2d 1381, 1392 \(7th Cir. 1986\); Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., supra, 784 F.2d at 1338](#). Perhaps, as the Department of Justice believes, these clauses are misused to anticompetitive ends in some cases; but there is no evidence of that in this case.

The other form of collusion alleged is more troublesome. The Clinic is said to have agreed with some of its competitors, in particular the North Central Health Protection Plan, an HMO that had 37,000 subscribers, [HN8](#) to divide markets, a practice that violates [section 1](#) of the Sherman Act. [Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 \(1990\)](#) (per curiam). The analogy between price-fixing and division of markets is compelling. It would be [**28] a strange interpretation of [antitrust law](#) that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.

The charge of a division of markets in this case is backed up by some pretty strong documents. In one of them an executive of the Marshfield Clinic, after noting that "at [*1416] the time in which management of Marshfield Clinic and North Central Health Protection Plan established the Free Flow arrangements, the parties involved purposely chose not to place in writing clear descriptions of their respective Plan service areas so as to minimize any risk in terms of violation of antitrust laws," remarks that some years ago physicians affiliated with the NCHPP "wished to establish a practice in Marshfield and we took the position that the Free Flow agreement did not support that activity"--and they backed off. The implications of this only slightly Aesopian wording are backed up by statistics showing that Security had fewer than 30 percent of the HMO subscribers in the two counties in which NCHPP was active, while in the counties surrounding those two counties on three [**29] sides it had more than 90 percent of the HMO subscribers.

We think the evidence of a division of markets, though a little scanty, was sufficient to sustain the jury's verdict on this (and only this) aspect of the case--provided this is not one of those cases in which a division of markets or other cartel-like activity is actually essential to the provision of a lawful service. [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 \(1979\); National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1984\); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 \(7th Cir. 1984\)](#). The "Free Flow" agreement to which the document from which we quoted refers was an agreement whereby Security's physicians and NCHPP's physicians could refer patients to each other without getting the permission of their superiors. The plan of the physician who rendered the service would bill the other plan for its cost. This was no doubt a valuable service, expanding the range of physicians to whom people enrolled in these two HMOs could turn. But the Clinic has failed to explain why, to provide this service, it was necessary for the two plans to agree not to open offices [**30] in each other's territories. We can

imagine an argument that would run as follows: if NCHPP, say, opened an office in Marshfield, the doctors staffing that office would constantly be referring patients to the Clinic because it has such a plethora of doctors in Marshfield (remember that it employs all the doctors working in that town). The office would be running a referral business, "free riding" on the reputation and quality of Marshfield's doctors, and perhaps it would be difficult to devise a reimbursement plan under which these doctors would be compensated for these services. It is not a bad argument, but it is not made by the Clinic and it has no support in the record.

We conclude that the jury verdict on liability must stand insofar as the charge of a division of markets is concerned, and therefore the provisions of the injunction (IV(A)(3), (B)(3), (C)(3), (D)(3), and (E)(2), and V(D)(1)--and possibly others; but for the sake of clarity and completeness the injunction ought to be rewritten from scratch in light of our invalidating most of it) that forbid the Clinic to divide markets with competing plans or groups. The rest of the injunction falls with the charges that we have [\[**31\]](#) held to be without legal or factual basis. No part of the award of damages or of costs and attorneys' fees can stand, because these items were not segregated by offense. There must be a new trial limited to damages for dividing markets. The burden will be on Blue Cross to show how much less it would have paid the Clinic had the Clinic refrained from that illegal practice.

We have not discussed every contention of the parties, but have said enough to indicate the basis for our decision. As a detail, we urge the bench and bar of this circuit not to imitate the special verdict on liability that went to the jury in this case. The verdict form contained 18 questions. If the jury wanted to find for the plaintiff on every contested point, all it had to do (and all it did do) was write "yes" 18 times. A verdict so configured, like a plea colloquy in which the answer that the defendant is expected to give to every one of the judge's questions is "yes," [*Castillo v. United States, 34 F.3d 443, 445 \(7th Cir. 1994\)*](#), invites rote answers rather than the careful consideration of the structure of the plaintiff's case that the use of a special verdict is intended to foster. Cf. [*W.T. Rogers Co. v. \[\\[**321\\] Keene, 778 F.2d 334, 346 \\(7th Cir. 1985\\)\]\(#\)*](#). None of the purposes ascribed to the giving of a special verdict, [*Stewart & Stevenson Services, Inc. v. Pickard, \[\\[*1417\\] 749 F.2d 635, 644 \\(11th Cir. 1984\\)\]\(#\)*](#); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2508 (1995), of which probably the most important is to minimize the likelihood or scope of a retrial in a case in which there is more than one independent ground for recovery, are served by a verdict form that does not invite the jurors to use their heads. Given the broad discretion of the trial judge in the formulation of special verdicts, e.g., [*Hibma v. Odegaard, 769 F.2d 1147, 1157 \(7th Cir. 1985\)*](#), and the fact that no objection was made to the form employed here, we do not suggest that this form would have constituted reversible error if the point had been argued; we merely offer for what it is worth our belief that it is not the best possible form, because it does not force the jurors to think before filling it out.

The judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Costs on appeal to the appellants.

AFFIRMED IN PART, REVERSED IN [\[**33\]](#) PART, AND REMANDED.



Great W. Directories v. Southwestern Bell Tel. Co.

United States Court of Appeals for the Fifth Circuit

September 20, 1995, Decided

No. 93-1715

Reporter

63 F.3d 1378 *; 1995 U.S. App. LEXIS 26749 **; 1995-2 Trade Cas. (CCH) P71,123

GREAT WESTERN DIRECTORIES, INC., Plaintiff-Appellee-Cross Appellant, v. SOUTHWESTERN BELL TELEPHONE COMPANY, et al., Defendants-Appellants-Cross Appellees. CANYON DIRECTORIES, INC., Plaintiff-Appellee-Cross Appellant, v. SOUTHWESTERN BELL TELEPHONE COMPANY, et al., Defendants-Appellants-Cross Appellees.

Subsequent History: [\[**1\]](#) As Corrected. Rehearing of Great Western Directories, Inc., Denied and Suggestion for Rehearing En Banc and Rehearing of Southwestern Bell Telephone Company, et al, Granted in Part January 26, 1996, Reported at: [1996 U.S. App. LEXIS 1113](#).

Prior History: Appeals from the United States District Court for the Northern District of Texas. D.C. DOCKET NUMBER 2:88-CV-0218 c/w 2:89-0003. JUDGE Mary Lou Robinson.

Core Terms

directory, Telephone, district court, exclusionary, antitrust, prices, injunction, monopoly, advertising, anticompetitive, markets, monopoly power, competitors, damages, increased price, updates, margin, yellow pages, publisher, listings, factors, preparedness, preparation, customers, abandon, costs, telephone directory, no evidence, accomplish, monopolize

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

[**HN1**](#) **Standards of Review, De Novo Review**

The appellate court reviews a district court's refusal to grant a judgment as a matter of law de novo, applying the same standards as the district court.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2 Judgment as Matter of Law, Directed Verdicts

The district court, in entertaining a directed verdict, views the evidence in the light most favorable to the party against whom the motion is made.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3 Appeals, Standards of Review

The appellate court must consider the evidence in its strongest light in favor of the party against whom the directed verdict motion was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4 Judgment as Matter of Law, Judgment Notwithstanding Verdict

A judgment notwithstanding the verdict should be granted by the trial court only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that a reasonable juror could not arrive at a contrary verdict, while viewing the facts in the light most favorable to the nonmovant and giving that party the advantage of every fair and reasonable inference that the evidence justifies.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN5 Antitrust & Trade Law, Sherman Act

The offense of monopoly under the Sherman Act § 2 consists of two elements: (1) possession of monopoly power in the relevant market, and (2) willful acquisition or maintenance of that power as opposed to acquiring market dominance through competitively desirable means or through events beyond its control.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN6 Monopolies & Monopolization, Actual Monopolization

Monopoly power is the power to control prices or exclude competition. Several factors are determinative of a finding of monopoly power: high market share, affirmative actions that have excluded actual or potential competitors, profit levels, and barriers that would thwart entry.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[**HN7**](#) **Monopolies & Monopolization, Actual Monopolization**

The purpose of the market definition and market power inquiry is to determine whether an arrangement has the potential for genuine adverse affects on competition. Proof of actual detrimental effects can obviate the need for the inquiry into market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[**HN8**](#) **Actual Monopolization, Monopoly Power**

In addition to establishing the existence of monopoly power under the Sherman Act § 2, it must be demonstrated that appellants "willfully" acquired or maintained their monopoly power. This involves an inquiry as to whether appellants acquired or exploited their monopoly power through competitively undesirable means. Specific intent to maintain a monopoly power is not required; however, it is relevant in determining whether the challenged conduct is exclusionary or anticompetitive.

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

[**HN9**](#) **Sherman Act, Claims**

An attempted monopoly in violation of the Sherman Act § 2 consists of 3 elements: (1) a showing that the appellants have engaged in predatory or anticompetitive conduct, (2) proof that the appellants specifically intended to acquire monopoly power in the relevant market, and (3) a dangerous probability that an actual monopoly position will ultimately be achieved.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[**HN10**](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

Predatory or anticompetitive conduct is that which unfairly tends to be exclusionary or tends to destroy competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN11**](#) [blue icon] Monopolies & Monopolization, Attempts to Monopolize

Specific intent is the intent to accomplish the forbidden objective, an intent that goes beyond the mere intent to do the act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN12**](#) [blue icon] Monopolies & Monopolization, Attempts to Monopolize

Intent may be inferred by anticompetitive practices or proven by direct evidence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[**HN13**](#) [blue icon] Monopolies & Monopolization, Actual Monopolization

The dangerous probability of achieving an actual monopoly position is customarily assessed by looking at the appellants' market share. If the appellants possess a large share, it will likely be concluded that appellants' conduct, if undeterred, will result in an actual monopoly. Control of key materials is also determinative.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[**HN14**](#) [blue icon] Monopolies & Monopolization, Actual Monopolization

Proof that the appellants' market share is minimal will result in a finding that an actual monopoly is improbable.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

[**HN15**](#) [blue icon] Sherman Act, Claims

Under the Sherman Act § 2, both a claim of monopoly and a claim of attempted monopoly, proscribes exclusionary conduct. Injury to competition is not an element of § 2. However, as a practical matter, evidence of an injury must exist if appellees are to obtain damages. Additionally, evidence of injury to competition supports a finding of exclusionary conduct. Nevertheless, the proper inquiry is whether appellants engaged in exclusionary, anticompetitive, or predatory conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN16**](#) [blue icon] Monopolies & Monopolization, Attempts to Monopolize

Exclusionary conduct is conduct that tends to exclude or restrict competition and is not supported by a valid business reason.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN17**](#) [blue icon] Monopolies & Monopolization, Attempts to Monopolize

Exclusionary conduct comprehends behavior that not only tends to impair the opportunities but also does not further competition on the merits or does so in an unnecessarily restrictive way.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN18**](#) [blue icon] Monopolies & Monopolization, Attempts to Monopolize

An attempt to exclude or actual exclusion is conduct based on something other than efficiency.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN19**](#) [blue icon] Monopolies & Monopolization, Attempts to Monopolize

Antitrust law does not require appellees to prove that appellants' conduct totally eliminated all competition or made it so unprofitable as to eliminate appellees as competitors. The appellees are required to show that the monopolists' unjust conduct handicapped their competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN20**](#) [blue icon] Monopolies & Monopolization, Actual Monopolization

It is not necessary to exclude competitors to be guilty of monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

[**HN21**](#) [blue icon] Monopolies & Monopolization, Actual Monopolization

When a firm displays an anticompetitive animus in the operation of an otherwise ambiguous business practice, what the firm seeks to accomplish provides as sure an indicator of the actual effect of the practice on competition as can be found in the shifting sands of antitrust litigation.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN22 [💡] **Monopolies & Monopolization, Actual Monopolization**

Where the appellants' acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage is not great.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN23 [💡] **Antitrust & Trade Law, Sherman Act**

To establish a business or property interest protected by the Sherman Act § 4, appellees must show that they intended and were prepared to enter the market they abandoned.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN24 [💡] **Regulated Practices, Market Definition**

In assessing a company's preparedness to expand, courts have looked to several factors: the ability of appellees to finance the business and purchase the necessary facilities and equipment, consummation of contracts by appellees, affirmative action by appellees to enter the business, and background and experience in the prospective business.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN25 [💡] **Private Actions, Standing**

There is typically a lack of standing where appellees lack evidence on all the preparedness factors. However, not every appellee in every case must show all four of the factors to merit standing.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN26 [💡] **Regulated Practices, Market Definition**

There is lack of preparedness to enter new market when no contracts consummated and no financing.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[HN27](#) [blue document icon] Regulated Practices, Market Definition

Experience in proposed business operation, unaccompanied by contracts and financing, are not enough to establish "business or property" interest.

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview](#)

[HN28](#) [blue document icon] Regulated Practices, Market Definition

Even though antitrust appellees operate a going concern, they must demonstrate their preparedness and intent to expand that business into a new market if they claim that the expansion of that business into a new market has been foreclosed to them by the monopolistic activities of the appellants.

[Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review](#)

[Civil Procedure > Remedies > Injunctions > Permanent Injunctions](#)

[Civil Procedure > Appeals > Standards of Review > Abuse of Discretion](#)

[Civil Procedure > Appeals > Standards of Review > De Novo Review](#)

[HN29](#) [blue document icon] Standards of Review, Clearly Erroneous Review

The appellate court reviews the propriety of a district court's decision to issue a permanent injunction for an abuse of discretion. The factual underpinnings are reviewed for clear error, while the application of legal principles is reviewed de novo.

[Civil Procedure > Appeals > Standards of Review > Abuse of Discretion](#)

[Civil Procedure > Trials > Bench Trials](#)

[HN30](#) [blue document icon] Standards of Review, Abuse of Discretion

A district court that adopts one party's suggested findings essentially verbatim leaves doubt whether it has discharged its duty to review the evidence for itself and reached its decision on the basis of its own evaluation for the evidence rather than that of an advocate.

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AMICUS CURIAE: ASSOCIATION OF DIRECTORY PUBLISHERS, WILLKIE, FARR & GALLAGHER, Theodore Case Whitehoue, David Paul Murray, WASH/D.C.

Judges: Before WISDOM, REYNALDO G. GARZA and GARWOOD, Circuit Judges.

Opinion by: REYNALDO G. GARZA

Opinion

[*1382] REYNALDO G. GARZA, Circuit Judge:

I. Summary and Procedural History

Plaintiffs-Appellees, Great Western Directories, Inc. (Great Western) and Canyon Directories, Inc. (Canyon), filed suit alleging that Defendants-Appellants, Southwestern Bell Telephone Company, et al. (collectively, "SWB"), violated Sections 1 and 2 of the Sherman Act, violated the Texas Free Enterprise and Antitrust Act, violated the Texas Deceptive Trade Practices Act, and tortiously interfered with business relations. Appellants allegedly orchestrated an "affiliation wide concerted action" to extend the SWB monopoly of the yellow pages market and to eliminate competition by raising the costs of doing business as an independent directory and by reducing the price of advertising in its wholly owned classified directory by 40%.

A jury returned a verdict in favor of Great Western and Canyon. The jury found damages of \$ 5 million on Great Western's antitrust claims, \$ 50,000 in actual and \$ 50,000 in additional damages on its DTPA [**2] claims, and \$ 50,000 in actual and \$ 50,000 in punitive damages for its tortious interference claims. The jury found damages of \$ 9,400 on Canyon's antitrust claims, \$ 10,000 in actual and \$ 10,000 in additional damages under its DTPA claims, and \$ 10,000 in actual and \$ 10,000 in punitive damages on its tortious interference claims. Both plaintiffs were awarded attorneys' fees.

Following the verdict, Appellants moved for JNOV and for a new trial. On July 27, 1990, the district court entered judgment on the verdict, awarding Great Western \$ 15 million and Canyon \$ 28,200 in trebled antitrust damages and awarding both plaintiffs attorneys' fees; no damage award was made on the state law claims. On May 8, 1992, the [*1383] district court held a hearing on Appellees' motion for injunctive relief and on Appellants' motions for judgment as a matter of law and new trial. On July 2, 1993, the district court entered a final judgment granting a permanent injunction and denying Appellants' post-trial motions.

On July 9, 1993, Appellants filed a motion to stay the injunction pending appeal. On July 29, 1993, Appellants filed its notice of appeal. On December 7, 1993, the district court entered its [**3] final judgment, denied Appellants' motion for stay, and refused to extend its injunction beyond the parties.

II. Parties and Subject Matter

Southwestern Bell Corporation (SWB) is a holding company; Southwestern Bell Telephone Company (Telephone), SWB's wholly owned subsidiary, provides telephone service to its customers in Arkansas, Kansas, Missouri, Oklahoma, and Texas. Telephone publishes and provides the "white pages" to its telephone customers. In order to publish the white pages Telephone must compile and maintain a database of names, addresses, and telephone numbers of all its customers. This compilation is known in the telecommunications world as directory listing information (DLI).

Southwestern Bell Yellow Pages (Yellow Pages), another wholly owned subsidiary of SWB, licenses DLI¹ from Telephone for use in publishing its classified, or yellow pages, directory. Telephone licenses DLI to independent publishers, such as Great Western and Canyon. Great Western is based in Amarillo, Texas and publishes a competing yellow pages (classified) directory in eleven cities in Texas and Oklahoma. Canyon publishes a single directory in Canyon, Texas (near Amarillo). Canyon [**4] is a "niche" publisher whose directory caters to local advertisers who do not need to advertise outside of their immediate geographic area.

¹ DLI is provided in a variety of formats. One form is known as the "book on the street" paper or "BOS-paper". BOS-paper is a published compilation of names, addresses and telephone numbers, that is, the white pages. Another format is known as "subscriber listing update service" (update service). The update service consists of two components. The first component, the "initial load", is a copy of Telephone's DLI on magnetic tape as of a given date. The second component, the "updates", is a monthly update of the initial load.

III. Facts

Appellants and Appellees paint distinctly different pictures of the facts in this case. However, some facts are uncontested. In June 1988 Yellow Pages improved its classified directories in certain markets and instituted a rate reduction in Amarillo. The rate reduction consisted of a 40% across-the-board reduction in advertising rates [**5] as well as various incentives enabling advertisers who maintained existing expenditure levels to receive additional advertising. Effective January 1, 1989, Telephone increased its DLI prices from \$ 0.30 to \$ 0.50 for the initial load, and the update to \$ 1.00.

The incidents leading up to the rate reduction and the DLI price increase are hotly contested as are the effects. Appellants and Appellees each give their own economic explanation of the causes and effects of the changes instituted by SWB. Briefly, Appellees contend SWB adopted a strategy to eliminate the competition and slow their declining market share. This was accomplished by a two-prong attack--raising the prices and imposing restrictive conditions on the sale of the DLI, while at the same time improving the quality of telephone directories published by Yellow Pages and reducing the prices charged for the advertisements. Because Great Western operates at a low marginal profit of two percent of its sales, reflecting its emphasis on expansion, the change in DLI prices forced Great Western out of its Richardson market and prevented it from entering its Little Rock market.

Appellants, on the other hand, contend that Yellow [**6] Pages' share of the advertising directory market was shrinking, and accordingly made improvements to their directories and instituted a rate reduction of 40% in Amarillo on a trial basis. Pursuant to studies conducted of DLI prices in other markets, Telephone decided to increase its DLI price. Appellees continued to compete; in fact, Appellees' revenues and market shares increased after the DLI price change. Great [*1384] Western's decision to abandon Richardson and not to enter Little Rock was based on their fear that SWB would increase its DLI prices in the future.

IV. Summary of the Law

Standard of Review

HN1[] This Court reviews a district court's refusal to grant a judgment as a matter of law *de novo*, applying the same standards as the district court. **HN2**[] The trial court, in entertaining a directed verdict, views the evidence in the light most favorable to the party against whom the motion is made. **HN3**[] On appeal, this Court must consider the evidence in its strongest light in favor of the party against whom the motion was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.² **HN4**[] A judgment notwithstanding the verdict (JNOV) should [**7] be granted by the trial court

only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that a reasonable juror could not arrive at a contrary verdict, [while] viewing the facts in the light most favorable to the nonmovant and giving that party the advantage of every fair and reasonable inference that the evidence justifies.³

Antitrust Law

Appellees raised two Section 2 claims: monopoly and attempted monopoly. They contend that Appellants violated Section 2 under both of these theories by abusing an essential facility and through market leveraging. The jury returned a verdict in favor of Appellees finding that:

(1) defendants monopolized and attempted to monopolize the alleged relevant markets for telephone directory advertising by denying reasonable [**8] access to an essential facility, that is, Telephone's DLI;

² [Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696, n. 6, 82 S. Ct. 1404, 1409, n. 6, 8 L. Ed. 2d 777 \(1962\)](#).

³ [Spuler v. Pickar, 958 F.2d 103, 105 \(5th Cir.1992\)](#).

(2) defendants monopolized the same alleged markets by leveraging monopoly power over DLI in an illegal restraint of competition in the telephone directory advertising markets; and
 (3) defendants attempted to monopolize the alleged telephone directory advertising markets by increasing the price of DLI to Yellow Pages and its competitors while at the same time substantially reducing Yellow Pages' rates for telephone directory advertising and substantially enhancing its directories.

HN5[] The offense of monopoly under Section 2 consists of two elements: (1) possession of monopoly power in the relevant market, and (2) willful acquisition or maintenance of that power as opposed to acquiring market dominance through competitively desirable means or through events beyond its control.⁴ **HN6[]** Monopoly power is the power to control prices or exclude competition.⁵ Several factors are determinative of a finding of monopoly power: high market share,⁶ affirmative actions that have excluded actual or potential competitors, profit levels, and barriers that would thwart entry.⁷ It should be noted that **HN7[]** the purpose **[**9]** of the market definition and market power inquiry is to determine whether an arrangement has the potential for genuine adverse affects on competition. Proof of actual detrimental effects can obviate the need for the inquiry into market power.⁸

HN8[] In addition to establishing the existence of monopoly power, it must be **[*1385]** demonstrated that the defendant "willfully" acquired or maintained its monopoly power. This involves an inquiry as to whether the defendant has acquired or exploited its monopoly **[**10]** power through competitively undesirable means. What are undesirable means? The responses of the courts were to distinguish between those exclusionary effects that are inherent in the forces of free competition and those that are substantially enhanced or made possible by the possession and exploitation of monopoly power. Specific intent to maintain a monopoly power is not required; however, it is relevant in determining whether the challenged conduct is exclusionary or anticompetitive.

HN9[] An attempted monopoly in violation of Section 2 consists of 3 elements: (1) a showing that the defendant has engaged in predatory or anticompetitive conduct, (2) proof that the defendant specifically intended to acquire monopoly power in the relevant market, and (3) a dangerous probability that an actual monopoly position will ultimately be achieved. **HN10[]** Predatory or anticompetitive conduct is that which unfairly tends to be exclusionary or tends to destroy competition. **HN11[]** Specific intent is the intent to accomplish the forbidden objective, an intent that goes beyond the mere intent to do the act. **HN12[]** Intent may be inferred by anticompetitive practices or proven by direct evidence. **HN13[]** Dangerous probability of achieving **[**11]** an actual monopoly position is customarily assessed by looking at the defendant's market share. If the defendant possesses a large share, it will likely be concluded that the defendant's conduct, if undeterred, will result in an actual monopoly.⁹ Control of key materials is also determinative.

V. Discussion

Exclusionary Conduct

⁴ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966).

⁵ *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 (1956).

⁶ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481-83, 112 S. Ct. 2072, 2090, 119 L. Ed. 2d 265 (1992).

⁷ WILLIAM C. HOLMES, **ANTITRUST LAW** HANDBOOK, 352-53 (1994 ed.).

⁸ *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986).

⁹ See e.g. *Advanced Health Care Serv. v. Radford Comm. Hosp.*, 910 F.2d 139 (4th Cir.1990) (85 percent); *Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245 (9th Cir.1990) (96 percent); *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir.1984). In contrast, **HN14[]** proof that the defendant's share is minimal will result in a finding that an actual monopoly is improbable. See, e.g., *Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413 (6th Cir.1990) (30 percent declining share); *C.A.T. Industrial Disposal, Inc. v. Browning-Ferris Industries*, 884 F.2d 209 (5th Cir.1989) (10 percent market share insufficient as a matter of law).

Appellants [**12] argue that under both a monopoly or attempted monopoly theory, Appellees must show that Appellants' conduct was improperly exclusionary, that is, that the conduct caused injury to competition.¹⁰ Because Canyon and Great Western continued to profit after the price increase, and because Great Western could have profitably expanded, Appellants argue there is no evidence to show that Appellants' conduct was exclusionary. This is Appellants' main argument and it is pervasive throughout its brief.

Appellants contend that in order for Appellees to succeed under a Section 2 antitrust claim, they must present evidence of injury to competition. This is not entirely true. [**13] Section 2, under [HN15](#)¹¹ both a claim of monopoly and a claim of attempted monopoly, proscribes exclusionary conduct. Injury to competition is NOT an element of Section 2. "Proving an injury to competition is not an element of a monopolization-based antitrust claim."¹² However, as a practical matter, evidence of an injury must exist if Appellees are to obtain damages.¹³ Additionally, evidence of injury to competition supports a finding of exclusionary conduct. Nevertheless, the proper inquiry is whether Appellants engaged in exclusionary, anticompetitive, or predatory conduct.

[HN16](#)¹⁴ Exclusionary conduct is conduct that tends to exclude or restrict competition and is not supported by a valid business reason. [HN17](#)¹⁵ Exclusionary conduct comprehends behavior that not only tends to impair the [*1386] opportunities but also does not further [**14] competition on the merits or does so in an unnecessarily restrictive way.¹⁶ [HN18](#)¹⁷ An attempt to exclude or actual exclusion is conduct based on something other than efficiency, that is, without a valid business purpose. [HN19](#)¹⁸ Antitrust law does not require a plaintiff to prove that the defendant's conduct totally eliminated all competition or made it so unprofitable as to eliminate the plaintiff as a competitor. The plaintiff is required to show that a monopolist's unjust conduct handicapped its competitors.¹⁹ [HN20](#)²⁰ It is not necessary to exclude competitors to be guilty of monopolization.²¹

[**15] Appellants' argument, that the DLI price increase had no adverse effect on competition and was not exclusionary, is not supported by the evidence taken in the light most favorable to Appellees. Appellees identify extensive evidence, if believed by the jury, that precludes a judgment as a matter of law. First, a jury could find that SWB's purpose in raising the DLI price and imposing more restrictive terms was to recapture its market share, to prevent expansion of current independents, and to prevent new independents from entering the market. SWB identified one of its competitive weaknesses as "low start-up costs" for independents. "Competitor's low margin and high risk strategy leaves [them] vulnerable to expense driven attacks."²² The only cost or expense for independents that SWB controlled was the price of DLI. SWB long since recognized that DLI was "vital to the publishing industry" and "without sharing this updated information with competing directory publishers, telephone companies are able to leverage their monopoly position in the telephone service area into the competitive directory market."²³ Most telling is the evidence indicating that Kaufman, Yellow Pages' president, [**16] suggested a DLI

¹⁰ Although the jury found Appellant liable under several theories of antitrust law, including monopoly, attempted monopoly, leveraging, and unreasonable denial of an essential facility, the briefs focus on the issue of exclusionary conduct and anticompetitive effect. Because exclusionary conduct is the linchpin in this case, we will focus upon it.

¹¹ [Mahone v. Addicks Utility Dist. of Harris County](#), 836 F.2d 921, 939 (5th Cir.1988).

¹² See *id.* (recognizing that Section 4 of the Clayton Act comes with a specific injury requirement).

¹³ [Aspen Skiing Co. v. Aspen Highlands Skiing Corp.](#), 472 U.S. 585, 605 n. 32, 105 S. Ct. 2847, 2859 n. 32, 86 L. Ed. 2d 467 (1985).

¹⁴ [Aspen Skiing Co.](#), 472 U.S. at 605, 105 S. Ct. at 2858.

¹⁵ [Hanover Shoe v. United Shoe Machinery Corp.](#), 392 U.S. 481, 496, 88 S. Ct. 2224, 2233, 20 L. Ed. 2d 1231 (1968); see also [Poster Exchange v. National Screen Service Corp.](#), 431 F.2d 334, 339 n. 13 (5th Cir.1970) (holding that a monopolist's decision to charge retail prices to competing wholesaler was unlawful if done "to gain a competitive advantage").

¹⁶ Although the planning documents from which these quotes were taken do not specifically recommend increasing the price of DLI, a jury could easily make the inferential hop.

price increase.¹⁸ An expert of economics testified that increasing Yellow Pages' own cost of production was "economically irrational but for its anti-competitive effect [on independents]."¹⁹ Later, Kaufman questioned why the DLI had been raised to \$ 1.00 when it could have been even higher so that "we might [be able] to ... get rid of some publishers." A jury could find that by raising the cost of production SWB intended to "get rid of" some of the low margin competitors, and thereby, capture even more of the directory market.

[**17] In *Lehrman v. Gulf Oil Corp.*²⁰ this Court discussed the difficulty of determining whether a business's practices are anticompetitive.

Few business practices are anticompetitive on their face.... The circumstances surrounding the use of a particular business practice give strong clues as to what those who employ the practice hope to accomplish by it, and what those individuals hope to accomplish may shed light on whether the practice does in fact have the hoped for ... anticompetitive effect. In short, [HN21](#) when a firm displays an anticompetitive animus in the operation of an otherwise ambiguous business practice, what the firm seeks to [\[*1387\]](#) accomplish provides as sure an indicator of the actual effect of the practice on competition as can be found in the shifting sands of antitrust litigation.

There is some evidence, from studies undertaken by SWB and comments made by Kaufman, that the price [\[**18\]](#) increase was intended to restrict the competition. Appellants argue correctly that this is not a substitute for exclusionary conduct or injury to competition. Nevertheless, it is one more "indicator" of SWB's exclusionary conduct the jury can take into account.

Second, there is evidence that other Companies' DLI prices were only one-third of the price Telephone was charging, and that the terms at which SWB offered the listings were restrictive. For small independents, like Canyon, SWB's required purchase of the entire directory even if the publisher only wanted small portions of the listings, substantially increased the fixed costs of operation. Independents were required to purchase both the residential and business updates; independents also had to contract to take updates for a period of two years; and if the publisher stopped taking updates within the two years, the publisher could not obtain listings again for another two years.²¹

[**19] Third, the evidence supports a finding that Appellants' conduct had an anti-competitive effect on the market. Both the number of publishers' licensing listings and the number of competitive directories sharply declined. The price increase threatened to put Canyon out of business, forced it to increase prices to advertisers--adversely affecting the consumer, and reduced its number of customers. The change contributed to Great Western's decline in profit margin, forced its withdrawal from Richardson, forced it to abandon its plans to enter Little Rock, and halted its historical pattern of entering two to three markets per year. Canyon's and Great Western's continued survival does not preclude them of a remedy.

¹⁷ Affidavit of former Yellow Pages President A.C. Parsons.

¹⁸ Several individuals testified at trial that Kaufman suggested looking into DLI prices to increase Telephone's revenues.

¹⁹ SWB argues on appeal that by passing this cost on to the independents, it can thereby reduce the amount of basic telephone service to its customers. This was argument was not presented to the jury and the district court found it meritless, as do we. We cannot say as a matter of law that this post-trial explanation accurately stated the true purpose and effect of the DLI price increase.

²⁰ [464 F.2d 26, 38 n. 9](#) (5th Cir.), cert. denied, [409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 \(1972\)](#).

²¹ After the district court questioned the two year requirement at a preliminary injunction hearing, SWB reduced the two year obligation to two months. For the two month period, independents had to purchase both business and residential listings; thereafter, they could purchase updates for business only or both.

The crux of Appellants' argument is the contention that Appellees failed to show an antitrust injury. Appellants contend that Great Western not only profited after the DLI price increase, but its profits increased over the previous year. Appellees maintain that the DLI price increased the costs of listings to Great Western as percentage of its sales from 1.87% to 4.56%, exceeding Great Western's 2% profit margin. In other words, Great Western could not maintain its previous increasing **[**20]** rate of expansion and retain its 2% marginal profit. The issue becomes whether this is an injury. Appellees' profits increased in 1989, just not as much as they would have; and for a low profit margin competitor, the price increase halted Great Western's expansion.

*Pierce v. Ramsey Winch Co.*²² is helpful in shedding light upon this issue. In *Pierce* the plaintiff was a distributor of, among other things, Ramsey cranes. Because Pierce bought the cranes at a substantial discount, due to large purchases made in cash, Pierce was able to sell them individually at a lower price than the manufacturer Ramsey. Therefore, Ramsey refused to supply them to Pierce. Pierce proceeded to buy them from another manufacturer and also focused on other products. After the supply termination, Pierce was able to operate at a profit level even higher than when selling Ramsey cranes. This Court held that despite the increase in profit, Pierce could still establish an antitrust injury by showing it would have earned an even higher profit selling Ramsey cranes but for the actions of Ramsey. Appellees argue analogously that they suffered a similar injury; but for SWB's DLI price increase, Great Western **[**21]** and Canyon would have earned an even higher profit.

The issue before this Court is whether Great Western and Canyon suffered an antitrust injury despite an increase in profit. We find that they did. There is sufficient evidence of exclusionary conduct and intent to exclude. This evidence coupled with the fact that Appellees, low profit margin competitors, **[*1388]** could have profited more than they did leads this Court to conclude that these actions were sufficient to establish an antitrust injury under *Pierce*.

Opportunity Lost

Appellants contend the district court erred in denying its motion for directed verdict against Great Western for two reasons. First, Great Western's fear of future price increases is too speculative to support a damage award for abandoning the Richardson market and failing to enter the Little Rock market. Second, Great Western has no standing to sue for its failure to enter Little Rock. We will discuss each in turn.

There is no evidence, Appellants **[**22]** argue, that Great Western could not compete in Little Rock and Richardson at the existing DLI prices. In fact, the district court acknowledged that it was the fear of future price increases, not present DLI prices, that forced Great Western to abandon Richardson and Little Rock. Great Western's claims are not ripe. Appellants contend if Telephone raised DLI prices to exclusionary levels in the future, then Great Western would be entitled to relief.

The court instructed the jury not to award damages unless they were in fact attributable to the alleged wrongful conduct. The jury could find and the court did find that the enhanced investment risk was a material cause of Great Western's abandonment of Richardson and failure to enter Little Rock. Additionally, this Court stated that in cases **HN22**²³ where the defendant's acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage is not great.²³ The district court found "the harm to Great Western and to fair competition was caused by what Defendants did and by what Great Western knew they wanted to do, would do, and could continue doing without legal redress being sought." The evidence reveals **[**23]** that SWB had tripled its DLI prices twice within four years and implemented conditions designed to deter new entry. An expert witness testified that investment decisions necessarily take into account risk. The value of a Little Rock entry before the DLI increase was reasonably certain, but not guaranteed. By increasing the risk to new entrants, SWB raised barriers to entry. Great Western not only had to consider present elevated DLI prices but also the risk of future increases over the three year period it takes to enter the market.

²² [753 F.2d 416, 436 \(5th Cir. 1985\)](#).

²³ [Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1565 \(5th Cir. 1984\)](#) (en banc).

Appellant cites several old non-Fifth Circuit cases for the proposition that a plaintiff cannot obtain damages that are to be suffered in the future.²⁴ These cases are distinguishable. The evidence reveals that SWB's conduct elevated the risk of entry into the respective markets *now*, not in the future, to such a degree that a jury could find the risk of entry prevented Great Western [**24] from entering the markets. As the district court stated it was what SWB did and what it could and would continue to do that caused injury.

Appellants' second argument is based on standing. Appellants contend Great Western has no standing to sue for abandoning its plans to enter the Little Rock market unless it can establish [HN23](#)[] a business or property interest protected by Section 4.²⁵ To establish this interest, Great Western must show that it intended and was prepared to enter the market. [*Jayco Systems, Inc. v. I**1389*₁ Savin Business Machines Corp., 777 F.2d 306, 313-314 \(5th Cir.1985\)*](#), cert. denied, 479 U.S. 816, [**25] 107 S. Ct. 73, 93 L. Ed. 2d 30 (1986). Ample evidence exists in the record of Great Western's intent to enter the Little Rock market. Appellee had begun investigations into the market, and had set a 1989 date for publication of a Little Rock directory. However, there is not substantial evidence that Great Western was prepared to enter the Little Rock market.

[HN24](#)[] In assessing a company's preparedness [**26] to expand, courts have looked to several factors: the ability of the plaintiff to finance the business and purchase the necessary facilities and equipment, consummation of contracts by the plaintiff, affirmative action by the plaintiff to enter the business, and background and experience in the prospective business. *Id.*²⁶

This Circuit has [HN25](#)[] typically found lack of standing where a plaintiff lacked evidence on all the preparedness [**27] factors. [*Id. at 315-316*](#) (plaintiff showed no ability to obtain financing); [*Hayes, 597 F.2d at 974-975*](#) (plaintiff failed to prove ability to finance or contracts made); [*Martin, 365 F.2d at 634*](#) (plaintiff failed to prove any of the four factors).²⁷ While we do not hold that every plaintiff in every case must show all four of the factors to merit standing, we find Great Western's showing to be insubstantial.

While Great Western has experience, there is no evidence of affirmative steps taken, contracts made or financing arranged in preparation to enter the Little Rock market. The sum total of Great Western's preparation was review of pricing information, two visits to Little Rock by a corporate [**28] officer and setting of a publication date. Great Western has only demonstrated that it intended to enter the market, not that it was prepared to do business there.

Great Western urges us to find its situation analogous to that of the plaintiff in *Heatransfer Corp. v. Volkswagenwerk A.G.* where we found standing in absence of all four of the factors of preparedness for a plaintiff who intended to expand production, not move into a new market. [*553 F.2d 964, 988 n. 20 \(5th Cir.1977\)*](#).²⁸ The plaintiff in

²⁴ [*Flintkote v. Lysfjord, 246 F.2d 368, 395*](#) (9th Cir.), cert. denied, [*355 U.S. 835, 78 S. Ct. 54, 2 L. Ed. 2d 46 \(1957\)*](#); [*Connecticut Importing Co. v. Frankfort Distilleries, Inc., 101 F.2d 79, 81 \(2d Cir.1939\)*](#); [*Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 716-17 \(D.Haw.1964\)*](#), aff'd, [*401 F.2d 182*](#) cert. denied, [*393 U.S. 1086, 89 S. Ct. 874, 21 L. Ed. 2d 779 \(1969\)*](#).

²⁵ Great Western alleges that SWB never raised the issue of preparedness in any of its motions for directed verdict, thus permitting this Court to review for plain error only. Preparedness, though, is only an element of standing under the antitrust claims. SWB expressly challenged the appellee's standing under antitrust in its motions for directed verdict. SWB also stated in its discussion of Great Western's tortious interference claim that Great Western was unprepared to enter the Little Rock Market. Regardless of the standard of review, Great Western put on no evidence of key aspects of standing as will be discussed.

²⁶ See also [*Hayes v. Solomon, 597 F.2d 958, 973 \(5th Cir.1979\)*](#), cert. denied [*444 U.S. 1078, 100 S. Ct. 1028, 62 L. Ed. 2d 761 \(1980\)*](#); [*Martin v. Phillips Petroleum Corp., 365 F.2d 629, 633-34*](#) (5th Cir.), cert. denied [*385 U.S. 991, 87 S. Ct. 600, 17 L. Ed. 2d 451 \(1966\)*](#); [*Gas Utilities Co. v. Southern Natural Gas Co., 996 F.2d 282, 283 \(11th Cir.1993\)*](#), cert. denied, [*U.S. __, 114 S. Ct. 687, 126 L. Ed. 2d 654 \(1994\)*](#); [*Curtis v. Campbell-Taggart, 687 F.2d 336, 338*](#) (10th Cir.), cert. denied, [*459 U.S. 1090, 103 S. Ct. 576, 74 L. Ed. 2d 937 \(1982\)*](#).

²⁷ [*Accord Gas Utility Co., 996 F.2d at 283 HN26*](#)[] (lack of preparedness to enter new market when no contracts consummated and no financing); [*Curtis, 687 F.2d at 338 HN27*](#)[] (experience in proposed business operation, unaccompanied by contracts and financing, not enough to establish "business or property" interest).

Heattransfer had standing in absence of all four factors of preparedness because little preparation was needed. No significant modification of plaintiff's production facilities was necessary for its expansion. Nor did plaintiff need to obtain new contract rights or additional sources of financing. *Id.*

In contrast, for a plaintiff moving into a new market, such as Great Western, **[**29]** the showing of preparedness is fundamental. We stated that,

HN28[↑] "even though an antitrust plaintiff operates a going concern, he must demonstrate his preparedness and intent to expand that business into a new market if he claims that the expansion of that business into a new market has been foreclosed to him by the monopolistic activities of the defendant." *Id.*

Great Western was not in the position of the plaintiff in *Heattransfer*. There were significant barriers to entry to the Little Rock market. Costs to enter the market were estimated at \$ 1.6 million. Additionally, Great Western would have had to establish a new customer base and new contracts. Under these facts, Great Western cannot claim that little or no preparation was required.

Great Western argues that "its plans to enter Little Rock were kept secret" to prevent entrenchment in the market by **[*1390]** SWB. However, this Court's eyes are open only to what is in the record. We will not attempt to divine Great Western's machinations but will look to what the company actually did in preparation. Preparation is an element for standing under Section 4 and Great Western did little. Because Great Western was not prepared to **[**30]** enter the Little Rock market, it had no standing to protect an alleged interest in that market. We reverse and remand to the District Court with instructions to dismiss the Little Rock claim.

Injunction

HN29[↑] We review the propriety of a district court's decision to issue a permanent injunction for an abuse of discretion.²⁹ The factual underpinnings are reviewed for clear error, while the application of legal principles is reviewed de novo.³⁰ For the reasons discussed below, we affirm the district court's decision to issue the permanent injunction.

[31]** Appellants contend that the district court erred in granting Appellees' injunctive relief because (a) Appellee failed to show the requisite threatened loss or damage, (b) the evidence was insufficient to support Appellees' claim that the updates were essential and the update prices prohibited new entry, and (3) there is no basis for the 13.5 cent amount. Section 16 of the Clayton Act empowers federal courts to grant an injunction "against threatened loss or damage by a violation of the antitrust laws." Appellants' argument is merely more of the same--there is no evidence of a threatened loss. The evidence is sufficient to support a finding that the updates were properly included in the instructions. Testimony from Richard O'Neal, Great Western's founder,³¹ corroborated by SWB business plans³² explained the need to maintain current information through updates. In determining the 13.5 cent price the district court considered the average price per listing charged by other regional Bell operating companies,

²⁸ See also *Cable Holdings v. Home Video*, 825 F.2d 1559, 1562 n. 3 (11th Cir.1987) (citing *Heattransfer* with approval).

²⁹ *Securities & Exchange Commission v. MacElvain*, 417 F.2d 1134, 1137 (5th Cir.1969) (finding that the district court did not abuse its discretion in entering a permanent injunction), cert. denied, 397 U.S. 972, 90 S. Ct. 1087, 25 L. Ed. 2d 265 (1970).

³⁰ The district court apparently adopted Appellee's proposed findings in support of the injunction. Such findings merit heightened scrutiny. *Falcon Constr. Co. v. Economy Forms Corp.*, 805 F.2d 1229, 1232 (5th Cir.1986) **HN30**[↑] ("A district court that adopts one party's suggested findings essentially verbatim leaves doubt whether it has discharged its duty to review the evidence for itself and reached its decision on the basis of its own evaluation for the evidence rather than that of an advocate.").

³¹ Richard O'Neal stated the updates are essential for the independents to call on new businesses and to distribute new directories.

³² Former Yellow Pages president explained that directory publishers need updated information to develop sales leads and to deliver directories to newly connected users.

the effect it would have on basic telephone ratepayers, and the costs of providing the data to independents. Appellant complains that by imposing such a low price, the district [**32] court is in effect forcing telephone customers to subsidize operations of the independent directories. The cost of compiling and maintaining the DLI falls squarely upon the ratepayers, when it should be shared more by independents who pay merely pennies more than the cost of copying the data. However, any regulated business can make the same argument and courts nevertheless have uniformly applied antitrust laws to them.³³ Additionally, the district court could find that the 13.5 cent price provided an adequate margin over costs.

[**33] On cross-appeal, Great Western and Canyon argue that the injunction should apply across the five state market and not merely where the plaintiffs are located. Broader relief embraces the public interest served by private antitrust lawsuits,³⁴ while narrow relief places the plaintiffs in a preferred [*1391] status over its competitors.³⁵ Furthermore, Appellees contend that if Great Western could not expand, neither could any other independent.

The district court narrowed its injunction because it found that the evidence in this case did not justify injunctive relief in markets other than where the plaintiffs compete. No evidence of direct harm in these markets was provided. Also, the district court recognized that it can grant injunctive [**34] relief to non-parties but only if necessary to give the named plaintiffs the continuing relief to which they are entitled.³⁶ We find no error requiring reversal.

We AFFIRM the court below in every respect with the exception that we REVERSE the claim of Great Western with regard to its entering the Little Rock market. The court below will make the necessary changes in its judgment because of the dismissal by us of the Little Rock claim of Great Western.

End of Document

³³ See e.g., [*OtterTail Power Co. v. United States*, 410 U.S. 366, 372-75, 93 S. Ct. 1022, 1027-28, 35 L. Ed. 2d 359 \(1973\)](#); [*Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353-54 \(5th Cir. 1980\)](#).

³⁴ See [*Wilk v. American Medical Association*, 671 F. Supp. 1465 \(N.D.Ill. 1987\)](#), aff'd, [*895 F.2d 352 \(7th Cir. 1990\)*](#).

³⁵ See [*Loew's Inc. v. Milwaukee Towne Corp.*, 201 F.2d 19, 22-23 \(7th Cir. 1952\)](#), cert. denied, [*345 U.S. 951, 73 S. Ct. 865, 97 L. Ed. 1374 \(1953\)*](#).

³⁶ See [*Professional Ass'n of College Educators v. El Paso County Community College Dist.*, 730 F.2d 258, 274](#) (5th Cir.), cert. denied, [*469 U.S. 881, 105 S. Ct. 248, 83 L. Ed. 2d 186 \(1984\)*](#).



Caldwell v. American Basketball Ass'n

United States Court of Appeals for the Second Circuit

January 30, 1995, Argued ; September 21, 1995, Decided

Docket No. 94-7147

Reporter

66 F.3d 523 *; 1995 U.S. App. LEXIS 27176 **; 150 L.R.R.M. 2321; 130 Lab. Cas. (CCH) P11,416; 1995-2 Trade Cas. (CCH) P71,122

JOE L. CALDWELL, Plaintiff-Appellant, v. THE AMERICAN BASKETBALL ASSOCIATION, INC.; THE SPIRITS OF ST. LOUIS BASKETBALL CLUB, a limited partnership; OZZIE SILNA; DANIEL SILNA; HARRY WELTMAN; DONALD SCHUPAK; and TEDD MUNCHAK, Defendants-Appellees.

Subsequent History: [**1] Certiorari denied July 1, 1996, Reported at: [1996 U.S. LEXIS 4293](#).

Prior History: Appeal from a grant of summary judgment in the United States District Court for the Southern District of New York (Leonard B. Sand, Judge) dismissing a complaint that alleged a conspiracy to prevent appellant from playing professional basketball. Because Caldwell's antitrust claims are precluded by the nonstatutory labor exemption to the antitrust laws and his tort claims are preempted by the National Labor Relations Act, we affirm.

Core Terms

bargaining, players, teams, basketball, collective bargaining, collective bargaining agreement, antitrust claim, Sherman Act, negotiations, principles, antitrust, employees, unfair labor practice, Relations, exemption, anti trust law, federal court, multiemployer, nonstatutory, remedies, bargaining representative, basketball player, state law claim, suspension, football, expired, merger, season, terms

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](#) [blue icon] Standards of Review, De Novo Review

The appellate court reviews the district court's grant of summary judgment de novo, and view the evidence in the light most favorable to plaintiff.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN2 [down] **Collective Bargaining & Labor Relations, Federal Preemption**

States are preempted from regulating conduct that even "arguably" constitutes an unfair labor practice under National Labor Relations Act § 8. [29 U.S.C.S. § 158](#).

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Jurisdiction

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN3 [down] **Separation of Powers, Primary Jurisdiction**

The National Labor Relations Board has exclusive jurisdiction to adjudicate conduct that arguably violates National Labor Relations Act § 8. [29 U.S.C.S. § 158](#).

Antitrust & Trade Law > Sherman Act > Defenses

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 > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4 [down] **Sherman Act, Defenses**

Employers who are horizontal competitors for labor are barred by antitrust laws from acting collusively in setting terms and conditions of employment absent justification under the Rule of Reason or some defense. When antitrust claims would subvert fundamental principles of federal labor policy, they are barred by the so-called nonstatutory exemption.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

HN5 **Collective Bargaining & Labor Relations, Duty to Bargain**

The inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN6 **Collective Bargaining & Labor Relations, Duty to Bargain**

Under Section 8(a)(5) of the National Labor Relations Act (NLRA), employers are obligated to bargain collectively with a union selected by a majority of employees in an appropriate unit. [29 U.S.C.S. § 158\(a\)\(5\)](#). Once a union has been selected as a collective bargaining representative, the NLRA extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. Only the union may contract the employee's terms and conditions of employment. Indeed, it is an unfair labor practice for an employer to seek to bargain with individual employees absent the union's consent.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Contracts Law > ... > Negotiable Instruments > Negotiations > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

HN7 **Collective Bargaining & Labor Relations, Duty to Bargain**

Once an exclusive representative has been selected, the individual employee is forbidden by federal law from negotiating directly with the employer absent the representative's consent, even though that employee may actually receive less compensation under the collective bargain than he or she would through individual negotiations.

Antitrust & Trade Law > Regulated Industries > Sports > Football

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Impasse Resolution

HN8 [down arrow] **Sports, Football**

The extinguishing of the employee's right to seek the best bargain begins once a mandatory collective bargaining relationship is established and continues throughout the relationship.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Impasse Resolution

HN9 [down arrow] **Collective Bargaining & Labor Relations, Duty to Bargain**

The National Labor Relations Act, [29 U.S.C.S. § 151 et seq.](#), makes clear that federal labor policy focuses on collective bargaining as a process, rather than collective bargaining agreements alone.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN10 [down arrow] **Collective Bargaining & Labor Relations, Bargaining Subjects**

Once an exclusive bargaining representative has been selected, the National Labor Relations Act, [29 U.S.C.S. § 151 et seq.](#), provides unions, employers, and employees with a "soup-to-nuts array" of rules, tribunals and remedies to govern that process. As a specialized tribunal, the National Labor Relations Board is established to enforce these and other obligations. Section 301 of the Labor Management Relations Act provides that collective agreements may be enforced in federal courts. [29 U.S.C.S. § 185\(a\)](#). Unions are obligated to bargain fairly on behalf of employees in the bargaining unit, an obligation enforceable in federal courts.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN11 [blue download icon] Union Violations, Union Refusal to Bargain

An employer's refusal to bargain in good faith over a proposed restriction on the right to hire and fire is an unfair labor practice that the National Labor Relations Board (NLRB) is empowered to adjudicate and to remedy. [29 U.S.C.S. §§ 158\(a\)\(5\), \(b\)\(3\), \(d\)](#). A discharge of an employee for engaging in union activity is another unfair labor practice enforceable by the NLRB. [29 U.S.C.S. § 158\(a\)\(3\)](#). Once an agreement is reached, a discharged employee may seek to enforce restrictions on discharges through the union, or individually in the federal courts under National Labor Relations Act § 301. [29 U.S.C.S. § 185](#). If the union acts arbitrarily in not enforcing an agreement or in allowing an employee to be discharged, the employee may bring an action against it in federal court under the duty of fair representation.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN12 [blue download icon] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Multiemployer bargaining groups do not violate the antitrust laws although they plainly involve horizontal competitors for labor acting in concert to set and to implement terms of employment. A worker's employment rights are to be determined by the union and the employer. The fact that the employer is a multiemployer organization thus does not alter the fact that there is no right to bargain individually, nor does it create an antitrust claim where none existed.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN13 [blue download icon] Antitrust & Trade Law, Sherman Act

A wholly unprincipled, judge-made exception for professional athletes should not be created.

Counsel: PHILIP J. SHEA, Phoenix, Arizona, (Shea & Wilks, Phoenix, Arizona, of counsel), for Plaintiff-Appellant.

JACK DAVID, New York, New York, (Steven Finell, David C. Berg, Siller, Wilk & Mencher, New York, New York, of counsel), for Defendants-Appellees The Spirits of St. Louis Basketball Club, Daniel Silna and Donald Schupak.

HERBERT TEITELBAUM, New York, New New York, (Teitelbaum, Hiller, Rodman, Paden & Hibsher, P.C., of counsel), for Defendant-Appellee Tedd Munchak.

Judges: Before: MESKILL, WINTER, and McLAUGHLIN, Circuit Judges.

Opinion by: WINTER

Opinion

[*525] WINTER, Circuit Judge:

Joe L. Caldwell appeals from Judge Sand's grant of summary judgment, *Caldwell v. American Basketball Ass'n, 825 F. Supp. 558 (S.D.N.Y. 1993)*, dismissing his complaint. [**2] The complaint alleged that the various appellees violated the Sherman Act, *15 U.S.C. § 1 et seq.*, by conspiring to prevent him from playing professional basketball and by attempting to monopolize the market for professional basketball services. It further alleged that appellees The Spirits of St. Louis Basketball Club, Donald Shupak, and Daniel Silna committed intentional or *prima facie* torts under New York law. Because Caldwell's antitrust claims are barred by the nonstatutory labor exemption and his state law claims are preempted by the National Labor Relations Act ("NLRA"), *29 U.S.C. § 151 et seq.*, we affirm.

BACKGROUND

In 1970, Caldwell signed a five-year contract to play basketball for the Carolina Cougars, a member team of the appellee American Basketball Association ("ABA"). In the same year, pursuant to the NLRA, the ABA Players' Association (the "Union") became the exclusive collective bargaining representative for all ABA players. Caldwell served as vice-president and later president of the Union and as the Union's player representative for the Cougars. *Caldwell, 825 F. Supp. at 560-61.*

During Caldwell's first four seasons with the Cougars, he performed ably [**3] and was elected to the All-Star team during two of the four years. He also became team captain of the Cougars. After Caldwell's fourth season, the owner of the Cougars, appellee Tedd Munchak, sold the team and became commissioner of the ABA. A group headed by appellees Ozzie and David Silna became the new owners of the Cougars. The Cougars subsequently moved to St. Louis and were renamed "The Spirits of St. Louis." *Id. at 561-62.*

On November 20, 1974, Marvin Barnes, a star player for the Spirits, failed to appear [*526] for an important game. Barnes's dissatisfaction with his contract with the Spirits had prompted him to "jump" the team as a negotiating tactic. When the Spirits' coach asked Caldwell where Barnes was, Caldwell denied having any knowledge of Barnes's whereabouts. Although Barnes returned to the team soon thereafter, the Spirits (as assignee from the Cougars) suspended Caldwell pursuant to certain terms in his individual contract, because they believed that he had been involved in planning the incident. *Id. at 562.*

Caldwell appealed his suspension, with the aid of the Union, to the ABA commissioner. However, Caldwell decided not to pursue internal remedies in the ABA [**4] but rather to litigate the suspension. Accordingly, in February 1975 Caldwell brought a contract action in a federal district court in Georgia against Munchak, who was a guarantor of his individual contract. After a bench trial, Caldwell recovered his full 1974-75 salary of \$ 220,000, plus interest, costs and expenses. *Id. at 563.*

Caldwell never played professional basketball again. His contract with the Spirits would have expired, or did expire, on October 29, 1975, but Caldwell alleges that he "was never told that his suspension was lifted, or that the Spirits had terminated his contract, or that other teams were free to negotiate with him." *Id. at 562.* After merger negotiations with the NBA succeeded, the ABA and the Spirits ceased operations after the 1975-76 season. *Id. at 564.*

Caldwell filed the instant lawsuit in early 1975. It was placed on the district court's suspense calendar pending resolution of the Georgia action but was not reactivated for eighteen years due to Caldwell's bankruptcy proceedings. *Id. at 563.* Caldwell alleged in his complaint that the defendants: (i) "combined and conspired to blacklist him and deprive him of the opportunity to continue [**5] his career as a professional basketball player" in violation of *Section 1* of the Sherman Act; (ii) conspired and attempted to monopolize the market for professional basketball services in violation of Section 2 of the Sherman Act; and (iii) acted tortiously and maliciously when they suspended Caldwell "indefinitely." *Id. at 564, 574, 576.*

Caldwell asserted that appellees and the National Basketball Association ("NBA") desired to keep him out of professional basketball during the 1974-76 period in order to exclude him from the ABA-NBA merger negotiations

that were then taking place. Caldwell claimed that he had achieved "notoriety" a year earlier when, as acting president of the Union, he had refused to approve the terms of a collective bargaining agreement.

Appellees offered evidence that Caldwell's physical limitations accounted for his inability to secure employment as a professional basketball player after 1975. In that regard, the record shows that: (i) Caldwell was 33 years old at the time of his suspension and less than two percent of NBA players during the five basketball seasons between 1976 and 1981 were 34 years old or older; (ii) Caldwell had sustained a torn ligament [\[**6\]](#) during the 1971 season; and (iii) Caldwell had sustained an additional injury in an automobile accident in January, 1975. [*Id. at 564*](#). Moreover, all but four of the ABA's teams ceased operations after the merger, resulting in a decreased demand for basketball players.

The district court granted summary judgment in favor of appellees on the ground that Caldwell's physical limitations were the sole cause of his failure to secure another position as a professional basketball player. [*Caldwell, 825 F. Supp. at 570*](#). We affirm, but on different grounds.

DISCUSSION

HN1[!\[\]\(b9c230eec721196b452e6849ca5630bc_img.jpg\)](#) We review the district court's grant of summary judgment *de novo*, [*Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 \(2d Cir. 1993\)*](#), and view the evidence in the light most favorable to Caldwell. See [*Prunier v. City of Watertown, 936 F.2d 677, 679 \(2d Cir. 1991\)*](#).

A. State Law Claims

We take the unusual step of addressing Caldwell's state law claims first because our resolution of those claims sheds light upon the disposition of his federal antitrust claims.

Caldwell asserts that the refusal of ABA teams to hire him was the result of a [\[*527\]](#) stance he had earlier taken as Union president in opposing [\[**7\]](#) a new collective bargaining agreement and because of appellees' resultant desire to exclude him from any role in the ABA-NBA merger negotiations. The essence of his factual claim thus is that the ABA refused him employment because he had engaged in union activities that are protected by Section 7 of the National Labor Relations Act. If true, these facts would constitute an unfair labor practice under NLRA §§ 8(a)(1) and (3). [*29 U.S.C. § 158\(a\)\(1\),\(3\)*](#).

HN2[!\[\]\(b1682f4ff2f24a71e73fc76cd4b31abf_img.jpg\)](#) States are preempted from regulating conduct that even "arguably" constitutes an unfair labor practice under NLRA § 8. [*San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45, 3 L. Ed. 2d 775, 79 S. Ct. 773 \(1959\)*](#). In [*Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 29 L. Ed. 2d 473, 91 S. Ct. 1909 \(1971\)*](#), the Supreme Court applied the *Garmon* preemption doctrine in the context of a state judgment based on a breach of contract theory and on facts that arguably constituted a violation of NLRA §§ 8(b)(2) and (a)(1),(3). [*Id. at 293*](#). It noted that concurrent state court and federal administrative jurisdiction over such conduct bristled with potential conflicts between rules of substantive law, methods of administering that law, [\[**8\]](#) and remedies for its violation. [*Id. at 287-88*](#). Both the comprehensiveness of the NLRA and the assignment of jurisdiction to a specialized federal agency, the National Labor Relations Board ("NLRB"), led the court to hold that **HN3**[!\[\]\(388286273bdba56ce1efff4bc3865d73_img.jpg\)](#) the NLRB has exclusive jurisdiction to adjudicate conduct that arguably violates Section 8.

Caldwell's state law claims must thus be dismissed. The conduct that he alleges is at least arguably an unfair labor practice and is subject to the exclusive jurisdiction of the National Labor Relations Board. Were his state law claims allowed to proceed, a federal court would have to find facts, determine whether the state law relied upon is consistent with the substantive provisions of the NLRA, and fashion a remedy to redress a violation. However, each of these tasks is the exclusive responsibility of the NLRB.

B. Antitrust Claims

1. Introduction

Although the *Garmon* doctrine of exclusive jurisdiction appears not to have been used as a defense in antitrust actions brought by unions or by players who are represented by a union, it is nevertheless relevant by analogy to our discussion of the so-called nonstatutory labor exemption, which bars Caldwell's [**9] antitrust claims.

Invoking antitrust principles that prohibit price (wage) fixing, see *Anderson v. Shipowners Assoc.*, 272 U.S. 359, 71 L. Ed. 298, 47 S. Ct. 125 (1926), and joint boycotts, see *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 (1914), Caldwell alleges that appellees agreed to blacklist him and thereby prevented him from continuing to play professional basketball. He bases his antitrust claim on two interrelated propositions: first, he asserts a right to seek the best terms for his labor as a professional basketball player; second, he asserts a right not to have teams that might compete for his skills agree collusively upon the terms upon which he will or will not be hired.

In *National Basketball Association v. Williams*, 45 F.3d 684 (2d Cir. 1995), we stated that **HN4**[[↑]] employers who are horizontal competitors for labor are barred by antitrust laws from acting collusively in setting terms and conditions of employment "absent justification under the Rule of Reason or some defense." *Id. at 687*. We will assume for purposes of analysis that absent a collective bargaining relationship, the conduct alleged by Caldwell would state a claim under the Sherman Act. Nevertheless, [**10] because Caldwell's antitrust claims would "subvert fundamental principles of federal labor policy," *Wood v. National Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987), they are barred by the so-called nonstatutory exemption.

2. Applicable Principles

HN5[[↑]] "The inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime." *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1054 [***528**] (D.C. Cir. 1995). It does so in two ways pertinent to Caldwell's claims. First, the employee loses the right to bargain for the best price for his or her labor. Subject, of course, to federal statutes specifically overriding the NLRA, such as the Fair Labor Standards Act, *29 U.S.C. § 201 et seq.*, or the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, the terms of the individual's employment are left exclusively to the union and the employer to determine through processes and rules mandated by the NLRA. Second, employers are allowed to act jointly when they have a collective bargaining relationship with a common union. This joint conduct is nothing more than the quite familiar institution of multiemployer bargaining. We now examine [**11] these principles in some detail.

HN6[[↑]] Under Section 8(a)(5) of the NLRA, employers are obligated to bargain collectively with a union selected by a majority of employees in an appropriate unit. *29 U.S.C. § 158(a)(5)*. Once a union has been selected as a collective bargaining representative, the NLRA "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 18 L. Ed. 2d 1123, 87 S. Ct. 2001 (1967); see also *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 484, 4 L. Ed. 2d 454, 80 S. Ct. 419 (1960) (the duty to bargain takes effect when the employees have selected their representative). "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Id.* (quotation and citation omitted); see also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 88 L. Ed. 762, 64 S. Ct. 576 (1944) (private contracts invalid when in conflict with collective bargaining agreement or NLRA's procedures). "Only the union may contract the employee's terms and conditions of employment." *Allis-Chalmers*, [***121**] 388 U.S. at 180. Indeed, it is an unfair labor practice for an employer to seek to bargain with individual employees absent the union's consent. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683, 88 L. Ed. 1007, 64 S. Ct. 830 (1944).

To be sure, in sports leagues, unionized players generally engage in individual bargaining with teams. However, it must be emphasized that such individual bargaining is not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself. As we noted in *Wood*, 809 F.2d at 959, **HN7**[[↑]] "once an exclusive representative has been selected, the individual employee is forbidden by federal law from negotiating directly with the employer absent the representative's consent, even though that employee may actually receive less compensation under the collective bargain than he or she would through individual negotiations." (citing *Allis-Chalmers*, 388 U.S. at 180 & *J.I. Case*, 321 U.S. at 338-39).

HN8 [↑] The extinguishing of the employee's right to seek the best bargain begins once a mandatory collective bargaining relationship is established and continues throughout the relationship. See [Williams, 45 F.3d at 692-93](#) (non-statutory labor exemption precludes antitrust challenge to terms and conditions of employment implemented after CBA expired and parties reached impasse). Accord, *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1056 (D.C. Cir. 1995) (same). In *Brown*, the National Football League ("NFL") unilaterally imposed a fixed salary on a category of players after a collective bargaining agreement had expired and the NFL and NFL Players Association had bargained to an impasse. The Players Association asserted that the NFL had violated the Sherman Act and that the nonstatutory labor exemption "applies only where a union has manifested its consent to a restraint on trade by signing a collective bargaining agreement." *Id.* at 1049. The court rejected this argument,¹ [*529] holding that the NFL's actions were part of the collective bargaining process and therefore within the nonstatutory exemption. *Id.* at 1053-54 ("employer's unilateral implementation after impasse of a term encompassed within its pre-impasse proposals" is a "unilateral but lawful aspect[] of the collective bargaining process established by the NLRA"). Although the collective bargaining agreement had [***14] expired, the court concluded that **HN9** [↑] "the NLRA makes clear that federal labor policy focuses on collective bargaining as a process, rather than collective bargaining agreements alone." *Id.* at 1051. We agree.

[**15] **HN10** [↑] Once an exclusive bargaining representative has been selected, the NLRA provides unions, employers, and employees with a "soup-to-nuts array" of rules, tribunals and remedies to govern that process. [Williams, 45 F.3d at 693](#); see generally, ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING (1976). For example, the parties must bargain in good faith over mandatory subjects of bargaining. [29 U.S.C. §§ 158\(a\)\(5\), 158\(b\)\(3\); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 2 L. Ed. 2d 823, 78 S. Ct. 718 \(1958\)](#); see generally, GORMAN, *supra* at 496-502. Caselaw requires the provision of information during bargaining, [NLRB v. Truitt Mfg. Co., 351 U.S. 149, 100 L. Ed. 1027, 76 S. Ct. 753 \(1956\)](#); see generally, GORMAN, *supra* at 409-18, and otherwise regulates the bargaining process during and between collective agreements. See GORMAN, *supra* at 399-400. Certain other practices by unions and employers are designated as illegal unfair labor practices. [29 U.S.C. § 158](#). As a specialized tribunal, the NLRB is established to enforce these and other obligations. See generally GORMAN, *supra* at 7-18. Section 301 of the Labor Management Relations Act provides that collective agreements [***16] may be enforced in federal courts. [29 U.S.C. § 185\(a\)](#). Finally, unions are obligated to bargain fairly on behalf of employees in the bargaining unit, [Vaca v. Sipes, 386 U.S. 171, 177, 17 L. Ed. 2d 842, 87 S. Ct. 903 \(1967\)](#), an obligation enforceable in federal courts. [National Labor Relations Board v. Local 282, Int'l Bhd. of Teamsters, 740 F.2d 141, 146 \(2d Cir. 1984\)](#).

Thus, a mandatory subject of bargaining pertinent in the instant matter is the circumstances under which an employer may discharge or refuse to hire an employee. **HN11** [↑] An employer's refusal to bargain in good faith over a proposed restriction on the right to hire and fire is an unfair labor practice that the NLRB is empowered to adjudicate and to remedy. [29 U.S.C. §§ 158\(a\)\(5\), \(b\)\(3\), \(d\)](#). A discharge of an employee for engaging in union activity is another unfair labor practice enforceable by the NLRB. [29 U.S.C. § 158\(a\)\(3\)](#). Once an agreement is reached, a discharged employee may seek to enforce restrictions on discharges through the union, [Vaca, 386 U.S. at 183-85](#), or individually in the federal courts under NLRA § 301. [29 U.S.C. § 185; Vaca, 386 U.S. at 184-85](#). If the union acts arbitrarily in not enforcing an agreement or in allowing [***17] an employee to be discharged, the employee may bring an action against it in federal court under the duty of fair representation. [Local 282, Int'l Bhd. of Teamsters, 740 F.2d at 146](#).

¹ The district court in the instant case held that the nonstatutory labor exemption did not apply to appellees because the dispute did not implicate a then-existing collective bargaining agreement. Noting that Caldwell's suspension "was not predicated on the suspension provisions of the Collective Bargaining Agreement [first entered in 1972] or the Association by-laws," the district court stated that "this controversy may be entirely resolved without any reference whatsoever to the Collective Bargaining Agreement." [National Basketball Ass'n v. Williams, 45 F.3d 684 \(2d Cir. 1994\)](#), has since applied the nonstatutory exemption in circumstances in which no collective bargaining agreement existed, as did *Brown v. Pro Football Inc.*, 50 F.3d 1041, 1052-54 (D.C. Cir. 1995), which held that the nonstatutory exemption applies whenever there is a collective bargaining relationship regardless of whether a collective bargaining agreement is in force.

We turn now to the question of whether an employee's antitrust claim is somehow bolstered by an allegation that employers acted jointly in refusing employment. It is not. As we held in [Williams, 45 F.3d at 688](#), and as reaffirmed in *Brown*, 50 F.3d at 1056, [HN12](#)¹ multiemployer bargaining groups do not violate the antitrust laws although they plainly involve horizontal competitors for labor acting in concert to set and to implement terms of employment. Multiemployer bargaining existed prior to the Sherman Act, [Williams, 45 F.3d at 691](#), and its legality was expressly considered by Congress when it passed the Taft-Hartley Act. See *NLRB v. Truck Drivers Local Union No. 449 ("Buffalo [*530] Linen")*, [353 U.S. 87, 95-96, 1 L. Ed. 2d 676, 77 S. Ct. 643 \(1957\)](#). A worker's employment rights are, as noted, to be determined by the union and the employer. The fact that the employer is a multiemployer organization thus does not alter the fact that there is no right to bargain individually, nor does it create an antitrust claim where none existed. [**18](#) See [Williams, 45 F.3d at 693](#).

3. Applying the Principles

Once the ABA became obligated to recognize the ABA Players Association as the exclusive bargaining representative of the ABA players, therefore, Caldwell lost the right to seek the best bargain from individual ABA teams. Moreover, those teams became exempt from any antitrust rule that might have compelled them to compete individually for players represented by the Union. If the ABA and the Union had agreed in a collective agreement that Caldwell should be paid a fixed wage, or could be discharged for any reason not specifically prohibited by a federal law such as Title VII, he could not have challenged that agreement under the antitrust laws. See [Wood, 809 F.2d at 962 n.4](#). Moreover, as noted, even in the absence of a collective bargaining agreement,² Caldwell's right to challenge a discharge by the ABA had to be founded on labor rather than [antitrust law](#).

[**19](#) Unlike the claim in *Wood*, Caldwell's claim regarding his discharge is not directly inconsistent with substantive federal labor law. Nevertheless, allowing Caldwell to proceed with his action would "subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act." [Wood, 809 F.2d at 959](#). Caldwell alleges that the ABA refused him employment because of a position he had taken earlier as Union president and its resultant desire to exclude him from the NBA-ABA merger negotiations. The ABA claims that it refused him employment because of his physical limitations. This dispute is the familiar case of an employee asserting a discharge based on union activities, a violation of NLRA § 8(a)(3), and an employer claiming that the discharge was for cause. See, e.g., *Fibreboard Paper Products Corp. v. NLRB*, [379 U.S. 203, 217, 13 L. Ed. 2d 233, 85 S. Ct. 398 \(1964\)](#); *J.P. Stevens & Co. v. NLRB*, [380 F.2d 292, 300 \(2d Cir.\), cert. denied, 389 U.S. 1005, 19 L. Ed. 2d 600, 88 S. Ct. 564 \(1967\)](#). Caldwell, however, choose not to pursue his claim under the NLRA. Instead, he sought relief under the Sherman Act.

As noted in preemption and sports labor/antitrust cases, it was Congress's determination that [**20](#) federal labor policy required a specialized agency equipped to find facts, to apply the NLRA, and to impose particular remedies. See [Amalgamated, 403 U.S. at 285-86](#), *Brown*, 50 F.3d at 1045. By contrast, the present matter must be adjudicated by federal courts, which are, if Caldwell prevails, directed to award treble damages and attorney's fees, [15 U.S.C. § 15\(a\)](#) -- remedies not available under the NLRA. Indeed, if Caldwell is allowed to proceed with the present action, employees in similar circumstances will either never resort to the NLRB or will institute parallel administrative and antitrust proceedings with the risk of inconsistent adjudications. Every employee who is locked out by a multiemployer group, every striker who is not reinstated, and every employee who is discharged could bring an antitrust action similar to Caldwell's. Clearly, Congress had no such intention. As noted, the NLRA offers "an array of rules and remedies . . . and . . . application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it." [Williams, 45 F.3d at 693](#).

² 2. However, the parties to a collective agreement are required to observe the terms of an expired collective agreement until they have bargained to an impasse. [NLRB v. Katz, 369 U.S. 736, 8 L. Ed. 2d 230, 82 S. Ct. 1107 \(1962\)](#). In a sports league, if a collective agreement that authorized individual bargaining expired but the status quo was being maintained, individual bargains could take place in the absence of a collective agreement. This exception to the general rule stated in the text does not affect the analysis.

The discussion above sets out principles that have been familiar to, [**21] and accepted by, the nation's workers for all of the NLRA's fifty years in every industry except professional sports. There is no precedent outside sports for ever initiating this genre of litigation. Indeed, as we noted in *Williams*, over a century had passed since the Sherman Act [*531] was amended before a worker or union challenged multiemployer bargaining under the antitrust laws, as did the NBA Players' Association in that case. [45 F.3d at 689](#). Nevertheless, although professional athletes are a barely discernible fraction of the nation's unionized employees, similar litigation involving athletes abounds. See *Brown*, 50 F.3d 1041 (football); [Powell v. NFL, 930 F.2d 1293 \(8th Cir. 1989\)](#)(football); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979)(hockey); [Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173 \(D.C. Cir. 1979\)](#)(football); [Mackey v. NFL, 543 F.2d 606 \(8th Cir. 1976\)](#), cert. dismissed, 434 U.S. 801 (1977)(football). However, we adhere to what we said in *Wood*, namely that [HN13](#)[] "a [**22] wholly unprincipled, judge-made exception . . . for professional athletes" should not be created. [809 F.2d at 961](#).

We therefore affirm.

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Moore ex rel. Mississippi v. Abbott Lab.

United States District Court for the Southern District of Mississippi, Jackson Division

September 22, 1995, Decided ; September 22, 1995, Filed

CIVIL ACTION NO. 3:95-CV-78BN

Reporter

900 F. Supp. 26 *; 1995 U.S. Dist. LEXIS 13989 **; 1995-2 Trade Cas. (CCH) P71,157

MIKE MOORE, ATTORNEY GENERAL ex rel. STATE OF MISSISSIPPI, PLAINTIFF VS. ABBOTT LABORATORIES, INC., BRISTOL-MYERS SQUIBB CO. AND MEAD JOHNSON & CO., DEFENDANTS

Core Terms

Defendants', real party in interest, state court, infant formula, removal, cause of action, asserts, diversity jurisdiction, state law, antitrust statute, attorney general, parens patriae, federal court, federal law, federal question, anti trust law, conspiracy, immunity, fraudulent joinder, plaintiff's claim, violations, diversity, purposes

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

HN1 [] Removal, Specific Cases Removed

See [28 U.S.C.S. § 1441\(a\)](#).

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Elements for Removal > General Overview

HN2 [] Removal, Specific Cases Removed

In removing an action from state to federal court, the removing party bears the burden of establishing federal jurisdiction. Whether a case is removable must be determined by reference to the allegations made in the original pleadings.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

900 F. Supp. 26, *26 1995 U.S. Dist. LEXIS 13989, **13989

HN3 **Federal & State Interrelationships, State Sovereign Immunity**

See [U.S. Const., amend. XI.](#)

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN4 **Federal & State Interrelationships, State Sovereign Immunity**

An unconsenting state is immune from suits brought by her own citizens as well as citizens of another state.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Elements for Removal > General Overview

Civil Procedure > ... > Removal > Elements for Removal > Removability

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > General Overview

HN5 **Removal, Specific Cases Removed**

Since the immunity granted by the [Eleventh Amendment, U.S. Const., amend. XI](#), is an immunity from being made an involuntary party to an action in federal court, it should apply equally to the case where the state is a plaintiff in an action commenced in state court and the action is removed to federal court by the defendant.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6 **Public Enforcement, State Civil Actions**

See [Miss. Code Ann. § 75-21-7](#) (rev. 1991).

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

900 F. Supp. 26, *26 1995 U.S. Dist. LEXIS 13989, **13989

Civil Procedure > Parties > Real Party in Interest > General Overview

[**HN7**](#) [down] Diversity Jurisdiction, Citizenship

A state is not considered a citizen for the purposes of diversity jurisdiction under [28 U.S.C.S. § 1332](#).

Civil Procedure > Parties > Joinder of Parties > Fraudulent Joinder

Civil Procedure > ... > Removal > Procedural Matters > Fraudulent Joinder

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

[**HN8**](#) [down] Joinder of Parties, Fraudulent Joinder

The removing party bears the burden of demonstrating fraudulent joinder. To prove fraudulent joinder, a defendant must establish that the plaintiff has no possibility of establishing a cause of action against them in state court. In evaluating fraudulent joinder claims, the court must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the nonremoving party. The court then must determine whether that party has any possibility of recovery against the party whose joinder is questioned. The court does not decide whether the plaintiff will actually or even probably prevail on the merits, but look only for a possibility that he may do so. If that possibility exists, then a good faith assertion of such an expectancy in a state court is not a sham and is not fraudulent in fact or in law.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Substantial Questions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

[**HN9**](#) [down] Federal Questions, Substantial Questions

Federal jurisdiction extends over only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. Under the well-pleaded complaint rule, the federal question must be present on the face of the complaint, and jurisdiction cannot be based on the existence of a federal defense. For federal question jurisdiction to exist, the federal law must be a direct element in the plaintiff's claim and it is not enough that it comes in remotely or indirectly.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial Governments > Relations With Governments

[**HN10**](#) [down] Constitutional Law, Supremacy Clause

State antitrust indirect purchaser statutes are not preempted by federal law.

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For ABBOTT LABORATORIES, defendant: Ross F. Bass, Jr., Michael B. Wallace, PHELPS DUNBAR, Jackson, MS. For BRISTOL-MYERS SQUIBB AND COMPANY, defendant: William F. Goodman, Jr., Lynn Plimpton Risley, WATKINS & EAGER, Jackson, MS. For MEAD JOHNSON & CO., defendant: Ross F. Bass, Jr., Michael B. Wallace, PHELPS DUNBAR, JACKSON, MS. William F. Goodman, Jr., Lynn Plimpton Risley, WATKINS & EAGER, Jackson, MS.

Judges: William H. Barbour, Jr., CHIEF JUDGE

Opinion by: William H. Barbour, Jr.

Opinion

[*28] OPINION AND ORDER

This cause is before the Court on the following motions: (1) Plaintiff's Motion to Remand; (2) Defendants' Motion for Leave to File Surreply Memorandum; and (3) Plaintiff's Application for Review and Objections to Magistrate Judge's Order Denying Motion to Quash and for Protective Order. Having considered the Motions, Responses, all attachments to each and supporting and opposing memoranda, the Court finds that (1) Plaintiff's Motion to Remand is well taken and should be granted; (2) Defendants' Motion for Leave to File Surreply Memorandum is [**2] well taken and should be granted; and (3) Plaintiff's Application for Review and Objections to Magistrate Judge's Order Denying Motion to Quash and for Protective Order is moot and therefore denied.

I. Factual Background and Procedural History

Plaintiff filed this action on January 18, 1995, in the Circuit Court of Holmes County, Mississippi.¹ Defendants are pharmaceutical companies that manufacture and sell infant formula nationally, including in the State of Mississippi. According to the Plaintiff, Defendants share approximately eighty percent of the Mississippi infant formula market. Plaintiff further asserts the following:

For over twelve years, from 1980 through 1992, defendants abused their overwhelming dominance of the infant formula market by independent action and agreement among themselves, whereby they grossly overcharged Mississippi consumers for infant formula. Complaint at P 15.

The substantial terms of defendants' conspiracy consisted of an agreement to fix the wholesale price of infant formula sold throughout the United States, including that sold in Mississippi. Complaint at P 20. Defendants' illegal conspiracy and [*29] agreement caused the price of infant [*3] formula to increase over 120 percent during the last ten years, while the price of milk, infant formula's principal ingredient, rose only 36 percent. Complaint at P 16. Because retailers determine their prices based on defendants' wholesale prices, the retail price of infant formula is directly affected by the wholesale prices charged by defendants. Complaint at P 13. Therefore, as a direct result of defendants' illegal conspiracy, plaintiffs and class members paid more for infant formula than they would have absent defendants' illegal conduct. Complaint at P 27-28.

Memorandum of Law in Support of Plaintiff's Motion to Remand at 1-2.

¹ Contrary to Defendants' assertion, this litigation did not begin on October 7, 1993. On that date, some of the same counsel who are prosecuting this suit filed a class action suit in this Court alleging that Defendants were engaged in an interstate conspiracy to raise, fix, maintain and stabilize at artificially high levels the wholesale prices of infant formula sold in the United States. *Cothran v. Abbott Laboratories, et al.*, Civil Action No. 3:93-CV-626LR (Oct. 7, 1993). The plaintiffs in that case voluntarily dismissed the case on November 8, 1993. The Court finds that these two cases, although related in subject matter, are not the same case for the purposes of the current Motion to Remand.

[**4] The Plaintiff in this matter is the Attorney General of the State of Mississippi who is suing on behalf of the State and as parens patriae on behalf of Mississippi citizens injured by Defendants' alleged misconduct. On behalf of the State, the Attorney General claims that Defendants' actions had the effect of requiring the State to pay artificially high prices for infant formula for the Mississippi Women, Infants and Children (WIC) Program. Plaintiff asserts that Defendants have thus violated certain provisions of the Mississippi antitrust statute, specifically [Miss. Code Ann. §§ 75-21-1](#) and [75-21-3](#). Plaintiff seeks recovery for such violations under [Miss. Code Ann. § 75-21-7](#), which sets forth certain penalties for violation of the Mississippi antitrust laws, and [Miss. Code Ann. § 75-21-9](#), seeking a penalty of \$ 500 for each instance of injury to the State.

Plaintiff also alleges violations of the Mississippi Consumer Protection Act, specifically [Miss. Code Ann. § 75-24-5](#), asserting that Defendants have engaged in unfair competition and unfair or deceptive trade practices. As a result of Defendants' alleged wrongful actions, Plaintiff asserts that the State and the citizens [**5] of the State have paid more for infant formula than they would have paid in the absence of Defendants' alleged unlawful conduct. Plaintiff asserts a right to recover damages pursuant to [Miss. Code Ann. § 75-24-15](#), in his capacity as parens patriae for the Mississippi citizens who have been injured by Defendants' alleged wrongful conduct.²

[**6] On February 17, 1995, Defendants removed this action to this Court on grounds of diversity of citizenship and federal question jurisdiction. Each of Defendants is a foreign corporation organized and existing under the laws of a state other than Mississippi. Defendants assert that the State of Mississippi, on whose behalf Mike Moore brought this suit, is not the real party in interest, and that the Attorney General has no parens patriae authority to bring suit on behalf of the citizens of the State. The real parties in interest, according to Defendants, are the private individuals who bought infant formula between 1980 and 1992, and these are the persons whose citizenship matters for the purposes of [28 U.S.C. § 1332](#). Defendants further assert that Plaintiff has engaged in artful pleading to avoid federal jurisdiction, and that Plaintiff's claims are not cognizable under Mississippi law.

II. Analysis

[HN1](#) [↑] [28 U.S.C. § 1441\(a\)](#) provides in relevant part as follows:

Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States [**7] for the district and division embracing the place where such action is pending.

[28 U.S.C. § 1441\(a\)](#). "The [HN2](#) [↑] removing party bears the burden of establishing federal jurisdiction." [Laughlin v. Prudential Ins. Co.](#), 882 F.2d 187, 190 (5th Cir. 1989) (citation omitted). Whether a case is removable must be determined by reference to the allegations [*30] made in the original pleadings. [Wheeler v. Frito-Lay, Inc.](#), 743 F. Supp. 483, 485 (S.D. Miss. 1990).

A. [Eleventh Amendment](#) Immunity

[HN3](#) [↑] The [Eleventh Amendment to the United States Constitution](#) provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The United States Supreme Court has interpreted this amendment on many occasions to determine when a suit is one against the State. See, e.g., [Pennhurst State Sch. & Hosp. v. Halderman](#), 465 U.S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984).

²The Court notes that [Miss. Code Ann. § 75-24-15](#) was amended in 1994 and the provision regarding attorneys' fees was removed from the statute. Plaintiff asserts a general right to recovery of attorneys' fees if successful on the merits of this suit. Defendants assert that [Miss. Code Ann. § 75-24-19](#) now governs the recovery of attorneys' fees and only allows recovery to the Plaintiff when a violation of [section 75-24-5](#) is knowing and willful. Defendants further assert that Mississippi law only allows the recovery of attorneys' fees when provided by statute. [Stokes v. Board of Directors of La Cava Improvement Co.](#), 654 So. 2d 524, 1995 WL 242266 (Miss. 1995). The Court need not address this issue as it is not necessary for a decision on the Motion to Remand.

That Court has held that "an [HN4](#)[[↑]] unconsenting State is immune from suits brought by her own citizens as well as citizens of another state." [*Id. at ***81 100*](#) (quoting [*Employees v. Missouri Dept. of Public Health & Welfare, 411 U.S. 279, 280, 36 L. Ed. 2d 251, 93 S. Ct. 1614 \(1973\)*](#)). The Plaintiff in this matter asserts that "the proscriptions of the [*Eleventh Amendment*](#) apply with equal force to a suit brought against a state in federal court, and a suit brought by a state in state court which is removed to federal court." Memorandum in Support at 16-17. Defendants do not directly address the issue of the [*Eleventh Amendment*](#) in their submissions to this Court.³

The Court has extensively researched this question and has found only a few federal court cases which even mention this issue. The Court has found only one case, however, which actually bases its ruling [[**9](#)] on the [*Eleventh Amendment*](#) issue. In [*California v. Steelcase, Inc., 792 F. Supp. 84 \(C.D. Cal. 1992\)*](#), the court addressed the issue of [*Eleventh Amendment*](#) immunity where the plaintiff is the state and the case has been removed by the defendants. The court first concluded that the state is not a citizen of itself for diversity purposes. [*Id. at 86*](#) (citing [*Moor v. County of Alameda, 411 U.S. 693, 717, 36 L. Ed. 2d 596, 93 S. Ct. 1785 \(1973\)*](#)). The court then addressed the [*Eleventh Amendment*](#) immunity issue:

Defendant, relying on the literal wording of the [*Eleventh Amendment*](#), contends that this is not a "suit . . . against one of the United States . . ." (emphasis added) because the State is the plaintiff. However, [HN5](#)[[↑]] since the immunity granted by the [*Eleventh Amendment*](#) is an immunity from being made an involuntary party to an action in federal court, it should apply equally to the case where the state is a plaintiff in an action commenced in state court and the action is removed to federal court by the defendant.

The statute under which this action was removed requires, for an action to be removable, that the district courts "have original jurisdiction" over the action. [[**10](#)] [*28 U.S.C. § 1441\(a\)*](#). Because of the jurisdictional bar of the [*Eleventh Amendment*](#), the district courts would not have original jurisdiction over this action, absent the consent of the State. The State does not consent to removal. Therefore, subject matter jurisdiction is lacking, at least as to the claim under the unfair competition statute.

[*792 F. Supp. at 86*](#); but see [*South Dakota State Cement Plant Comm'n v. Wausau Underwriters Ins. Co., 778 F. Supp. 1515, 1522 \(D.S.D. 1991\)*](#) (declining to address the [*Eleventh Amendment*](#) claim with the State as the plaintiff in a motion to remand concluding that "the contention that the [*Eleventh Amendment*](#) nevertheless has bearing upon this Court's jurisdiction is not supported by any authority cited by either party").

The Court finds the reasoning of the [*Steelcase*](#) court to be sound. By removing this matter to federal court, Defendants have involuntarily subjected the State of Mississippi to the jurisdiction of this Court. Because the State does not consent to this removal, the Court finds that it lacks subject matter jurisdiction over this action due to the [*Eleventh Amendment*](#) proscription, provided that the [[*31](#)] State of Mississippi is the real [[**11](#)] party in interest in this matter.

B. Real Party in Interest and Diversity Jurisdiction

The real party in interest issue is relevant to the [*Eleventh Amendment*](#) immunity question as well as to a proper determination of diversity of citizenship. Because the Court has previously found that the [*Eleventh Amendment*](#) precludes the removal of this suit to federal court if the Plaintiff is the real party in interest, the Court will address the issues of real party in interest and diversity of citizenship together because the questions pertaining to each are somewhat intertwined.

Plaintiff asserts that the State of Mississippi is the real party in interest with regard to the [*parens patriae*](#) claims brought under the Mississippi antitrust statute and consumer fraud statute. Plaintiff further asserts that even if the Court determines that the State has no independent interest in the [*parens patriae*](#) claims, the State is still a real

³ While Defendants assert that the State is not the real party in interest in this lawsuit, Defendants fail to address whether the [*Eleventh Amendment*](#) prohibits the State, if it is the real party in interest, from being brought into federal court through the removal process as an involuntary plaintiff.

party in interest with regard to the statutory penalty and WIC claims. Therefore, according to Plaintiff, because the State is the real party in interest, there is no diversity in this matter because a state is not a citizen for the purposes of diversity jurisdiction [\[**12\]](#) under [28 U.S.C. § 1332](#).

Defendants assert that "the Attorney General is acting as the nominal party for a group of lawyers who want to mask what is in fact a private class action on behalf of Mississippi consumers of infant formula that would otherwise be barred by Mississippi law." Defendants' Joint Memorandum in Opposition at 3. Defendants further assert that Plaintiff's non-*parens patriae* claims have been fraudulently joined to defeat diversity jurisdiction. Therefore, according to Defendants, the State of Mississippi is not a real party in interest to this litigation, and diversity jurisdiction exists with regard to the Defendants and the true plaintiffs.

The Court need not decide whether the State of Mississippi has the authority to pursue *parens patriae* claims in the manner asserted in this case in order to dispose of this issue. [HN6](#)  [Miss. Code Ann. § 75-21-7](#) (rev. 1991) provides as follows:

Any person, corporation, partnership, firm or association of persons and the officers and representatives of the corporation or association violating any of the provisions of this chapter shall forfeit not less than one hundred dollars (\$ 100.00) nor more than two thousand dollars [\[**13\]](#) (\$ 2,000.00) for every such violation. Each month in which such person, corporation or association shall violate this chapter shall be a separate violation, the forfeiture and penalty in such case to be recovered alone by suit in the name of the state on the relation of the attorney general and by the consent of the attorney general suits may be brought by any district attorney, such suits to be brought in any court of competent jurisdiction.

Id. (emphasis added). This statute clearly gives the Attorney General of the State the authority to bring suit in the name of the State for violations of Mississippi antitrust law. Furthermore, the Attorney General bringing suit in this capacity is merely the alter ego of the State, and the State is therefore the real party in interest. See [Tradigrain v. Mississippi State Port Authority](#), 701 F.2d 1131, 1132 (5th Cir. 1983).

In this case, the State is the real party in interest, therefore diversity jurisdiction does not exist. [HN7](#)  A state is not considered a citizen for the purposes of diversity jurisdiction under [28 U.S.C. § 1332](#). [Moor v. County of Alameda](#), 411 U.S. 693, 717, 36 L. Ed. 2d 596, 93 S. Ct. 1785 (1973); [Tradigrain](#), [\[**14\]](#) 701 F.2d at 1132. Because the State of Mississippi is the real party in interest and is not a citizen for the purposes of diversity jurisdiction, removal on the basis of diversity jurisdiction was improper.

Defendants assert, however, that Plaintiff's statutory penalty claim was fraudulently joined by the Plaintiff in that such a claim cannot succeed as a matter of Mississippi law. This argument is not persuasive. [HN8](#)  The removing party bears the burden of demonstrating fraudulent joinder. [Carriere v. Sears, Roebuck & Co.](#), 893 F.2d 98, 100 (5th Cir.) (citing [Laughlin v. Prudential Ins. Co.](#), 882 F.2d 187, 190 (5th Cir. 1989)), cert. denied, 498 U.S. 817, 111 S. Ct. 60, 112 [\[*32\]](#) L. Ed. 2d 35 (1990). To prove fraudulent joinder, Defendants must establish that Plaintiff has no possibility of establishing a cause of action against them in state court. [Dodson v. Spiliada Maritime Corp.](#), 951 F.2d 40, 42 (5th Cir. 1992).

In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the nonremoving party. We are then to determine whether that party has any possibility of recovery against the party whose joinder [\[**15\]](#) is questioned. . . . We do not decide whether the plaintiff will actually or even probably prevail on the merits, but look only for a possibility that he may do so. . . . If that possibility exists, then "a good faith assertion of such an expectancy in a state court is not a sham . . . and is not fraudulent in fact or in law."

Id. at 42-43 (citations omitted); see also [Jernigan v. Ashland Oil Inc.](#), 989 F.2d 812, 815-16 (5th Cir.) (concluding that all factual allegations must be viewed in the light most favorable to the plaintiff in determining the issue of fraudulent joinder), cert. denied, 126 L. Ed. 2d 150, 114 S. Ct. 192 (1993).

The Court finds that Defendants have failed to establish fraudulent joinder in this matter.⁴ Defendants argue vehemently that Mississippi antitrust law is limited to intrastate conspiracies. Defendants argue legislative history, cite Mississippi cases regarding legislative intent and quote from authoritative treatises to support their argument. Curiously absent from Defendants' argument, however, is any decision by the Mississippi Supreme Court concerning whether the Mississippi antitrust statute is limited in application to intrastate [**16] conspiracies. The Court finds that Plaintiff has stated an arguably valid claim on the face of the Complaint, pursuant to Miss. Code Ann. §§ 75-21-1, 75-21-3 and § 75-21-7, the penalty provision of the antitrust statute. Even if that claim is ambiguous under state law, the Mississippi state courts are the proper forum for determining this issue of state law which has not yet been decided by the highest court in Mississippi.

Defendants can therefore only secure removal of this case, based upon diversity jurisdiction, by proceeding under 28 U.S.C. § 1441(c) which permits the removal of a claim joined to a nonremovable claim if it is "separate and independent" from the nonremovable claim. McKay v. Boyd Constr. Co., 769 F.2d 1084, 1087 (5th Cir. 1985). The McKay court concluded that section 1441(c) must be construed narrowly "to reduce [**17] the number of cases removable from state to federal court." Id. at 1087 (citation omitted).

Thus, "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." Id. (quoting American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S. Ct. 534, 540, 95 L. Ed. 702 (1951)).

The Court finds that Defendants have failed to meet the section 1441(c) standard of showing that the other claims asserted in Plaintiff's Complaint are separate and independent from Plaintiff's claims under the Mississippi antitrust statute. As stated previously, Defendants merely argue that Plaintiff has no valid state law antitrust claim. The Court finds that this claim, along with all others asserted in Plaintiff's Complaint, should be decided by the state courts because the antitrust claim is a state law claim which is interlocked with and interdependent upon Plaintiff's remaining claims in the Complaint.

C. Federal Question Jurisdiction

Defendants assert that Plaintiff is using artful pleading to avoid federal jurisdiction. According to Defendants, Plaintiff [**18] has no cause of action under state law because Plaintiff alleges an interstate conspiracy which should properly be brought as an alleged violation of the federal Sherman Act. Plaintiff asserts that this cause of action is valid under state law, and that Defendants [*33] have failed to prove the necessary elements for the artful pleading doctrine.

HN9 Federal jurisdiction extends over "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983). Under the well-pleaded complaint rule, the federal question must be present on the face of the complaint, Gully v. First National Bank, 299 U.S. 109, 113, 81 L. Ed. 70, 57 S. Ct. 96 (1936), and jurisdiction cannot be based on the existence of a federal defense. Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 787 (5th Cir.), cert. denied, 498 U.S. 926, 112 L. Ed. 2d 261, 111 S. Ct. 307, 111 S. Ct. 308 (1990). "For federal question [**19] jurisdiction to exist, the federal law must be a direct element in the plaintiff's claim and . . . it is not enough that it comes in remotely or indirectly." 13B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3562 (1984).

The Court finds that Defendants have failed to show that Plaintiff's claims are only cognizable, if at all, under federal law. As noted previously, Plaintiff has stated, on the face of the Complaint, an arguably valid cause of action under Miss. Code Ann. §§ 75-21-1, 75-21-3 and § 75-21-7, the penalty provision of the antitrust statute. Defendants' argument that the facts set forth in the Complaint do not state a valid cause of action under that statute is an

⁴ The Court is assuming in making this determination that there can be fraudulent joinder of claims, as Defendants assert, as opposed to fraudulent joinder of persons.

argument which should be made to the state courts in a motion to dismiss once this case is remanded. Defendants have failed to offer any Mississippi case which has held that the Mississippi antitrust statute applies only to intrastate, as opposed to interstate, violations of the statute. Until the state courts have so ruled, this Court will not speculate concerning this area of state law, especially in deciding a Motion to Remand.⁵

[**20] The only exception to the well-pleaded complaint rule, which might be applicable to this case,⁶ is whether federal antitrust law completely preempts state antitrust law such that Plaintiff could not maintain an action in state court. The United States Supreme Court has specifically ruled that [HN10](#)[↑] state antitrust indirect purchaser statutes are not preempted by federal law. [California v. ARC America Corp., 490 U.S. 93, 102, 104 L. Ed. 2d 86, 109 S. Ct. 1661 \(1989\)](#). Therefore, Plaintiff's claims are not preempted by federal law.

The Court finds that there is no apparent federal question on the face of Plaintiff's Complaint, and [**21] that Plaintiff has asserted only state law causes of action in the Complaint. Furthermore, federal antitrust law does not preempt the state statutes at issue in this case. Removal based upon federal question jurisdiction is therefore improper.

III. Conclusion

The Court finds that Plaintiff's Motion to Remand should be granted. Plaintiff has asserted, on the face of the Complaint, a valid cause of action pursuant to [Miss. Code Ann. § 75-21-7](#) (rev. 1991). The Court makes no finding regarding the other causes of action asserted by the Plaintiff or whether such causes of action are cognizable under state or federal law. These claims cannot be separated pursuant to [28 U.S.C. § 1441\(c\)](#). The Court will therefore remand the entire case to state court. [See McKay, 769 F.2d at 1087](#).

Because the Court has considered the Surreply Memorandum, the Court will grant Defendants' Motion to File Surreply Memorandum. The Plaintiff's Application for Review is now moot because this case is being remanded [*34] to state court and is therefore denied.

Plaintiff has requested an award of attorneys' fees incurred in opposing this removal. Plaintiff asserts that Defendants have acted egregiously in removing [**22] this case when they knew it should remain in state court. The Court finds that the legal arguments presented by Defendants to support their opposition to Plaintiff's Motion to Remand were not frivolous nor presented solely for delay, and that an award of attorneys' fees is therefore not proper in this matter.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Remand should be and hereby is granted. This matter is hereby remanded to the Circuit Court of Holmes County, Mississippi.

IT IS FURTHER ORDERED that Plaintiff's request for attorneys' fees is hereby denied.

IT IS FURTHER ORDERED that Defendants' Motion for Leave to File Surreply Memorandum should be and hereby is granted.

IT IS FURTHER ORDERED that Plaintiff's Application for Review and Objections to Magistrate Judge's Order Denying Motion to Quash and for Protective Order is moot and therefore denied.

SO ORDERED this the 22nd day of September, 1995.

⁵ The Court is not required to make an Erie guess in the context of a Motion to Remand concerning how the Mississippi state courts would rule on this issue of state law. The Court will not usurp the function of the state court in determining the meaning of the Mississippi antitrust statute in a case instituted in a state court.

⁶ Although Plaintiff raises the res judicata exception to the well-pleaded complaint rule, there is no federal judgment which would act as a bar to Plaintiff's state law claims. [See Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 \(1981\); Powers v. South Cent. United Food & Commercial Workers Unions, 719 F.2d 760, 766 \(5th Cir. 1983\).](#)

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William H. Barbour, Jr.

CHIEF JUDGE

End of Document



Serfecz v. Jewel Food Stores

United States Court of Appeals for the Seventh Circuit

May 11, 1995, Argued ; September 26, 1995, Decided

Nos. 94-3211, 94-4017, 95-1201

Reporter

67 F.3d 591 *; 1995 U.S. App. LEXIS 27500 **; 1995-2 Trade Cas. (CCH) P71,128

JOSEPH SERFECZ and FIRST CHICAGO TRUST, Plaintiffs-Appellants, v. JEWEL FOOD STORES, et al., Defendants-Appellees.

Subsequent History: [\[**1\]](#) As Amended April 11, 1997.

Prior History: United States District Court for the Northern District of Illinois, Eastern Division. No. 92 C 4171. John F. Grady, Judge.

Disposition: AFFIRMED

Core Terms

Mall, retail, grocery, competitor, antitrust, lease, conspiracy, shopping center, anti trust law, grocery store, space, district court, monopolize, injuries, Skates, defendants', consumers, motive, anticompetitive, conspired, summary judgment, anchor tenant, sublease, special injury, plaintiffs', premises, damages, rental space, supplier, restraint of trade

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Penalties

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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 > ... > Private Actions > Standing > General Overview

67 F.3d 591, *591 1995 U.S. App. LEXIS 27500, **1

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN1 [down] **Sherman Act, Penalties**

Section 1 of the Sherman Act, [15 U.S.C.S. § 1](#), prohibits anticompetitive activities designed to restrain unreasonably trade and bans every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. Section 2 prohibits monopolistic practices and provides sanctions for every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > 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 > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN2 [down] **Costs & Attorney Fees, Clayton Act**

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee. The Clayton Act, [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN3 [down] **Antitrust & Trade Law, Sherman Act**

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.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4 [down] **Clayton Act, Claims**

The language of the Clayton Act, [15 U.S.C.S. § 15](#), has been construed to limit the parties who may bring an antitrust action to (1) those who have suffered the type of injury that the antitrust laws were intended to prevent and (2) those whose injuries are a result of defendant's unlawful conduct. The Supreme Court, focusing on Congress' intent to have antitrust laws construed in light of the common law, also has read [15 U.S.C.S. § 15](#) to contain a proximate cause element, denying standing to plaintiffs whose injuries are indirect or secondary.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

[**HN5**](#) **Private Actions, Standing**

The United States Supreme Court has identified several factors to be considered in determining whether a plaintiff is the proper party to bring a private action under the antitrust laws: (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the nature of the plaintiff's injury and the relationship between the plaintiff's injury and the type of activity sought to be redressed under the antitrust laws; and (3) the speculative nature of the plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages.

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

[**HN6**](#) **Standards of Review, De Novo Review**

The court reviews de novo the district court's grant of summary judgment and evaluates the evidence in a light most favorable to the nonmoving party.

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 > 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

[**HN7**](#) **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate when the pleadings and supplemental materials present 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

defendant's motion for summary judgment, a plaintiff must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > ... > General Premises Liability > Types of Premises > Stores

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8 [down] **Private Actions, Remedies**

In order to maintain an antitrust action under the Sherman Act, [15 U.S.C.S. §§ 1](#) and [2](#), plaintiffs must establish that they (1) have suffered an antitrust injury and (2) are the proper plaintiffs to maintain an antitrust action with respect to the relevant markets.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN9 [down] **Private Actions, Remedies**

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. It should, in short, be the type of loss that the claimed violations would be likely to cause. This test focuses on the connection between the purpose of the antitrust laws (protecting market competition) and the alleged injury. When the plaintiff's injury is linked to the injury inflicted upon the market, such as when consumers pay higher prices because of a market monopoly or when a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the [antitrust law](#) -- the preservation of competition.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Real Property Law > Landlord & Tenant > Landlord's Remedies & Rights > Rent Recovery

HN10 [down] **Private Actions, Remedies**

Suppliers to direct market participants typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect to be considered antitrust injuries.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Private Attorneys General

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN11 [] Standing, Clayton Act

From the class of injured persons suffering an antitrust injury only those who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under the Clayton Act, [15 U.S.C.S. § 15](#). 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, particularly when denying standing is not likely to leave a significant antitrust violation undetected or unremedied. An appropriate balance between the interest in deterrence through private antitrust enforcement and avoidance of excessive treble damages litigation is achieved by granting standing only to those who, as consumers or competitors, suffer immediate injuries with respect to their business or property, while excluding persons whose injuries were more indirectly caused by the antitrust conduct.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Inferences & Presumptions > Inferences

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

HN12 [] Sherman Act, Claims

To establish a violation of the Sherman Act, [15 U.S.C.S. § 1](#), plaintiffs must provide evidence that tends to exclude the possibility of independent action by the defendants. When a plaintiff relies on circumstantial evidence, as is very often the case, he must show that the inference of conspiracy is reasonable in light of the competing inference of independent action. Because there is often only a fine line separating unlawful concerted action from legitimate business practices, conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN13 [] Antitrust & Trade Law, Sherman Act

In the U.S. Seventh Circuit Court of Appeals, to evaluate the legal sufficiency of the evidence in antitrust conspiracy cases the court first reviews the evidence of conspiracy submitted by the plaintiff. Next, the court examines whether

the defendants have offered evidence that tends to show that the conduct that forms the basis of the plaintiff's complaint is as compatible with the legitimate business activities of the defendant as it is with illegal conspiracy. Finally, if the court determines that this analysis leaves the evidence of conspiracy ambiguous, the court determines whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview](#)

HN14 [] **Antitrust & Trade Law, Sherman Act**

Although a lack of motive may be evidence that parties did not conspire, the presence of an economic motive is of very little probative value. 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. The mere existence of mutual economic advantage, by itself, does not tend to exclude the possibility of independent, legitimate action and supplies no basis for inferring a conspiracy. The mere confluence of economic interests between the parties does not establish, standing alone, the existence of a conspiracy.

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

HN15 [] **Summary Judgment, Entitlement as Matter of Law**

Although, at the summary judgment stage, the court must evaluate the record so as to give the nonmoving party the benefit of the doubt on all reasonable inferences that may be drawn from that record, the court is not permitted to allow a case built on a metaphysical doubt to go to the jury.

[Torts > ... > Malicious Prosecution > Elements > Favorable Termination](#)

[Torts > Intentional Torts > Malicious Prosecution > General Overview](#)

HN16 [] **Elements, Favorable Termination**

The Illinois courts have long disfavored actions for malicious prosecution and have sought to encourage a policy of open access to the courts. In order to establish malicious prosecution, a claimant must show that: (1) the action was terminated in plaintiff's favor; (2) the action was brought maliciously and without probable cause; and (3) the plaintiff suffered special injury or special damage beyond the usual expense, time or annoyance in defending a lawsuit.

[Civil Procedure > Remedies > Provisional Remedies > General Overview](#)

[Torts > Intentional Torts > Malicious Prosecution > General Overview](#)

[Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions](#)

HN17 [blue icon] Remedies, Provisional Remedies

Under Illinois common law, special injury for purposes of a malicious prosecution claim is usually identified with an arrest or seizure of property or some constructive taking or interference with the person or property. A showing of interference with property is satisfied only if a court issues a provisional remedy such as attachment, an order of arrest or an injunction. In Illinois, the court's focus rests upon the peculiar effect of the suit upon plaintiff's right to use the property; special injury in civil cases will not be found unless the injuries emanate directly from the impact of the issues allegedly wrongfully litigated.

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For UNITED STATES OF AMERICA, INCORPORATED, an Ohio corporation, Defendant - Appellee (95-1201): James P. Chapman, CHAPMAN & ASSOCIATES, Chicago, IL. Robert A. Chapman, Chicago, IL.

Judges: Before CUDAHY, ESCHBACH and RIPPLE, Circuit Judges.

Opinion by: RIPPLE

Opinion

[*594] RIPPLE, *Circuit Judge*. Joseph Serfecz and First Chicago Trust Company of Illinois ("First Chicago Trust") have ownership interests in the Grove Mall in Elk Grove Village, Illinois. They claim that Jewel Food Stores ("Jewel"), American Stores Properties, Inc. ("American Properties"), and the developers of competing Elk Cross ing Mall have conspired to run Grove Mall out of business and to monopolize the retail grocery and shopping center markets in Elk Grove Village. They brought this action alleging defendants violated the Sherman Act, [15 U.S.C. §§ 1, 2](#). They also alleged supplemental state law claims of malicious prosecution and breach of lease. The district court granted the defendants' motions for summary judgment with regard to the antitrust and malicious prosecution claims and granted a partial summary judgment with regard to the breach of lease claim. Mr. Serfecz and First

Chicago Trust now appeal that judgment.¹ For the reasons set forth below, we affirm the judgment of [**2] the district court.

I

BACKGROUND

A. Facts

In 1963, Jewel entered into a lease for retail space in Grove Mall. Jewel's lease ran until 1986 and provided Jewel with three five-year options to renew. In 1977, Mr. Serfecz purchased Grove Mall and assumed all existing leases including the Jewel lease. [**3] In 1986, Jewel exercised its first option to renew and in 1991 it exercised its second option. Jewel's current lease expires in 1996 and, based upon the remaining five-year option, may be extended until 2001.

From 1963 until 1987, Jewel owned and operated a grocery store in its leased premises at Grove Mall. In October 1987, Jewel vacated the premises and moved its grocery operation across the street to the newly constructed Elk Crossing Mall. Since its move, Jewel has continued to pay rent and has exercised its second option to renew the lease. Jewel has refused to give up its leasehold interest in the premises and its retail space has remained unoccupied. Jewel proposed to sublet the space to United Skates of America ("United Skates") for use as a roller skating rink. Mr. Serfecz objected to this proposed sublease because he believed occupancy by United Skates would ruin Grove Mall as a retail center and increase his insurance liability. In 1990, Jewel filed an action in state court that sought a declaratory judgment regarding its right to sublet. The Illinois trial court ruled against Jewel; it held that the express provisions of the lease gave Mr. Serfecz the right to refuse any [**4] sublet that would increase his insurance rates. The appellate court affirmed.

Mr. Serfecz, joined by First Chicago Trust,² brought this action against Jewel, [*595] American Properties,³ United Skates,⁴ and the developers and operators of the Elk Crossing Mall.⁵ That complaint claimed that the defendants conspired to devalue and to destroy Grove Mall in order to eliminate competition in the retail grocery and shopping center markets. The plaintiffs contend that the defendants conspired to keep the Jewel rental space empty, to prevent a major anchor tenant from taking over Jewel's rental space, to obstruct Mr. Serfecz's attempt to redevelop Grove Mall, and to coerce Grove Mall tenants to leave and move across the street to Elk Grove Mall. The plaintiffs maintain that the alleged conspiracy is part of an overall marketing strategy of restricting the use of property in order to keep out competitors and to restrain trade. In Counts I and II of their complaint, plaintiffs alleged defendants violated § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. In Count III plaintiffs allege Jewel's

¹The district court had jurisdiction of Counts I and II under 15 U.S.C. § 26 and 28 U.S.C. § 1337. The district court had supplemental jurisdiction over Counts III and IV under 28 U.S.C. § 1367(a). On January 10, 1995, the district court granted defendants' motion for summary judgment on Counts I, II, III and part of IV. The court did not grant summary judgment as to the portion of Count IV claiming breach of lease due to an unlawful use of the premises. Pursuant to Federal Rule of Civil Procedure 54(b), the district court determined that there was no reason to delay entry of final judgment in favor of defendants on all claims except the unlawful use claim in Count IV or to delay appeal from that judgment.

²First Chicago Trust Company of Illinois, Trustee of Trust No. 684 is the title holder of Grove Mall. Joseph Serfecz is the beneficial owner of the trust.

³American Properties, Inc. is the company that manages properties owned and rented by Jewel.

⁴United Skates of America, Inc. is an Ohio Corporation that operates roller skating rinks and is licensed and doing business in Illinois.

⁵The complaint lists five defendants connected with the development of Elk Crossing Mall: Patrick F. Daly and Associates, Inc., the architect for Elk Crossing Mall; D.E.I., Inc., the contract purchaser of the land on which the Elk Crossing Mall was built; Dalan/Jupiter, Inc., a developer of Elk Crossing Mall; Mid-America Real Estate Corporation, the leasing agent for Dalan/Jupiter, Inc. and Elk Crossing Mall; and Patrick F. Daly, an officer, director, and shareholder of Patrick F. Daly and Associates, Inc., D.E.I., Inc., and Dalan/Jupiter, Inc., and owner of a limited partnership interest in Elk Crossing Mall.

declaratory judgment action regarding the United Skates sublet was malicious prosecution and in [**5] Count IV allege breach of lease by Jewel.

[**6] B. The Antitrust Laws: The Relevant Statutory Provisions

Section One of the Sherman Act [HN1](#) prohibits anticompetitive activities designed to restrain unreasonably trade and bans "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." [15 U.S.C. § 1](#). Section Two prohibits monopolistic practices and provides sanctions for "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . ." [15 U.S.C. § 2](#).

Section Four of the Clayton Act defines the class of persons who may bring a private suit under the antitrust laws. Section Four provides:

[HN2](#) Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee. [15 U.S.C. § 15](#). The Supreme Court has held that [HN3](#) "Congress did not [**7] intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." [Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14, 31 L. Ed. 2d 184, 92 S. Ct. 885 \(1972\)](#). [HN4](#) The language of § 4 has been construed to limit the parties who may bring an antitrust action to (1) those who have suffered the type of injury that the antitrust laws were intended to prevent and (2) those whose injuries are a result of defendant's unlawful conduct. [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#). The Court, focusing on Congress' intent to have antitrust laws construed in light of the common law, also has read § 4 to contain a proximate cause element, denying standing to plaintiffs whose injuries are indirect or secondary. [Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540-46, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#). [HN5](#) The Court has identified several factors to be considered in determining whether a plaintiff is the proper party to bring a private action under the antitrust laws: (1) the causal connection between the antitrust violation and the plaintiff's injury; [*596] (2) the nature of the plaintiff's injury and the relationship between the plaintiff's [**8] injury and the type of activity sought to be redressed under the antitrust laws; and (3) the speculative nature of the plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages. [Associated Gen. Contractors, 459 U.S. at 537-46](#); see also [Nelson v. Monroe Regional Medical Ctr., 925 F.2d 1555, 1562 \(7th Cir.\), cert. dismissed, 502 U.S. 903 \(1991\)](#).

C. The District Court Proceedings

The district court granted the defendants' motion for summary judgment on the antitrust claims. With respect to the monopolization of the retail grocery market claim, the court held that the plaintiffs lacked antitrust standing. The court held that the plaintiffs had presented enough evidence for a trier of fact to find that Jewel acted deliberately to prevent a competitor from occupying Jewel's rental space and to find a causal connection between the absence of a grocery store anchor tenant and the demise of Grove Mall. The court concluded that plaintiffs' injury was, nevertheless, too indirect to confer standing with respect to the retail grocery market. With respect to the retail shopping center market, the court determined that the plaintiffs had standing, [**9] but that they had failed to establish a genuine issue of triable fact as to the existence of the conspiracy among the defendants to restrain trade and to monopolize sales and development in this market.

The district court also granted defendants' motion for summary judgment on the malicious prosecution claim. It held that plaintiffs had failed to allege a special injury. The court additionally granted defendants' motion for summary judgment on the breach of lease claim insofar as the plaintiffs' claim was based upon Jewel's failure to continue operating as a grocery store at Grove Mall. The court denied the defendants' motion to the extent that the plaintiffs' claim was based upon the illegal use provision of the lease. It determined that the broad nonrestrictive wording of the illegal use provision prohibited using the premises to violate the antitrust laws. The court reasoned that,

although the plaintiffs lacked antitrust standing to recover damages for the monopolization of the grocery market, they did have standing, as parties to the lease, to sue for breach of the lease provision relating to violations of the law, arguably including violation of § 2 of the Sherman Act. In the [**10] district court's view, "use of the leased premises in furtherance of a Section 2 antitrust violation could indeed constitute a breach of the lease." Mem. Op. at 38. As we have noted earlier, *supra* n.1, this issue is not before us today.

II

DISCUSSION

HN6[[↑]] We review de novo the district court's grant of summary judgment. We evaluate the evidence in a light most favorable to the nonmoving party. *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993), cert. denied, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994). **HN7**[[↑]] Summary judgment is appropriate when the pleadings and supplemental materials present 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); Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). To survive a defendant's motion for summary judgment, a plaintiff must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Greater Rockford Energy & Technology Corp.*, 998 F.2d at 394.

A. The Antitrust Claims

The Sherman Act was enacted "to assure customers the [**11] benefits of price competition, and . . . protect[] the economic freedom of participants in the relevant market." *Associated Gen. Contractors*, 459 U.S. at 538; see *Sanner v. Board of Trade*, 62 F.3d 918, slip op. at 15 (7th Cir. 1995). In this case, there are two relevant markets--the retail grocery market and the retail shopping center market. **HN8**[[↑]] In order to maintain an antitrust [**597] action, plaintiffs must establish that they (1) have suffered an antitrust injury and (2) are the proper plaintiffs to maintain an antitrust action with respect to each of these markets. See *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1202 (7th Cir. 1986); *In re Industrial Gas Antitrust Litig.*, 681 F.2d 514, 515 (7th Cir. 1982), cert. denied, 460 U.S. 1016 (1983).

1. The Retail Grocery Market

The district court determined that plaintiffs had presented enough evidence to permit a trier of fact to conclude that defendants had acted deliberately to prevent a competitor from occupying Jewel's rental space and that the absence of a grocery store anchor tenant was a significant cause of Grove Mall's decline. A private antitrust plaintiff, however, does not acquire standing merely [**12] by showing that he was injured by the defendant's conduct. In addition to establishing a link between the defendant's acts and the plaintiff's injuries, the Supreme Court has held that:

HN9[[↑]] 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. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp., 429 U.S. at 489 (citations omitted). This test focuses on the connection between the purpose of the antitrust laws (protecting market competition) and the alleged injury. When the plaintiff's injury is linked to the injury inflicted upon the market, such as when consumers pay higher prices because of a market monopoly or when a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the antitrust law--the preservation of competition.

It is not contested that Mr. Serfecz brings this action neither [**13] as a consumer nor as a competitor in the retail grocery market, but as a lessor of rental space to competitors in this market. **HN10**[[↑]] Suppliers to direct market participants typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect to be considered "antitrust injuries." *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning*

Ass'n, 830 F.2d 1374, 1379 (7th Cir. 1987); see also Stamatakis Indus. v. King, 965 F.2d 469, 471 (7th Cir. 1992) ("[A] producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other."); Bodie-Rickett & Assocs. v. Mars, Inc., 957 F.2d 287, 290-91 (6th Cir. 1992) (holding that injury to broker through loss of commission was not "antitrust injury"). In *Southwest Suburban*, a trade association that provided listing services to real estate brokerage firms alleged that the defendants conspired to boycott, and encouraged customers to boycott, the plaintiff's listing service. Consequently, the trade association was unable to provide a comprehensive listing of properties to its subscribers. The defendants allegedly had taken action directly against [**14] the trade association to reduce the value of its listing in order to exclude non-preferred brokers from the real estate brokerage services market. The court held, however, that the defendants' anti-competitive practice was directed at the members of the trade association, not the trade association itself, and that any injury to the trade association, as a supplier of listing services, was too remote from the antitrust violation to confer standing. Southwest Suburban, 830 F.2d at 1379. We believe that the plaintiffs are in a similar position to that trade association and are best characterized as suppliers to the market participants, retail grocery stores and grocery purchasers.

In Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983), our colleagues in the Sixth Circuit held that an owner-lessor of retail commercial space did not have standing to maintain an antitrust action against a grocery store retailer who would not release its rental space to allow the plaintiff to lease the space to a different grocery store. The plaintiff claimed that the defendants intended to monopolize the retail [*598] grocery market by destroying the site as a location for the operation of [**15] a retail grocery outlet. The Sixth Circuit held that the plaintiff's injury (rental devaluation) as a supplier of retail space to direct participants in the retail grocery market was not "sufficiently linked to the pro-competitive policy of the antitrust laws." Southaven, 715 F.2d at 1087; see also Rosenberg v. Cleary, Gottlieb, Steen & Hamilton, 598 F. Supp. 642 (S.D.N.Y. 1984) (holding that owner and developer of shopping mall alleging defendants conspired to keep it from opening a grocery store by filing state court lawsuits and preventing building permits from being issued lacked standing because developer was not a direct participant in the retail grocery market).

Here, the plaintiffs' injury is not the direct effect of the defendants' anticompetitive conduct. Assuming Jewel's goal was to gain control of the retail grocery market in Elk Grove, Illinois, we do not believe that the damages claimed by plaintiffs (devaluation of Grove Mall) present the type of anticompetitive injury that the antitrust laws were intended to remedy. See *Sanner*, Nos. 94-2139, 94-2152, slip op. at 14-15 (7th Cir. Aug. 7, 1995).

Even if plaintiffs' injury could be characterized as an antitrust injury, [**16] this factor alone would not confer standing: HN11[] "From the class of injured persons suffering an 'antitrust injury' only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under § 4." In re Industrial Gas Antitrust Litig., 681 F.2d at 516. "The existence of an identifiable class of persons whose selfinterest 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 . . . [particularly when denying standing] is not likely to leave a significant antitrust violation undetected or unremedied." Associated Gen. Contractors, 459 U.S. at 542. Our decisions have recognized the need to balance the interests of deterrence through private antitrust enforcement and avoidance of excessive treble damages litigation. "An appropriate balance is achieved by granting standing only to those who, as consumers or competitors, suffer immediate injuries with respect to their business or property, while excluding persons whose injuries were more indirectly caused by the antitrust [**17] conduct." In re Industrial Gas Antitrust Litig., 681 F.2d at 520. If the competing grocery stores have been precluded from the market and injured by defendants' actions, their injuries would be direct and they could maintain an antitrust action against the defendants. See Southwest Suburban, 830 F.2d at 1379-80; Southaven, 715 F.2d at 1086-87; In re Industrial Gas Antitrust Litig., 681 F.2d at 520. Similarly, grocery consumers could maintain an action if defendants' actions stifled competition allowing defendants to engage in monopoly pricing in the retail grocery market.⁶ [**18] Suppliers of rental space to grocery retailers are not the proper parties

⁶ See Nelson v. Monroe Regional Medical Ctr., 925 F.2d 1555, 1563-65 (7th Cir.), cert. dismissed, 502 U.S. 903 (1991) (holding that patients who were denied medical treatment on non-emergency basis had standing to bring antitrust action against medical

to maintain an antitrust action with respect to the defendants' alleged monopolistic and anticompetitive activities in the retail grocery market.⁷ In sum, we hold that these plaintiffs [*599] do not have the requisite direct injury to have standing to assert that Jewel has monopolized, or conspired with others to monopolize, the retail grocery market. We express no opinion on whether, in a suit brought by another plaintiff who can show the requisite direct injury, such allegations could be established.

[**19] 2. Retail Shopping Center Market

The plaintiffs' antitrust allegations are not limited to the retail grocery market. They also allege that the defendants had conspired to restrain trade and to monopolize sales in the retail shopping center market. Here, the district court quite correctly determined that the plaintiffs, who are direct participants in this market, alleged an injury that is sufficiently direct to give them standing.

Section One of the Sherman Act prohibits the formation of any "contract, combination or conspiracy in restraint of trade or commerce . . ." [15 U.S.C. § 1. HN12](#)¹² To establish a violation of [§ 1](#) of the Sherman Act, plaintiffs must provide, therefore, evidence that "tends to exclude the possibility of independent action by the [defendants]." [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#). When a plaintiff relies on circumstantial evidence, as is very often the case, he "must show that the inference of conspiracy is reasonable in light of the competing inference[] of independent action." [Matsushita, 475 U.S. at 588](#); see [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 468, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#). Because there is often only a fine line separating [*20] unlawful concerted action from legitimate business practices, "conduct [that is] as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." [475 U.S. at 588](#). In [Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167 \(7th Cir. 1990\)](#), we set forth our approach [HN13](#)¹³ to evaluating the legal sufficiency of the evidence in antitrust conspiracy cases. We first review the evidence of conspiracy submitted by the plaintiff. Next, we examine whether the defendants have offered evidence that tends to show that the conduct which forms the basis of the plaintiff's complaint is as compatible with the legitimate business activities of the defendant as it is with illegal conspiracy. Finally, if we determine that this analysis leaves the evidence of conspiracy ambiguous, we determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests. [Id. at 1171-72](#).

center); [Ball Memorial Hosp., Inc. v. Mutual Hosp., Inc., 784 F.2d 1325, 1334 \(7th Cir. 1986\)](#) ("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."); see also II Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#), P 370 at p. 253 (Rev. ed. 1995) ("Because protecting consumers from monopoly pricing is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation. As a result, consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted.").

⁷ See [Southwest Suburban, 830 F.2d at 1379-80](#); [Southaven, 715 F.2d at 1086-87](#); [In re Industrial Gas Antitrust Litig., 681 F.2d at 520](#); see also [International Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1329 \(3d Cir. 1992\)](#) (holding that operator of storage facility who was neither a consumer nor producer of soda ash lacked standing to bring antitrust action against producers of soda ash where direct participants in market would be better plaintiffs), cert. denied, [123 L. Ed. 2d 154, 113 S. Ct. 1588 \(1993\)](#); [Bodie-Rickett & Assocs. v. Mars, Inc., 957 F.2d 287, 290-91 \(6th Cir. 1992\)](#) (concluding that broker of snacks and candies lacked standing to bring an antitrust action against snack and candy manufacturer where targets of alleged conspiracy, competing manufacturers and wholesale customers, were more direct victims); [S.D. Collectibles, Inc. v. Plough, Inc., 952 F.2d 211, 213-14 \(8th Cir. 1991\)](#) (determining that broker who solicited orders for resale of product and was not a consumer or competing manufacturer or distributor lacked standing to bring antitrust action against manufacturers and distributor of product); [Peck v. General Motors Corp., 894 F.2d 844, 847-48 \(6th Cir. 1990\)](#) (holding that owners and officers of automobile dealership who were neither consumers nor competitors in automobile market lacked standing to bring antitrust action against automobile manufacturer); [Henke Enters. v. Hy-Vee Food Stores, Inc., 749 F.2d 488, 489-90 \(8th Cir. 1984\)](#) (concluding that owner of hardware store in shopping center lacked standing to bring antitrust action against owner of grocery store who anchored mall and upon vacating mall prohibited assignee from leasing property to another grocery store because hardware store was neither competitor nor consumer in the retail grocery market).

Plaintiffs submit that Jewel and the Elk Crossing defendants engaged in a conspiracy to restrain trade in the retail shopping center market. They point out that both Jewel [**21] and the Elk Crossing defendants had a compelling motive to eliminate Grove Mall as a competitor. They also note that the Elk Crossing defendants built Elk Crossing without investigating the possibility that Grove Mall would be redeveloped and emerge as a competitor. They further point out that Jewel and the Elk Crossing defendants have built other shopping centers with Jewel as an anchor tenant, where Jewel obtained restrictions precluding the use of its old leasehold location as either a retail food store or a drug store.

[*600] Plaintiffs submit that defendants conspired to have Jewel anchor Elk Crossing while preventing a major anchor tenant from taking over Jewel's rental space in order to block Mr. Serfecz's attempt to redevelop Grove Mall. The anticompetitive conduct about which the plaintiffs complain involves two separate activities--Jewel's move to Elk Crossing and Jewel's attempted sublease to United Skates and refusal to relinquish its leasehold interest. The defendants have provided evidence showing that Jewel's move to Elk Crossing is compatible with their legitimate business interests. Jewel argues that its move to Elk Crossing was based upon legitimate business concerns; Elk [**22] Crossing offered Jewel a new, updated, and larger space and the ability to open a companion Osco drugstore; Jewel could not operate a drugstore in Grove Mall because Walgreens possessed the exclusive right to operate a drugstore at Grove Mall. The Elk Crossing defendants argue that their interest in Jewel is based upon the desirability of Jewel/Osco as an anchor tenant for a neighborhood shopping center. Elk Crossing and Jewel therefore have proffered legitimate business reasons for Jewel's decision to move to Elk Crossing and for Elk Crossing's desire to have Jewel as a tenant.

Jewel's actions relating to its Grove Mall lease are more problematic. The plaintiffs argue that Jewel attempted to sublet to United Skates in order to destroy Grove Mall as a retail shopping center because a roller rink anchor tenant is inconsistent with that use. The plaintiffs contend that Jewel, knowing that the lease prohibited subleases that would increase insurance rates absent the owner's consent, initiated the state declaratory judgment action in order to discourage potential retailers interested in subleasing the space and to tie up the plaintiffs in litigation. Jewel counters that its attempted [**23] sublease to United Skates was based on its desire to earn rent on the vacant space; it makes no argument, however, with regard to the continued payment of rent for the vacant space. Moreover, Jewel's explanation does not offer any legitimate business justification for its failure to minimize its rental payments on vacant space by accepting Mr. Serfecz's offer to pay United Skates rent or to release Jewel from the lease. Although this lack of explanation on Jewel's part may evidence an anticompetitive motivation on its part, it does not permit, by itself, an inference of a conspiracy on the part of Jewel with the owners of Elk Crossing. Absent some showing that Jewel has held onto its lease with Grove Mall because of an agreement with the Elk Crossing defendants, we cannot say that the record supports a violation of [§ 1](#) of the Sherman Act. We therefore turn to the remainder of the plaintiffs' contentions in order to determine if they have demonstrated that the record raises a genuine issue of triable fact as to an agreement between Jewel and Elk Crossing.

We turn first to the evidence of motive. The plaintiffs argue that Jewel and the Elk Crossing defendants both had a compelling [**24] motive to destroy Grove Mall as a viable competitor. According to plaintiffs, the value of Elk Crossing is inflated because of a lack of alternate space and competitors. Therefore, the Elk Crossing owners have been able to charge high rental prices, obtain a multimillion dollar mortgage and permit the Elk Crossing partners to withdraw \$ 7 million in excess value within two years after the mall was completed. The lack of competition also has permitted Jewel to reap the benefits of having a "captive population" because it is the only retail grocery store in the area. Both defendants certainly have a motive to pursue their respective economic objectives free of competition from a redeveloped Grove Mall. However, it is important to note that proof of motive is of limited utility in this context. [HN14](#)↑ Although a lack of motive may be evidence that parties did not conspire, the presence of an economic motive is of very little probative value. See [Matsushita, 475 U.S. at 596-97](#) ("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 [**25] plausible explanations, the conduct does not give rise to an inference of conspiracy."). The mere existence of mutual economic advantage, by itself, does not tend to exclude the possibility of independent, legitimate [*601] action and supplies no basis for inferring a conspiracy. [Riverview Inves., Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474, 483-84](#) (6th Cir.), cert. denied, 498 U.S. 855, 112 L. Ed. 2d 117, 111 S. Ct. 151 (1990). We agree with the district court that the

mere confluence of economic interests between the parties does not establish, standing alone, the existence of a conspiracy.

The plaintiffs next argue that defendants built Elk Crossing knowing that there would be no competition from Grove Mall. They presented testimony that one of the key concerns of a developer planning to build a shopping center is the presence of current or future competition. Kenneth Leonard, a real estate consultant, testified that he knew of no reputable, knowledgeable developer or chain store who did not consider the threat of competition a most important consideration when undertaking a development project. Neither Jewel nor the Elk Crossing defendants have produced evidence that a market analysis or feasibility study **[**26]** was conducted concerning possible future competition.⁸ The Elk Crossing defendants argue that they had no incentive to do such a study or analysis and dispute the importance of conducting such studies. The failure of the Elk Crossing developers to take the precautionary step of undertaking a market study is not, in our view, sufficiently indicative in itself of an agreement to justify denial of summary judgment. This evidence could not support a jury finding of conspiracy between the Elk Crossing owners and Jewel. It raises, at best, the "metaphysical doubt" that Matsushita, 475 U.S. at 585, counsels is not sufficient to submit the issue to a jury. We agree with the district court that the fact that the defendants believed that Elk Crossing would be able to compete successfully with the less modern mall across the street does not supply a basis for inferring a conspiracy.

[27]** Plaintiffs also point to two instances in which Patrick F. Daly and his architectural firm have engaged in "similar conduct" with Jewel in developing other shopping centers. The first is the Hickory Hills shopping center. In 1985, Patrick F. Daly & Associates, Inc. was employed as the architectural firm for the shopping center, and Mr. Daly had an ownership interest in the development. Prior to the development of Hickory Hills, Jewel was located across the street and when Jewel moved it obtained a restriction on its former leasehold location. The second instance is the Scharrington Square shopping center in Schaumburg, Illinois. Patrick F. Daly & Associates, Inc. was employed as the architectural firm and Mr. Daly had an ownership interest in the development.⁹ Prior to the development of Scharrington Square, Jewel had been located in a nearby shopping center. Jewel obtained a restriction on the old leasehold location so that the premise could not be leased to any person or entity whose primary business was either the retail sale of food or prescription drugs.

[28]** The plaintiffs can point to no evidence showing Daly's involvement with Jewel's negotiations of the lease restrictions. The fact that Daly's architectural firm has worked on a number of shopping centers that are anchored by Jewel and that Daly has invested in these shopping centers create an inference of Daly's ability to attract business more than it creates an inference of a conspiracy.

The plaintiffs describe their theory of the case in these terms:

The Elk Crossing defendants have an on-going relationship with Jewel. The Elk Crossing defendants build and own new shopping centers in locations where Jewel **[*602]** has an old store nearby. Jewel moves into the new center and sterilizes the old location.

Appellants' Br. at 41. Plaintiffs have failed to connect Daly's actions with Jewel's actions, and neither set of actions, standing alone or in tandem, is evidence for inferring a conspiracy.

The evidence of record fails to show that, if the case were submitted to a trier of fact, there would be sufficient evidence to justify a judgment for the plaintiffs. HN15 [↑] Although, at the summary judgment stage, we must

⁸ Leonard testified that the documents that the defendants produced for review contained no information as to competition. In regard to the absence of documents relating to competition, Leonard testified that: "It is so strange that this one critical piece of information that everybody else in the world looks to as being vital, that they agonize endlessly over, nobody, two of the most sophisticated people around, supposedly didn't even mention it. You have a sophisticated development group and a sophisticated chain store group, smart, very smart people, and they both like forgot, they had mental lapses." R.221-22, Ex.2 at 110-11.

⁹ Dalan/Jupiter, Inc. was the company responsible for the development of the shopping center. Neither party has given a clear description of Mr. Daly's relationship to Dalan/Jupiter, Inc. though both admit that he was an officer, owner, or shareholder.

evaluate the record so as to give the nonmoving party the benefit of [**29] the doubt on all reasonable inferences that may be drawn from that record, we are not permitted to allow a case built on a metaphysical doubt to go to the jury. *Matsushita, 475 U.S. at 586-87*. Here the plaintiffs' case is built on a metaphysical doubt on a metaphysical doubt. There is simply no evidence that precludes the possibility of independent action. *Id. at 597 n.21*. In this context, the absence of that evidence deprives the plaintiffs of a reasonable case that would support a jury verdict. *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1000-01 (3d Cir. 1994)*, cert. denied, 131 L. Ed. 2d 556, 115 S. Ct. 1691 (1995); see *Eastman Kodak, 504 U.S. at 468-77*.

B. The Malicious Prosecution Claim

In February 1990, Mr. Serfecz learned that Jewel was negotiating a sublease with United Skates, who wished to operate a roller skating rink on the premises. Mr. Serfecz wrote Jewel and explained his opposition to the sublease. He believed that, under the terms of the lease, Jewel could not sublease without prior written consent to any tenant whose operation would cause an increase in insurance rates. Jewel responded by stating that it believed that it had the right to sublet the premises as long as [**30] the proposed sublease was for a lawful purpose. It offered to reimburse Mr. Serfecz for any increase in the insurance premium. Mr. Serfecz changed the locks to the premises and Jewel brought a declaratory judgment action against Mr. Serfecz in state court regarding its right to sublease to United Skates. The trial court granted Mr. Serfecz's motion for a directed verdict, and the Illinois appellate court affirmed. *Jewel Cos. v. Serfecz, 204 Ill. Dec. 63, 641 N.E.2d 22 (Ill. App. Ct. 1991)*. On appeal before this court, plaintiffs maintain that the suit was brought solely for the purpose of harassment, intimidation, and interference with the redevelopment of Grove Mall, and they charged Jewel with malicious prosecution.

HN16 [↑] The Illinois courts have long disfavored actions for malicious prosecution and have sought to encourage a policy of open access to the courts. *Levin v. King, 271 Ill. App. 3d 728, 648 N.E.2d 1108, 1110, 208 Ill. Dec. 186 (Ill. App. Ct. 1995)*; *Keefe v. Aluminum Co. of Am., 166 Ill. App. 3d 316, 519 N.E.2d 955, 956, 116 Ill. Dec. 740 (Ill. App. Ct. 1988)*. In order to establish malicious prosecution, a claimant must show that: (1) the action was terminated in plaintiff's favor; (2) the action was brought maliciously and without probable cause; and (3) the plaintiff suffered [**31] "special injury" or special damage beyond the usual expense, time or annoyance in defending a lawsuit. *Levin, 648 N.E.2d at 1110*; *Keefe, 519 N.E.2d at 956*. The district court determined that the plaintiffs were able to show that the declaratory judgment action was terminated in their favor. It also concluded that they had provided sufficient evidence to create a factual dispute as to whether the action was brought maliciously and without probable cause. However, according to the court, they were unable to show special injury. We agree.

HN17 [↑] Under Illinois common law, special injury is usually "identified with an arrest or seizure of property or some constructive taking or interference with the person or property." *Levin, 648 N.E.2d at 1110*. "[A] showing of interference with property 'is satisfied only if a court issues a provisional remedy such as attachment, an order of arrest or an injunction.'"¹⁰ [*603] *Equity Assocs., Inc. v. Village of Northbrook, 171 Ill. App. 3d 115, 524 N.E.2d 1119, 1124, 121 Ill. Dec. 71 (Ill. App. Ct. 1988)* (quoting *Tedeschi v. Smith, Barney, Harris, Upham & Co., 548 F. Supp. 1172, 1174 (S.D.N.Y. 1982)*, aff'd, *757 F.2d 465* (2d Cir.), cert. denied, 474 U.S. 850, 88 L. Ed. 2d 122, 106 S. Ct. 147 (1985)). In Illinois, the court's focus [**32] rests upon the peculiar effect of the suit upon plaintiff's right to use the property; special injury in civil cases will not be found unless the injuries emanate directly from the impact of the issues allegedly wrongfully litigated. Compare *Bank of Lyons v. Schultz, 78 Ill. 2d 235, 399 N.E.2d 1286, 35 Ill. Dec. 758 (Ill. 1980)* (holding that injunction restraining distribution of life insurance proceeds for more than nine years to widowed beneficiary sufficient interference with property to satisfy special injury requirement) and *Norin v. Scheldt Mfg. Co., 297 Ill. 521, 130 N.E. 791 (Ill. 1921)* (concluding that prosecution of involuntary bankruptcy created basis for malicious prosecution claim because of the unusual and far reaching impact of a bankruptcy action on property rights) with *Keefe, 519 N.E.2d at 957* (determining that public record of unsatisfied judgment and impairment of credit rating as a result of pending litigation did not satisfy special injury requirement). The injuries

¹⁰ Plaintiffs argue that the temporary restraining order issued by the trial court created a special injury identical to the issuance of a preliminary injunction barring a plaintiff from use of her property. We disagree. The temporary restraining order was issued after Serfecz changed the locks and simply gave Jewel, the legal tenant, access to and control of its leased premises.

that plaintiffs allege are lost rental payments and the devaluation and inability to redevelop Grove Mall. These allegations of damages are insufficient to satisfy the special injury requirement. Allegations of loss of potential tenants, of institutional [**33] lending commitments, and of the earnings and appreciation of a building complex are inadequate to satisfy the special injury requirement. See *Equity Assocs., Inc.*, 534 N.E.2d at 1122.

C. The Breach of Lease Claim

Plaintiffs also allege that Jewel has breached paragraph 28 of the lease by using the premises solely for the purpose of keeping the anchor space dark. Paragraph 28 provides that the "lessee shall use the leased premise only for operation of a grocery supermarket." The plaintiffs state that "the gist of [our] argument concerning paragraph 28 is that Jewel is using the premises to stifle competition and not to operate [**34] a grocery supermarket." Reply Br. at 21. This argument is, at best, an extension of plaintiffs' argument that Jewel has breached the lease by using the premises for an unlawful purpose, a claim which is still pending in the district court.
11

Paragraph 28 is a typical use-restriction [**35] provision delineating the permissible uses of the leased premises. We do not believe paragraph 28 supports plaintiff's claim that a use-restriction as to the sale of groceries restricts the defendants from leaving the store vacant. Allowing a store to remain vacant is different from opening a hardware or music store on the leased premises, and we believe it is the latter and not the former that paragraph 28 was meant to address.

Conclusion

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED

Dissent by: CUDAHY

Dissent

CUDAHY, Circuit Judge, dissenting. This is a difficult case. Much of the relevant case law and the various guides to standing it contains may be read at least superficially to support the result reached by the majority. The alleged injury here is "indirect" in the sense that Serfecz is not a [*604] competitor in the retail grocery market nor, obviously, a consumer. Yet the economic reality is that Serfecz has suffered a more calculable and a more substantial injury from Jewel's allegedly anti-competitive conduct than would a plaintiff whose injuries were in theory direct. In fact, if Serfecz's suit fails for lack of standing, there is not much realistic [**36] hope of anyone else's taking up the cudgels. This is certainly a relevant, though not necessarily dispositive, factor in the analysis.

It is unlikely that a grocery store competitor (or here *potential* competitor) of Jewel would challenge Jewel's conduct in retaining its hold on its abandoned store. With all the thousands of possible locations available in the Chicago area, it is doubtful that a competitor would undertake an expensive and prolonged lawsuit to gain entry to one of them--and one already subject to Jewel's strong competition, at that. This would be true even if, as is alleged here, Jewel played dog in the manger with other store locations as well.

¹¹ In the district court, plaintiffs claimed that Jewel breached paragraph 1 of the lease by using the premise to restrain trade and monopolize the retail grocery business. Paragraph 1 of the Jewel lease provides:

Lessee shall not use the demised premise for any unlawful purpose nor shall it commit waste. 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.

R.22, Ex.7 at 1. The district court found that use of the premises in furtherance of a § 2 antitrust violation could constitute a breach of the lease and denied defendant's motion for summary judgment as to this claim.

A customer would be even more unlikely to sue since her damages would be slight and very difficult to prove. On the other hand, Serfecz has lost his anchor tenant and been precluded from getting another. The consequent decline in the value of his shopping center involves not only a substantial loss but one more easily calculable than losses to potential competitors or to consumers. Serfecz may be in theory only a supplier to a potential competitor but his evident loss is much more likely to be the basis of a lawsuit than the [**37] putative loss of one "directly" injured.

Judge Grady, whose summary judgment decision we review here, expressed doubt and frustration about the result to which he felt driven by the cases. He expressed the view that competitors of Jewel or its consumers would not in fact be in a position to challenge the alleged anticompetitive conduct here. Judge Grady expressed his concerns as follows:

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 suggest that Serfecz might be correct that a competing grocery store not yet operating in the area, such as Dominicks, would be more likely to forgo [**38] a location than to incur the high startup 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. Mem. Op. at pp. 19-20.

Admittedly, the prospect of there being no enforcement of the antitrust laws here if the present suit fails is not dispositive, but it should weigh significantly in the scales. "An antitrust standing determination is ultimately a product of the particularities of each case." *Sanner v. Board of Trade*, 62 F.3d 918, slip op. at 15 (7th Cir. 1995). "*McCready and Associated General Contractors* exemplify that innumerable elements, including proximity and directness, constitute [**39] proper areas of inquiry" in determining antitrust standing. *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983). This case is a far cry from *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983), where the injury to the plaintiff union was far more speculative than any injury to landowners (customers) and other contractors (competitors) to whom [*605] coercion was applied in that case. Certainly these landowners and other contractors could readily have sued had they in fact been injured. That is not the case here.

I believe that this case is distinguishable from much of the precedent because Jewel as an anchor tenant in a shopping center occupies a dual role. It is no doubt a competitor in the retail grocery market. But it (or its replacement if one is permitted) is also an essential ingredient of a successful shopping center. Jewel's refusal to permit competition is therefore in and of itself a fatal blow to the viability of the center. The issue is whether Serfecz has "antitrust" standing and I am persuaded that he does in these limited circumstances--even though the injury to him is indirect. Cf. *Greater Rockford* [**40] *Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391 (7th Cir. 1993), cert. denied, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994).

Southaven Land Co., cited by the majority, is factually on point but reaches a result opposite to the one I advocate here. However, that case conceded that, "a finding or concession that [the lessor] is not a direct participant in the relevant market is not dispositive of the § 4 'standing' issue." *715 F.2d at 1086*. The Sixth Circuit went on to conclude that the injury to the lessor of grocery store facilities was not "inextricably intertwined" with the injury to the retail grocery market so as to make the analysis in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982), controlling. I think the analysis of the Sixth Circuit up to, but not including, its final step is correct. I disagree, however, on the question whether the injury to the retail grocery market here is inextricably intertwined with the injury to Serfecz and the Grove Mall. If, as is alleged, Jewel retained its lease on the empty

store in the Grove Mall with intent to monopolize the retail grocery business in the area, it is difficult to see how damage to the Mall would not have been foreseeable and [**41] inevitable. Therefore, I believe that the one injury is inextricably intertwined with the other. Injury to the Mall is surely more calculable than injury to a potential competitor not yet present in the market. Cf. *Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967)*.

In the case before us, Judge Grady found:

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 Mall. There is also evidence that Jewel acted deliberately to prevent a competitor from occupying the space in the Mall. Mem. Op. at 7.

It is also true that there is no problem of duplicative recovery here because Serfecz presumably could recover the loss in value of his shopping center due to his inability to redevelop it, as well as lost rental income. A potential competitor, on the other hand, could recover the unrelated amount of lost profits, and a consumer could recover damages due to higher prices. On balance, therefore, I believe that Serfecz has antitrust standing and should be allowed to proceed.

I therefore [**42] respectfully dissent.

End of Document

Cieri v. Leticia Query Realty

Supreme Court of Hawaii

September 28, 1995, Decided ; September 28, 1995, FILED

NO. 17445

Reporter

80 Haw. 54 *; 905 P.2d 29 **; 1995 Haw. LEXIS 73 ***

LAWRENCE CIERI, JR. and JANIS CIERI, Plaintiffs-Appellees/Cross-Appellants,¹ vs. LETICIA QUERY REALTY, INC., and LETICIA QUERY, Defendants-Appellants/Cross-Appellees, and JOSEPH Y. YAMAJI and VIOLET N. YAMAJI, Defendants-Appellees

Subsequent History: [***1] As Amended October 12, 1995.

Prior History: APPEAL FROM THE FIRST CIRCUIT COURT. CIV. NO. 90-3699-11.

Core Terms

consumer, unfair, attorney's fees, commerce, practices, deceptive act, treble damages, consumer protection, punitive damages, trial court, real estate, election, damages, costs, argues, purchases, qualify, seller, real estate transaction, personal investment, business context, remedies, repairs, anti trust law, deceptive, broker, great amount, entities, merchant, purposes

LexisNexis® Headnotes

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN1[

Where an award is made under [Haw. Rev. Stat. § 480-13](#) and punitive damages are also awarded for common law courts, the recovery should be either treble damages or punitive damages, whichever is the greater amount.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN2[

¹ The Cieris' cross-appeal was dismissed by stipulation approved by this court on April 17, 1994.

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See [Haw. Rev. Stat. § 480-13\(b\)](#).

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN3](#) [] Standards of Review, De Novo Review

An interpretation of a statute is a question of law reviewed de novo.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

[HN4](#) [] Consumer Protection, Deceptive & Unfair Trade Practices

See [Haw. Rev. Stat. § 480-2](#).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

[HN5](#) [] Consumer Protection, Deceptive & Unfair Trade Practices

[Haw. Rev. Stat. § 480-2\(d\)](#) provides that no person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful under this section.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

[HN6](#) [] Consumer Protection, Deceptive & Unfair Trade Practices

[Haw. Rev. Stat. § 480-1](#) (1992) defines "consumer" as a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Commercial Law (UCC) > ... > Subject Matter > Goods > Definition of Goods

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > ... > Standards of Performance & Liability > Breach, Excuse & Repudiation > General Overview

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

Commercial Law (UCC) > ... > Subject Matter > Definitions > General Overview

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Commercial Law (UCC) > ... > Subject Matter > Goods > General Overview

HN7 [blue downward arrow] Consumer Protection, Deceptive & Unfair Trade Practices

See [Haw. Rev. Stat. § 490:2-105\(1\)](#) (1985).

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Civil Procedure > ... > Justiciability > Standing > General Overview

HN8 [blue downward arrow] Standing, Personal Stake

The crucial inquiry with regard to standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf. Second, an essential element of the standing inquiry is that the party or parties seeking standing suffered an actual or threatened injury as a result of the defendant's wrongful conduct, and that the injury is fairly traceable to the defendant's actions.

Governments > Legislation > Interpretation

HN9 [blue downward arrow] Legislation, Interpretation

When construing a statute, a court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Moreover, where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

Governments > Legislation > Types of Statutes

HN10 [blue downward arrow] Legislation, Interpretation

Haw. Rev. Stat. ch. 480 is a remedial statute, which is to be construed liberally in order to accomplish the purpose for which it was enacted. Remedial statutes are liberally construed to suppress the perceived evil and advance the enacted remedy.

Civil Procedure > Remedies > General Overview

Contracts Law > Remedies > Election of Remedies

HN11 [blue downward arrow] Civil Procedure, Remedies

The equitable doctrine of election of remedies is not a rule of substantive law but rather is a technical rule of procedure or judicial administration. Election of remedies is the act of choosing between two or more concurrent but inconsistent remedies based upon the same state of facts. Ordinarily a plaintiff need not elect, and cannot be compelled to elect between inconsistent remedies during the course of trial. If, however, a plaintiff has

unequivocally and knowledgeably elected to proceed on one of the remedies he or she is pursuing, he or she may be barred recourse to the other. The doctrine acts as a bar precluding a plaintiff from seeking an inconsistent remedy as a result of his or her previous conduct or election.

Counsel: Edward C. Kemper of Kemper & Watts, for defendants-appellants/cross-appellees Leticia Query Realty, Inc., and Leticia Query.

Joseph A. Kinoshita of Kinoshita & Steele, for plaintiffs-appellees/cross-appellants Lawrence Cieri, Jr. and Janis Cieri.

Judges: MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, JJ.

Opinion by: MOON

Opinion

[*56] [**31] OPINION OF THE COURT BY MOON, C.J.

This is a case involving real estate fraud and statutory unfair practices. plaintiffs-appellees Lawrence Cieri, Jr. and Janis Cieri (collectively, the Cieris) purchased a residence from defendants-appellees Joseph and Violet Yamaji (collectively, the Yamajis). In the transaction, defendants-appellants Leticia Query and Leticia Query Realty, Inc. (collectively, the Query entities) served as the Yamajis' licensed real estate broker. Immediately after moving into the residence, the Cieris discovered undisclosed plumbing problems, and they subsequently filed suit against the Yamajis and the Query entities for tortious breach of contract, fraud/misrepresentation, and unfair or deceptive trade acts or practices in violation of Hawai'i Revised Statutes (HRS) chapter 480. [**2] By special verdict, a jury found Query individually liable for fraud and for violating [HRS § 480-2](#); the jury exonerated the Yamajis and Leticia Query Realty of any wrongdoing.

Pursuant to the jury's special verdict, the trial court entered judgment against Query for \$ 10,878.00 in treble damages, \$ 12,252.00 in attorneys' fees, and \$ 851.36 in costs. Query appeals the amount of the judgment and the court's denial of her motion for judgment notwithstanding the verdict (JNOV). For the following reasons, we affirm.

I. BACKGROUND

A. Facts

On September 21, 1989, the Cieris and the Yamajis signed a Deposit, Receipt, Offer and Acceptance (DROA) form for the sale of the Yamajis' twenty-year-old residence to the Cieris. The Yamajis did not live in the residence [*57] [**32] and had been renting the property to others for some time. The Query entities had served as the property manager for the property, screening potential renters, collecting rents, making mortgage payments, and reporting problems to the Yamajis. They also ordered and made payments for necessary repairs to the property as directed by the Yamajis.

Mr. Yamaji testified at trial that the property had always been used for [**3] rental, and, for the last three years prior to its sale, the residence was rented by the Milliners. Mr. Milliner testified at trial that there were drainage problems with a toilet in one of the bathrooms, that the washing machine would back up and flood the garage, and, when it rained heavily, water often leaked into the family room. Mr. Milliner also testified that, due to problems with the washing machine, flooding occurred approximately once a month during the last two years of his residency. Query was contacted on each occasion, and, according to Mr. Milliner, "responded quickly" by calling plumbers. Query and Mr. Milliner also advised the Yamajis about the problems on several occasions.

Receipts, admitted into evidence at trial, indicated that plumbers had visited the residence on October 15, 1988, December 30, 1988, and April 17, 1989. Problems were found with the laundry washer line, the main bathroom toilet, and a bathtub drain.

In June 1989, because the rental income was becoming insufficient to cover the mounting insurance and mortgage costs, the Yamajis decided to sell the property. Query recommended that, before selling the property, certain repairs be made to the house [***4] by the Yamajis, including repairs to the plumbing system. Mr. Yamaji testified that, among other repairs that he had done himself, including raising the family room floor and installing a new shake roof, he had hired a plumber to repair the washer hose.

On September 17, 1989, the Yamajis entered into an exclusive-right-to-sell listing agreement with Leticia Query Realty to sell the residence. The Yamajis, with the assistance of Query, filled out a "Sellers Real Property Disclosure Statement" (the disclosure statement), dated September 29, 1989, in conjunction with the DROA. Question 3-d of the disclosure statement asked: "Have there been any problems with the plumbing (including solar systems, septic tank, or other), electrical, water and/or gas?" Question 1-c asked: "Have you ever had any leaks repaired?" The answers to both questions were "no." The Cieris and Yamajis both signed the disclosure statement. At trial, Mr. Yamaji and Query explained that they had answered the questions in the negative in part because they considered the water in the family room to be "seepage" and the washer and bathtub incidents to be "maintenance" rather than "problems."

Although the sale was to [***5] close on December 1, 1989, the Yamajis agreed to let the Cieris move in three days early, subject to prorated rent and an early occupancy agreement. On November 30, 1989, a backup in a second floor bathroom flooded the house and seeped downstairs, damaging the carpet. The Cieris notified Mr. Yamaji, who notified Query, who in turn called a plumber.

Two days later, on December 2, 1989, after Mrs. Cieri used the washing machine, water apparently backed up from the sewage line and flooded the garage. Mr. Cieri testified that human waste was in the water and that the house smelled badly. According to Query, there was some question whether the December 2, 1989 problem was caused by a preexisting condition, or by damage made by the plumber two days earlier on November 30, 1989. The plumbing eventually was fixed, but the Cieris had to relocate for three days and thereby incurred various expenses.

B. Prior proceedings

On November 23, 1990, the Cieris filed suit against the Yamajis and the Query entities for: (1) tortious breach of contract; (2) fraud/misrepresentation; and (3) unfair and deceptive trade practices under the HRS chapter 480. At trial in February 1993, although the [***6] jury found that the Yamajis and Query had made false representations to the Cieris, the jury determined that: (1) only Query "[made] the false representation with the [*58] [**33] intent to defraud";² (2) the Cieris relied on Query's misrepresentations;³ [***7] (3) the fraud/misrepresentation on the part

² Question No. 5 on the special verdict form and the jury's response stated:

Question No. 5. As to any Defendant for whom you have answered "Yes" to Question No. 4, did such Defendants make the false representation with the intent to defraud the Plaintiffs?

YES

NO

Joseph and Violet Yamaji

X

Leticia Query

X

Leticia Query Realty

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of Query was a legal cause of the Cieris' damages.⁴ The jury also found that Query, but not Leticia Query Realty, had committed "a deceptive act or practice."⁵

X

³ Question No. 6 on the special verdict form and the jury's response stated:

Question No. 6. As to any Defendant for whom you have answered "Yes" to Question No. 5, did the Plaintiffs rely on the representations of such Defendants?

YES

NO

Joseph and Violet Yamaji

X

Leticia Query

X

Leticia Query Realty

X

⁴ Question No. 8 on the special verdict form and the jury's response stated:

Question No. 8. As to any Defendant for whom you have answered "Yes" to Question No. 7, was the misrepresentation/fraud of such Defendants a legal cause of Plaintiffs' damages?

YES

NO

Joseph and Violet Yamaji

X

Leticia Query

X

Leticia Query Realty

X

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In answer to question No. 11 on the special verdict form, which asked the jury to determine "the amount of [the Cieris'] damages as a result of the breach of contract,⁶ [***8] fraud, and/or deceptive acts or practices," the jury awarded the sum of \$ 3,626.00.⁷ The jury also awarded \$ 7,950.00 for punitive damages.

Pursuant to the jury's special verdict, the trial court, on April 6, 1993, initially entered a judgment in the amount of \$ 10,878.00 (\$ 3,626.00 trebled) pursuant to [HRS § 480-13\(b\)\(1\)](#) (Supp. 1992).⁸ The Cieris and Query subsequently filed cross-motions to alter the judgment, or for a JNOV, or for a new trial, arguing that under the Intermediate Court of Appeals' (ICA) decision in [Eastern Star v. Union Building Materials, 6 Haw. App. 125, 712 P.2d 1148 \(1985\)](#), the court must award the highest damages chosen by the jury as between fraud and the [HRS § 480-2](#) claim.⁹ In *Eastern Star*, the ICA held that, [HN1](#)[↑] where an award is made under [HRS § 480-13](#) and punitive damages are also awarded for common law courts, "the recovery should be either treble damages or punitive [***9] damages, whichever is the greater amount." [6 Haw. App. at 142, 712 P.2d at 1160](#) (emphasis in original).

⁵ Question No. 9 on the special verdict form and the jury's response stated:

Question No. 9. Did either Leticia Query or Leticia Query Realty commit a deceptive act or practice?

YES

NO

Leticia Query

X

Leticia Query Realty

X

⁶ In answer to question No. 1 on the special verdict form, the jury found that the Yamajis did not breach their contract with the Cieris.

⁷ Based on the questions regarding misrepresentation that preceded question No. 11, the award for "fraud" includes "misrepresentation." Hereinafter, as used in this opinion, the phrase "award of \$ 3,626.00 for fraud" means the jury's award of \$ 3,626.00 for fraud/misrepresentation and unfair or deceptive acts or practices.

⁸ [HN2](#)[↑] [HRS § 480-13\(b\)](#) provides:

(b) Any consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by [section 480-2](#):

(1) May sue for damages sustained by the consumer, and if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$ 1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorneys fees together with the costs of suit; and

(2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorneys fees together with the cost of suit.

⁹ Although the Cieris and Query both relied on the principals announced in *Eastern Star*, they disagreed as to its application. The Cieris contended that, under [HRS § 480-13](#), an award of attorneys' fees is mandatory and, therefore, must be included in the calculus of the "greater amount" of recovery dictated by *Eastern Star*; Query disagreed and argued that an award of attorneys' fees is not considered when determining the "greater amount" of recovery. See *infra* section II.B.

[***10] [*59] [**34] On May 7, 1993, the trial court held a hearing on the cross-motions. At the hearing, counsel for the Cieris -- confronted with *Eastern Star* -- opted for the award for fraud and punitive damages, totaling \$ 11,576.00 (\$ 3,626.00 plus \$ 7,950.00). The court therefore ruled that judgment be entered in that amount.

Thereafter, counsel for the Cieris attempted to recover attorneys' fees on the fraud claim, and the parties filed supplemental memoranda. On September 28, 1993, the court reversed its prior position and entered a new judgment in the amount of \$ 10,878.00 in treble damages, \$ 12,252.00 in statutory attorneys' fees, and \$ 851.36 in costs. Query timely appeals from this judgment.

II. DISCUSSION

A. Statutory Unfair or Deceptive Acts or Practices

Query first argues that the trial court erred in basing the amount of the judgment on the Cieris' claim under HRS chapter 480, because the Cieris do not qualify as "consumers" under [HRS § 480-1](#) and therefore do not have standing to sue for unfair or deceptive acts or practices. Preliminarily, however, we take this opportunity to discuss the scope of the applicability of [HRS § 480-2](#), which proscribes "unfair or deceptive [***11] acts or practices *in the conduct of any trade or commerce*" (emphasis added), as it pertains to the transaction and the defendants at issue in this case.

HN3 [↑] An interpretation of a statute is a question of law reviewed *de novo*. [Mehau v. Reed, 76 Hawai'i 101, 112, 869 P.2d 1320, 1331 \(1994\)](#).

1. The "Trade or Commerce" Requirement of [HRS § 480-2](#)

a. Federal Beginnings

The genesis of Hawai'i's consumer protection statute is in federal **antitrust law**. Although the federal arsenal of antitrust laws is comprised of several differently worded statutes of varying scope that have generated volumes of case law, all of the acts have a common focus on trade, commerce, and business, and all share a concern for the preservation of unrestrained economic competition and free trade. See, e.g., Sherman Act, [15 U.S.C. § 1 \(1973\)](#) ("Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* . . . is declared to be illegal." (Emphasis added.)); Clayton Act, [15 U.S.C. § 13 \(1973\)](#) ("It shall be unlawful for any person engaged in *commerce*, in the course of such *commerce*, either directly or indirectly, to discriminate [***12] in price between different purchasers of *commodities* of like grade and quality, where either or any of the purchases involved in such discrimination are in *commerce* . . . 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." (Emphasis added.)); [Standard Oil Co. v. FTC, 340 U.S. 231, 249, 95 L. Ed. 239, 71 S. Ct. 240 \(1951\)](#) (In passing the antitrust laws, "Congress was dealing with competition, which is sought to protect, and monopoly, which is sought to prevent."); 1 E. Kintner, *Federal Antitrust Law*, § 1.1, 1 (1980) ("The antitrust laws of the United States are rooted in a commitment to the promotion of free enterprise and the existence of competition in the marketplace."). This underlying concern with trade, commerce, or business is perhaps best expressed by an early pronouncement of the United States Supreme Court, analyzing the Sherman Act, [15 U.S.C. § 1, et seq.](#), wherein the Court stated:

The Sherman Act was [***13] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of the trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment [conducive] to the preservation of our democratic political and social institutions. But even were that premise open to question, [*60] [**35] the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."

Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 4-5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).¹⁰

[***14] Hawai'i's antitrust and consumer protection law is an amalgam of the various prohibitions contained in the federal law; however, our consumer protection provisions bear the most resemblance to the 1938 amendments to Section 5 of the Federal Trade Commission Act (FTCA). Originally, the 1914 version of the FTCA limited the power of the Federal Trade Commission (FTC) to prevent "unfair methods of competition." Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719. In 1938, however, Congress amended section 5 of the FTCA to give the FTC express authority over "unfair or deceptive acts or practices." Act of March 21, 1938, ch. 49, § 3, 53 Stat. 111, amending Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719, codified at [15 U.S.C. § 45\(a\)\(1\) \(1982\)](#). The 1938 amendment "created direct protection of consumer interests on a par with market competitors, heralded increased activity of the FTC in all aspects of commercial advertising with an interstate effect, and spurred parallel efforts by the states." VII E. Kintner, *Federal Antitrust Law*, § 49.1, 124 (1988).

b. *The "Trade or Commerce" Requirement in the Development of Hawai'i's Consumer Protection Law*

Embodying in Hawai'i's virtually [***15] word-for-word adoption of the prohibitions contained in the Sherman, Clayton, and FTC acts is the federal antitrust laws' focus on commerce, the economy, and competition. In 1965, in an effort to "provide the Attorney General with much needed authority to bring proceedings to enjoin unfair and deceptive business practices by which consumers are defrauded and the economy of the State is harmed," Hse. Stand. Comm. Rep. No. 55, in 1965 House Journal, at 538, the state legislature passed a provision, then codified as Revised Laws of Hawai'i (RLH) § 205A-1.1 (1965) and recodified today as [HRS § 480-2](#) (Supp. 1992).¹¹ RLH § 205A-1.1 was, and [HRS § 480-2](#) is, virtually identical to section 5 of the FTCA and provided, very simply, that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RLH § 205A-1.1; see also [Island Tobacco Co. v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 300, 627 P.2d 260, 268 \(1981\)](#) ([HRS § 480-2](#) is "a virtual counterpart of § 5(a)(1) of the [FTCA].").

[***16] From the outset, it was clear that the focus of what would eventually be the spearhead of [*61] [**36] Hawai'i's consumer protection law was on trade, commerce, and business:

¹⁰ An undercurrent in federal antitrust law, as hinted at by the above-quoted language from *Northern Pacific*, is, in the event of a conflict between the goal of preserving competition and the "populist" goals of "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment [conducive] to the preservation of our democratic political and social institutions," [Northern Pacific, 356 U.S. at 4](#), that the "populist" goals must yield. See, e.g., [Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#) ("Taken as a whole, the legislative history [of the Clayton Act, § 7] illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."); 1 P. Areeda & D. Turner, *Antitrust Law*, P 103, 7 (1978) ("There is little if anything in the cases that suggests the courts have in fact been willing to pursue populist goals at the expense of competition and efficiency. . . . If anything, they support the priority of competition and its efficiency goals.").

¹¹ [HN4](#) [↑] [HRS § 480-2](#) provides in pertinent part:

§ 480-2 Unfair competition, practices, declared unlawful. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

(b) In construing this section, the courts . . . shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act ([15 U.S.C. 45\(a\)\(1\)](#)), as from time to time amended.

....

(d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.

Your committee recognizes, as did the Congress of the United States in 1914 when it enacted the Federal Trade Commission Act, that it is impractical to enact a law prohibiting each unfair method of competition or unfair or deceptive act or practice *in the conduct of trade and commerce* after the need therefor comes to light. In explaining the need for the broad language of the Federal Trade Commission Act, Congress said:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit *business* of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. [***17] What is harmful under certain circumstances may be beneficial under different circumstances.

The hundreds of unfair *business* practices which have been effectively stopped under the authority of the Federal law attest of Congress' wisdom in doing more than merely enumerating and prohibiting the then known unfair *business* practices. A law similar in effect to the Federal law was enacted by the State of Washington in 1961. Your committee is informed that the Washington law, like the Federal law, has been most effective in dealing with unfair and deceptive *business* practices.

Hse. Stand. Comm. Rep. No. 55, in 1965 Hse. Journal, at 538 (emphasis added); see also Hse. Stand. Comm. Rep. No. 267, in 1965 Hse. Journal, at 603 ("Your Committee concludes that a law similar in effect to the federal law dealing with unfair and deceptive business practices is essential to a State-sponsored fair business program in Hawaii.").

The focus on trade, commerce, and business is also reflected in [HRS § 480-13](#), which sets out the cause of action for violations of [HRS § 480-2](#). Prior to its amendment in 1987, [HRS § 480-13](#) stated in pertinent part:

§ 480-13 Suits [*18] **by persons injured; amount of recovery, injunctions.**** (a) Any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:

(1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$ 1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorneys fees together with the cost of suit; *provided that no showing that the proceeding or suit would be in the public interest (as those terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary when the party against whom the proceeding or suit is brought is a merchant as that term is defined in chapter 490.*

[HRS § 480-13](#) (1985) (emphasis added) [hereinafter, the language underscored above is referred to as the public interest/merchant requirement]. Thus, in order to have had standing to bring an action under the 1985 version of [HRS § 480-13](#), a plaintiff was required to demonstrate either that the suit was in the "public interest" or that the defendant was a "merchant." This requirement was linked [***19] to the focus of the statutory scheme on competition. As the ICA noted in [Beerman v. Toro Manufacturing Corp., 1 Haw. App. 111, 118, 615 P.2d 749, 754 \(1980\)](#), "the legislative history to [§§ 480-2](#) and [480-13](#) makes clear that the paramount purpose of both statutes is to prevent deceptive practices *by businesses* that are injurious to other businesses and consumers." (Emphasis added.)

In 1987, the state legislature passed Act 274, 1987 Haw. Sess. L., Act 274, §§ 1-5 at 834-40 (Act 274), in part to ease the burden on the state attorney general's limited resources. Act 274, *inter alia*, marshalled the assistance of the general public in combating the perpetration of unfair and deceptive acts [[*62](#)] [[**37](#)] in trade and commerce and allowed members of the consuming public to act as "private attorneys general" to enforce [HRS §§ 480-2 through 480-13](#). See Sen. Stand. Comm. Rep. No. 1056, in 1987 Senate Journal, at 1345 ("Your Committee also believes that private enforcement of antitrust laws is beneficial to the judicial process as it discourages violations and eases the burden on the attorney general's limited resources.").

To this end, Act 274 created a new [HN5](#) [HRS § 480-2\(d\)](#), which provides [***20] that " no person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful under this section." By so doing, the legislature principally sought to preclude [HRS § 480-2](#)'s applicability to "private disputes between businesspersons." See Sen. Stand. Comm. Rep. No. 1056, in 1987 Senate Journal, at 1345 (" Your Committee has amended the bill as follows: . . . Provided that suits based upon unfair or deceptive acts or practices under [section 480-2](#) may be brought only by consumers, the attorney general, or the office of consumer protection, in effect precluding its application to private disputes between businesspersons.").

[HN6](#) [HRS § 480-1](#) (Supp. 1992) defines "consumer" as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment."

Act 274 also eliminated the public interest/merchant requirement in [HRS § 480-13](#) and added a new section, [HRS § 480-13\(b\)](#) specifically concerning recovery under [HRS I^{***21} § 480-2](#). See Sen. Conf. Comm. Rep. No. 105, in 1987 Senate Journal, at 872 ("your Committee has made numerous amendments which include the following: . . . Amended [section 480-2](#) . . . by providing that it shall not be necessary to show that the proceeding or suit brought under this section would be in the public interest."). Indeed, [HRS § 480-2\(c\)](#) (Supp. 1992) now provides that " no showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section."

The 1987 amendments to HRS chapter 480, therefore, had significant ramifications for the individual consumer in Hawai'i. In addition to aiding in the enforcement of HRS chapter 480 to benefit and preserve economic competition, the principal personal effect of the 1987 amendments to HRS chapter 480 on the individual was to allow "consumers," who had been the victims of unfair or deceptive acts or practices in the conduct of any trade or commerce, a means to seek recompense for purely individual wrongs; the principal social effect of the amendments was to reinforce the consumer protection [***22] aspects of HRS chapter 480.

2. Relative to the Query Entities, the Transaction at Issue in the Present Case Involved Conduct in "Any Trade or Commerce."

Despite the significant changes to the statute, the emphasis of the 1987 amendments did not inject a new purpose into HRS chapter 480 and, most importantly, did not detract nor retreat from any of the purposes associated with trade, commerce, and business previously discussed above. [HRS § 480-2](#)'s prohibition of "unfair or deceptive acts or practices *in the conduct of any trade or commerce*" and HRS chapter 480's concomitant focus on trade, commerce, and business remained and continues to frame the applicability of the statutory scheme in general.

However, as previously stated, Query argues on appeal that the Cieris do not have standing as "consumers," pursuant to [HRS § 480-1](#), to sustain an action for unfair or deceptive acts or practices. As a threshold issue, however, we must first address whether the defendants in this case engaged in "conduct in any trade or commerce" with respect to the transaction at issue.

Heretofore we have not had occasion to address the independent significance of the terms "trade or commerce" [***23] in [HRS § 480-2](#). However, insofar as many, if not most, of the several states' consumer protection statutes, [*63] [**38] including Hawai'i's, have a common genesis in the federal antitrust statutes, we look to other jurisdictions for guidance.

In [Lantner v. Carson](#), 374 Mass. 606, 373 N.E.2d 973 (1978), the Supreme Judicial Court of Massachusetts held that Section 2 of Massachusetts' consumer protection statute, General Laws of the Commonwealth of Massachusetts chapter 93A (chapter 93A), which is identical to [HRS § 480-2](#), "is not available where the transaction is strictly private in nature, and is in no way undertaken in the ordinary course of a trade or business." [Id. at 608](#), 373 N.E.2d at 975. In *Lantner*, the plaintiffs had purchased a private residence from the defendants-

sellers.¹² Shortly after the plaintiffs' occupancy of the residence, several problems arose, including problems related to a defective water system and chimney. Plaintiffs repaired the defects and brought suit against the defendants-sellers for, *inter alia*, the cost of the repairs.

[***24] Noting that section 2 of Massachusetts' consumer protection statute proscribed "unfair or deceptive acts or practices in the conduct of any trade or business," the Massachusetts court rejected plaintiffs' argument that Massachusetts' consumer protection statute is "broad enough to reach *any* type of commercial exchange, regardless of the nature of the transaction or the character of the parties involved," and that "the remedial provisions of the statute should be available to the consumer who purchases from an individual homeowner, regardless of the fact the transaction is not in pursuit of the seller's ordinary course of business." The court held that "the proscription in section 2 [of the consumer protection act] of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a *business context*." *Id. at 611, 373 N.E.2d at 977* (emphasis added).

In so holding, the *Lantner* court reasoned that:

An individual homeowner who decides to sell his [or her] residence stands in no better bargaining position than the individual consumer. Both parties have rights and liabilities [***25] established under common law principles of contract, tort, and property law. Thus, arming the "consumer" [with chapter 93A] in this circumstance does not serve to equalize the positions of buyer and seller. Rather, it serves to give superior rights to only one of the parties, even though as nonprofessionals both stand on an equal footing.

Id. at 612, 373 N.E.2d at 977. The *Lantner* court, however, did not further elucidate on what would constitute a "business context."

Subsequently, in *Begelfer v. Najarian*, 381 Mass. 177, 409 N.E.2d 167 (1980), the plaintiffs-borrowers brought an action seeking a declaration that a promissory note executed by them in favor of defendant-lender and his wife, was void due to a violation of the Massachusetts usury statute. The plaintiffs-borrowers also contended that the violation of the statute was an unfair and deceptive act that in turn constituted a violation of chapter 93A. As in *Lantner*, the Massachusetts high court determined that chapter 93A did not apply to the lender-defendant because the transaction did not occur [***26] in a "business context." The court explained that the question whether a transaction took place in a "business context" was an issue of fact that required assessment of factors such as: (1) the nature of the transaction; (2) the character of the parties involved; (3) the activities engaged in by the parties; (4) whether similar transactions had been undertaken in the past; (5) whether the transaction was motivated by business or for personal reasons (as in the sale of a home); and (6) whether the participant played an active part in the transaction. *Id. at 190-91, 409 N.E.2d at 176.*

The *Begelfer* court further specifically noted that chapter 93A did not require that "a commercial transaction must take place only in the ordinary course of a person's business or occupation before its participants may be subject to liability under [chapter 93A]." *Id. at 191, 409 N.E.2d at 176.* Nevertheless, the court reasoned that the transaction did not occur in a "business context" because: (1) [*64] [**39] the defendants' participation in the real estate transaction underlying the loan was minimal; (2) the defendants had no voice in negotiating the terms of the loan; (3) the payments on the loan [***27] were made to an agent and not directly to the defendants; (4) the defendants were solicited by other investors to participate in the loan; and (5) the defendants were not active in the management of the loan.¹³

Later, in *Lynn v. Nashawaty*, 12 Mass. App. Ct. 310, 423 N.E.2d 1052 (1981), the Massachusetts Appeals Court further explained the nature of the "business context" requirement. In *Lynn*, the plaintiffs had purchased a stationery

¹² The plaintiffs in *Lantner* had employed a real estate broker who was not named as a defendant in the case.

¹³ The *Begelfer* court further specifically rejected the argument that, because the defendants actively pursued their legal remedies, the defendants were necessarily "persons engaged in the conduct of any trade or commerce." *Id.*

store from the defendants. The defendants had represented to the plaintiffs that there would be \$ 13,000.00 worth of inventory on the store premises at the time of the consummation of the sale. However, the plaintiffs alleged that the inventory was overvalued and brought an action under Chapter 93A for unfair or deceptive acts or practices.

[***28] On appeal, the defendants argued that, based upon *Lantner*, Chapter 93A did not apply to "isolated transactions." The Appeals Court rejected the defendants' argument and distinguished *Lantner*, holding that " the sale of a business or business assets by a businessperson is not the same as the sale of a home by an individual homeowner." [*Id. at 313-14, 423 N.E.2d at 1054.*](#)

Massachusetts law is therefore uniform in excepting individual sellers of residential real estate from the Massachusetts consumer protection act when such sales do not fall within a "business context," as dictated by the "conduct in trade or commerce" language in Massachusetts General Laws chapter 93A, § 2. The exception, however, has not been similarly applied in situations involving real estate brokers and salespersons dealing in sales of residential real estate. For example, in [*Mongeau v. Boutelle, 10 Mass. App. Ct. 246, 407 N.E.2d 352 \(1980\)*](#), the defendant-real estate broker, prior to execution of a purchase and sale agreement by the plaintiff-purchaser of a certain parcel of land, misinformed the plaintiff as to the acreage of the parcel and failed to disclose that the property was encumbered [***29] by a right of way, facts that the broker either knew or should have known. Subsequent to the plaintiff-purchaser's discovery of the defects, he refused to proceed with the purchase and forfeited his deposit. Thereafter, the plaintiff-purchaser brought suit against the defendant-broker, alleging claims based on common law fraud and violation of chapter 93A. As a real estate broker involved in the transaction, the defendant-broker did not dispute the applicability of chapter 93A to him, but asserted that a prior action brought by the plaintiff-purchaser for common law fraud against the individual sellers, stemming from the same transaction, barred the action against him. The trial court dismissed the action. On appeal, the Massachusetts Appeals Court held that the allegations against the defendant-broker were sufficient to state a claim under chapter 93A and remanded the action to the trial court for factual findings on the common law fraud claim.

Similarly, in [*Nei v. Burley, 388 Mass. 307, 446 N.E.2d 674 \(1983\)*](#), the plaintiffs-buyers purchased a house lot from the defendants-sellers. The defendants-sellers engaged the defendant-broker to market the lot. In their complaint, the [***30] plaintiffs-buyers alleged, *inter alia*, that the defendants-sellers and the defendant-broker had represented to them that the land was suitable for a house and that it had passed percolation and high water tests. After the purchase, the presence of a high water table forced the plaintiffs-buyers to truck considerable amounts of fill and soil to the lot to raise its level so that the septic sewer system would meet the requirements of the applicable sanitary code. The counts of the complaint, based on chapter 93A, were tried before a judge without a jury, who ruled in favor of all of the defendants. On appeal, the Supreme Judicial Court of Massachusetts affirmed, holding that: (1) the defendants-sellers were not subject to liability under chapter 93A because they were not engaged in trade or business; and (2) although [*65] [**40] the chapter 93A cause of action was properly brought against the broker, the plaintiffs-buyers failed to adduce sufficient evidence at trial to prove the causation element of the claim.

As did the courts in *Lantner*, *Begelfer, Lynn, Mongeau*, and *Nei*, we similarly interpret [*HRS § 480-2*](#) to require that, in order to fall within the purview of HRS chapter [***31] 480, a claim for alleged unfair and deceptive acts or practices against an owner-seller must stem from a transaction involving "conduct in any trade or commerce," similar to the Massachusetts courts' definition of the concept of "business context." The question whether a transaction occurs within a "business context," thus implicating the applicability of HRS chapter 480 to an individual owner-seller, must be determined on a case-by-case basis by an analysis of the transaction.

In view of the general scarcity of real estate in Hawai'i, and its concomitant high costs, see, e.g., [*Housing Fin. and Dev. Corp. v. Castle, 79 Haw. 64, 80, 898 P.2d 576, 592 \(1995\)*](#), many purchasers of residential real estate utilize and rely on brokers for their expertise and resources, including access to data in locating properties as well as determining pricing of "comparables" as a basis for negotiations. Thus, a party who engages a broker or salesperson to represent him or her in a real estate transaction has a considerable advantage over a party who is not so represented. Accordingly, in the context of the Query entities, in particular, and real estate brokers and salespersons, in general, [***32] we believe that real estate brokers and salespersons, unlike individual sellers, are generally subject to liability under HRS chapter 480.

As implicitly recognized by the Massachusetts courts, the broker's or salesperson's role in facilitating every real estate transaction in which he or she participates necessarily involves "conduct in any trade or commerce," namely, the systematic sale or brokering of interests in real property. Thus, it is unnecessary to engage in a case-by-case analysis in determining whether a real estate transaction, purportedly involving unfair or deceptive acts or practices by a broker or salesperson who represents a party to such transaction, occurs in a "business context." Consequently, we hold as a matter of law that a broker or salesperson actively involved in a real estate transaction invariably engages in "conduct in any trade or commerce." Accordingly, the Query entities were properly subject to liability pursuant to HRS chapter 480.

3. Standing to Sue as "Consumers" Under Chapter 480

a. Real Estate or Residences Do Not Constitute "Goods" Under [HRS § 480-1](#)

Relying on [*Kona Hawaiian Associates v. The Pacific Group*, 680 F. Supp. \[***33\] 1438 \(D. Haw. 1988\)](#), Query asserts that the Cieris do not have standing to bring an action under HRS chapter 480 because they do not qualify as "consumers" under [HRS § 480-1](#). As previously noted, [HRS § 480-1](#) defines "consumer" as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." Query submits that, because real estate or residences do not qualify as "goods," the Cieris are not "consumers."

In *Kona Hawaiian*, the seller of a hotel brought a multi-count suit against a prospective purchaser and the purchaser's partners, asserting, *inter alia*, a claim for unfair and deceptive trade practices based on a violation of [HRS § 480-2](#). The United States District Court for the District of Hawai'i granted summary judgment in favor of the defendants-purchasers, holding that the plaintiff-seller had failed to state a claim under [HRS § 480-13](#) because the defendants-purchasers were not "merchants" under [HRS § 480-13](#). The *Kona Hawaiian* court reasoned that the defendants-purchasers were not "merchants" because [***34] "a real estate transaction involving the sale of a hotel, is not a transaction involving goods or services. Accordingly, in this transaction . . . the [purchaser's partners] are not merchants within the meaning of [chapter 480]." [*Id. at 1453*](#).

[*66] [**41] Query asserts that, because the present case similarly arises from a real estate transaction involving the sale of a residence, the trial court should have granted her motion for JNOV on the [HRS § 480-2](#) claim. The Cieris argue that *Kona Hawaiian* is distinguishable for two reasons: first, the real estate transaction at issue in *Kona Hawaiian* dealt with a transaction between the seller and purchaser directly, not between the purchaser and a real estate broker; and second, *Kona Hawaiian*'s ultimate holding concerned whether the seller of the property was a "merchant" under [HRS § 480-13](#) prior to 1987. We disagree with the Cieris.

Pursuant to *Kona Hawaiian*, we hold that real estate or residences do not qualify as "goods" under [HRS § 480-1](#), and the Cieris therefore do not have standing as "consumers" to bring a claim alleging a violation of HRS chapter 480 for the real estate transaction at issue in the present case as [***35] purchasers of "goods."

In reaching its conclusion that real estate or residences do not qualify as "goods," the *Kona Hawaiian* court relied on [*Lacey v. Edgewood Home Builders, Inc.*, 446 A.2d 1017 \(R.I. 1982\)](#), and [*Wendling v. Cundall*, 568 P.2d 888 \(Wyo. 1977\)](#), both of which dealt with the question whether a real estate transaction would qualify as a transaction in "goods." In those cases, the Supreme Courts of Rhode Island and Wyoming relied upon the definition of "goods" located in each state's version of section 2-105 of the Uniform Commercial Code (UCC).¹⁴ Both Rhode Island and Wyoming's versions of section 2-105 are identical to Hawai'i's version, codified in [HN7](#) HRS chapter 490, which provides that:

"Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing

¹⁴ See Rhode Island General Laws 1956 (1969 Reenactment) § 6A-2-105; [*Wyoming Statutes § 34-2-105*](#).

crops and other identified things attached to realty as described in the section on goods to be severed from realty.

HRS § 490:2-105(1) (1985). [***36] Like Rhode Island and Wyoming's versions of section 2-105, the reference to real estate or residences are conspicuously absent from Hawai'i's version of section 2-105.

We therefore agree with the analysis in *Kona Hawaiian* and hold that, for purposes of determining whether a plaintiff has standing to sue for unfair and deceptive trade acts or practices as a "consumer" pursuant to HRS § 480-13, real estate and residences are not "goods" as that term is utilized in HRS § 480-1.

b. *The Cieris Do Not Have Standing as "Consumers" by Allegedly Having Been "Solicited to Purchase" Brokerage Services By Query.*

Alternatively, the Cieris maintain that they have standing as "consumers" under HRS § 480-1 because they allegedly were "solicited to purchase" brokerage services by Query. The infirmity in the Cieris' position, however, is threefold: First, the Cieris did not plead any claims for relief against Query on such grounds, nor did they allege any facts in support of such grounds in [***37] their complaint. It is well settled that HN8[[↑]] "the crucial inquiry [with regard to standing] . . . is whether the plaintiff has *alleged* such a personal stake in the outcome of the controversy as to warrant his [or her] invocation of . . . [the court's] jurisdiction and to justify exercise of the court's remedial powers on his [or her] behalf." Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 281, 768 P.2d 1293, 1298 (1989) (citations, quotation marks and original emphasis omitted, emphasis added).

Second, an essential element of the standing inquiry is, *inter alia*, that the party or parties seeking standing "suffered an actual or threatened injury as a result of the defendant's wrongful conduct," and that "the injury is *fairly traceable* to the defendant's actions." Pele Defense Fund v. Paty, 73 Haw. 578, 593, **421 I*671 837 P.2d 1247, 1258 (1992) (emphasis added), cert. denied, 122 L. Ed. 2d 671, U.S. , 113 S. Ct. 1277 (1993); see also Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 70, 881 P.2d 1210, 1216 (1994) (To show standing, a plaintiff must "clearly demonstrate [] an "injury in fact . . . *traceable* to the challenged [***38] action." (emphasis added)). We do not believe that the injury as pled in this case -- namely, the Cieris' incurring repair costs for the plumbing problems purportedly undisclosed by the defendants -- occurred "as a result of," or is "fairly traceable" to, Query's allegedly fraudulent representations regarding Query's capacity to serve as the Cieris' broker in a transaction where she also represented the seller.

Finally, as evinced by the scope and character of the interrogatories on the special verdict form, the issue of dual agency or allegedly fraudulent statements made by Query relating to her solicitation of the Cieris was not before the jury. For example, all interrogatories on the special verdict form relating to breach of contract, misrepresentation, fraud, and deceptive acts or practices fall under the general heading of "claims relating to plumbing." Moreover, the interrogatory regarding the amount of damages on the special verdict form provides: "What is the amount of Plaintiffs' damages as a result of the breach of contract, fraud, and/or deceptive acts or practices *relating to the plumbing of the home?*" (Emphasis added.)

c. *The Cieris Have Standing as "Consumers" [***39] Because They "Committed Money in a Personal Investment."*

The Cieris also maintain that they qualify as "consumers" under HRS § 480-1 because they committed money in a "personal investment." The dispositive question, therefore, is whether real estate or residences qualify as "personal investments" as the term is used in HRS § 480-1. Based on a review of the statutory language and the legislative history, we answer in the affirmative and hold that, by purchasing the home at issue in the present case, the Cieris committed money in a personal investment, and accordingly have standing as "consumers."

It is well settled that, HN9[[↑]] when construing a statute, this court's "foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." Crosby v. State Dep't. of Budget & Fin., 76 Hawai'i 332, 340, 876 P.2d 1300, 1308 (1994) (citation omitted), cert. denied, U.S. , 115 S. Ct. 731 (1995). Moreover, "where the language of the statute is plain and

unambiguous, our only duty is to give effect to its plain and obvious meaning." [State v. Ramela, 77 Hawai'i \[***40\] 394, 395, 885 P.2d 1135, 1136 \(1994\)](#) (citation omitted).

"Invest" is defined in pertinent part as "to put (money) to use, by purchase or expenditure, in something offering profitable returns, esp. interest or income." *The Random House College Dictionary*, at 702 (Rev. ed. 1979). We believe that, as previously noted, real estate is, particularly in Hawai'i, both scarce and expensive. As a result, the purchase of real estate or a residence likely is the largest "investment" a person in Hawai'i may make in a lifetime.

We further believe that, contrary to Query's contentions, real estate may be purchased with an intent to reside on the parcel of property and, concurrently, with an intent to hold the property in anticipation of an appreciation in the parcel's resale value. Accordingly, absent legislative intent to the contrary, we believe the plain and obvious meaning of the term "personal investment" includes real estate or residences.

As previously noted, in 1987, the legislature amended HRS chapter 480 to allow suits based on unfair or deceptive acts or practices under [HRS § 480-2](#) to be brought only by consumers, the attorney general, or the office of consumer protection. [HRS \[***41\] § 480-1](#)'s definition of "consumer" was amended to include "a natural person who, primarily for personal, family, or household purposes . . . commits money, property or services in an investment." The legislative history, however, did not provide any insight as to the legislature's intent regarding the scope of the term "investment."

[*68] [43]** In 1990, the legislature amended [HRS § 480-1](#) by adding the word "personal" to modify the term "investment." As amended, the section provides that a "consumer" is a "natural person who . . . commits money, property, or services in a *personal* investment." [HRS § 480-1](#) (Supp. 1992) (emphasis added). The relevant legislative history provides that:

The purpose of this bill is to amend [Section 480-1, Hawaii Revised Statutes](#), by changing the definition of "consumer."

Your Committee heard testimony in favor of this bill from an attorney in private practice. He testified that the reference to "investors" in the definition of "consumer" has been subject to two Ninth Circuit Court of Appeals cases, both of which held that the Legislature did not intend that investment matters were covered in antitrust cases. He further stated his view that the inclusion **[***42]** of investors in either a consumer protection or anti trust act created a paradox, since investment matters are subject to Chapter 485 and, therefore, investment matters should not be intermingled in an antitrust or consumer protection law.

The Department of Commerce and Consumer Affairs (DCCA), the Honolulu Police Department (HPD), and another attorney in private practice opposed this bill.

The DCCA testified that the definition of "consumer" in Chapter 480 was a distinct approach to consumer protection, and that the word "investment" was not restricted to securities, but includes other types of ventures.

.....

Background information was given for the definition [of "consumer"] by an attorney who stated that when the definition of "consumer" was formulated, the Office of Consumer Protection (Division of DCCA) wanted to insure that people who had invested in bogus financial schemes would be covered by [Section 480-2](#). An example is the Ronald Rewald investment case.¹⁵ **[***45]** He further stated that although he believed that

¹⁵ The Rewald investment case revolved around a pervasive local "pyramid" investment scheme in which earlier investors were paid with money obtained from subsequent investors. [In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 69 Haw. 523, 525, 751 P.2d 77, 78 \(1988\)](#). In Rewald, Bishop, Baldwin, Rewald, Dillingham & Wong, Inc. (the Rewald firm) held itself out as "one of Hawaii's oldest and largest privately-held international investment and consulting firms" dealing only in "secured, safe, non-risk" investments. The Rewald firm was incorporated in 1979 and fifty percent of its stock was held by Ronald Rewald, who was the chairman of its board of directors and its treasurer. The remaining fifty percent was held by Sunlin Wong, its president. The Rewald firm guaranteed its investors a minimum twenty percent annual return on investments, and gathered more than twenty million dollars in five years, investing only a fraction of what was received.

businesses fighting other businesses should not be able to use consumer fraud statutes against one another, unsophisticated and potentially gullible consumers [***43] should be protected from investment fraud situations by recourse to the remedies in Section 480-2.

Your Committee believes that one of the purposes for the definition of "consumer", as formulated in Section 480-2, was to address the consumer investment fraud situation, such as the Rewald situation. However, the language of the definition may be overboard and not limited to situations of investment fraud schemes to consumers. Therefore, your Committee has amended the bill by inserting the word "personal" before the word "investment" to clarify that the provision is to protect individual consumers, rather than businesses.

Hse. Stand. Comm. Rep. No. 716-90, in 1990 House Journal, at 1113 (emphasis added). Query argues that the import of the legislative history was to emphasize that securities were included within the scope of the term "investment." We agree. However, the legislative history does not evince an intent on the part of the legislature to preclude the inclusion of real estate or residences within the scope of the term "investment." Moreover, HN10 [HRS chapter 480 is a remedial statute, which is "to be construed liberally in order to accomplish the purpose for [***44] which [it was] enacted. . . . Remedial statutes are liberally construed to suppress the [perceived] evil and advance the [enacted] remedy." *Dawes v. First Ins. Co. of Hawai'i, Ltd.*, 77 Hawai'i 117, 123, I**44] I*69] 883 P.2d 38, 44, reconsideration denied, 77 Hawai'i 489, 889 P.2d 66 (1994) (citation and some brackets omitted). Based on the foregoing, we hold that real estate or residences qualify as "personal investments" pursuant to HRS § 480-1. Accordingly, the Cieris qualify as "consumers" who "committed money in a personal investment," and therefore have standing to sue under HRS chapter 480.¹⁶

B. The Eastern Star Case and the "Greater Amount" of Recovery

1. A Choice of Remedies

Having concluded that the Cieris qualify as "consumers" and have standing to sue under chapter 480, we next address the choice of remedies issue raised by *Eastern Star*. In *Eastern Star*, the ICA held that:

Despite our holding above [that 480-2 does not supersede common law fraud], we agree . . . that an award of both treble damages and punitive damages for the same act constitutes improper double recovery. . . . The recovery should be either treble damages or punitive damages, whichever is the greater amount.

6 Haw. App. at 142, 712 P.2d at 1159-60 (citations omitted and emphasis in original).

Under *Eastern Star*, [***46] a plaintiff proving both fraud and unfair or deceptive acts or practices violations of HRS § 480-2 cannot recover for fraud and punitive damages, on the one hand, and treble damages, on the other; rather, the plaintiff must elect a remedy. By so holding, *Eastern Star* restates well-settled law and is consistent with both state and federal court interpretations of state unfair practices statutes and federal antitrust laws. See, e.g., Hale v. Basin Motor Co., 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990) ("recovery of both statutory treble damages and punitive damages based upon the same conduct would be improper.... Here, the possibility was open to the court to consider both treble damages under the Unfair Trade Practices Act and, if proven, a punitive damage award for fraud. The [plaintiffs] could accept the greater of the two awards."); *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 218 (3d Cir. 1992), cert. denied, 122 L. Ed. 2d 677, U.S. , 113 S. Ct. 1285 (1993) ("[plaintiff] must elect between recovering under either tort law with any punitive damages or under its antitrust claim with its treble damages."); see also Annotation, *Plaintiff's [***47] Rights to Punitive or Multiple Damages When Cause of Action Renders Both Available*, 1 A.L.R. 5th 449 (1992 and Supp. 1994).

¹⁶ Having concluded that the Cieris have standing to sue under HRS chapter 480 and that the trial court properly applied HRS chapter 480 to the present case, we need not reach the Cieris' argument that they are "indirect purchasers" and thus qualify as "consumers."

Applying these principles to the present case, we face two issues: (1) whether statutory attorneys' fees are included in determining the "greater amount" of recovery; and (2) if so, whether the Cieris are precluded from obtaining the greater amount under the election of remedies doctrine. We address each issue in turn.

2. Statutory Attorneys' Fees As A Portion of Recovery

Query, relying on a literal interpretation of *Eastern Star*, argues that the trial court had no choice but to award damages for the common-law count (\$ 3,626.00 for fraud plus \$ 7,950.00 for punitives, for a total of \$ 11,576.00) because the total is greater than the statutory treble damages (\$ 3,626.00 trebled, or \$ 10,878.00). She argues that the ICA was aware that statutory attorneys' fees were awardable, but made no mention of such fees in *Eastern Star*.

On the other hand, the Cieris argue that under [HRS § 480-13\(b\)\(1\)](#), attorneys' fees are mandatory. See HRS § 480-13(b) ("the plaintiff *shall* be awarded a sum not less than \$ 1,000 or threefold damages by the [***48] plaintiff sustained, whichever sum is the greater, *and reasonable attorneys' fees together with the costs of suit.*" (emphasis added)). They maintain that the reasoning expressed in *Eastern Star* indicates that the court should base the award to the plaintiff on whichever theory results in a greater amount of recovery, and mandatory attorneys' fees necessarily comprise a portion of the statutory recovery [*70] [**45] for purposes of calculating the "greater amount" of recovery. We agree.

In [*Town East Ford Sales v. Gray*, 730 S.W.2d 796 \(Tex. Ct. App. 1987\)](#), the Texas Court of Appeals faced precisely the same issue. In that case, the plaintiff, who had purchased an automobile, brought suit for common-law fraud and statutory unfair practices against the seller and prevailed. In resolving the same choice of remedy issue on appeal, the *Town East* court noted that it "must decide whether we may consider attorney's fees and court costs in determining which cause of action affords [plaintiff] the greater relief." [*Id. at 812*](#). The court reasoned that, because attorneys' fees and costs are mandatory when a consumer prevails under the Texas Deceptive Trade Practices Act (DTPA), such fees [***49] and costs "are considered a part of the consumer's relief under the statute." *Id.* Therefore, the court held that, "for the purposes of determining which cause of action affords the greater recovery, we may consider attorney's fees as part of the consumer's recovery under the DTPA." *Id.* The court accordingly awarded statutory treble damages and fees and costs of \$ 51,869.31, which exceeded the common law fraud award of \$ 4,906.05 in actual damages plus \$ 15,000.00 in punitive damages.

Similarly, in [*Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont*, 845 F.2d 404 \(2d Cir. 1988\)](#), aff'd, [*492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 \(1989\)*](#), the United States Court of Appeals for the Second Circuit affirmed an award of over \$ 6,000,000.00 in punitive damages on a state law tort claim for intentional interference with contractual relations because the award exceeded the \$ 153,438.00 in treble damages and \$ 212,500.00 in attorneys' fees and costs under [*15 U.S.C. § 15*](#). *Kelco* presents the opposite factual situation from the present case: the common law tort claim provided the higher recovery. In denying an award of attorneys' fees on the tort/punitive damages claim, the *Kelco* court reasoned [***50] that:

Where, as here, the prevailing party elects a remedy provided by state law, and thereby forgoes its treble damage award, it should forgo the entire remedy provided by federal law, including attorneys' fees. *Attorneys' fees are an integral member of the federal remedy.* . . . In any event, its \$ 6 million dollar punitive damage award should provide an adequate fund from which [plaintiff] may pay its attorneys' fee without discomfiture.

[*845 F.2d at 411*](#) (emphasis added).

We agree with the rationale as set forth in the line of authority represented by *Town East* and *Kelco*. As correctly noted by the Cieris, under Hawai'i's statutory scheme, awards of attorneys' fees are mandatory. We therefore hold that the trial court properly included the amount of attorneys' fees in the calculation of the greater amount of recovery. Thus, pursuant to *Eastern Star*, because the trial court's award of \$ 10,878.00 in treble damages, \$ 12,252.00 in attorneys' fees, and \$ 851.36 in costs, exceeds \$ 11,576.00, (\$ 3,626.00 for fraud plus \$ 7,950.00 in

punitive damages), the trial court's judgment based on the Cieris' statutory unfair practices claim was proper.
¹⁷ [***51]

3. The Cieris' Are Not Estopped From Recovering Statutory Damages and Attorneys' Fees

Query argues that, under the election of remedies doctrine, the Cieris irrevocably chose to recover under the common law, and by so doing, they either waived, or are estopped from, obtaining statutory damages and attorneys' fees. We disagree.

Query asserts that the Cieris' counsel "elected" recovery under the [***52] fraud count at the May 7, 1993 hearing on the motions to alter judgment. The transcript of the hearing provides in pertinent part:

[*71] [**46] The Court: You've read [Query's counsel's] Motion for [JNOV]?

Cieris' counsel: Yes, I have.

The Court: And . . . he addresses the issue of the judgment amount. And he does some analysis based upon the Eastern Star case, all right.

Cieris' counsel: That's correct, Your Honor.

The Court: Do you disagree with his interpretation?

Cieris' counsel: Your Honor, I don't disagree with the interpretation, however, there is still a question regarding, I believe, Eastern Star states that treble damages or punitive damages, the greater of the two would be awarded. In that sense, I would agree with the decision.

The Court: So what is your position as to what the judgment should be? In your memoranda it seems that you're still asking for both punitive and treble.

Cieris' counsel: We would revise that somewhat to bring it into line with the decision in *Eastern Star* and request that the amendment be that the punitive damages be awarded pursuant to the jury verdict as it is the greater of the amount awarded as treble [***53] damages.

The Court: Okay. So what is the amount that you believe that you should be awarded in the judgment?

Cieris' counsel: Okay. The special damages award of \$ 3,650 plus punitive damages of \$ 7,950.

The Court: All right. So you're saying that it should be the total of \$ 11,576?

Cieris' counsel: That's correct, Your Honor.

....

Cieris' counsel: Your Honor, just to clarify that point, nothing has been withdrawn regarding the treble damages portion, it is just that if the punitive damages are not awarded to plaintiff then the treble damages award should stand.

The Court: All right. It's not my understanding that he's withdrawing anything.

All right. With regard to Plaintiff's Motion to Alter or Amend the Judgment, the motion is granted insofar as the judgment shall be amended to reflect an award in the amount of \$ 11,576 which reflects the total of the special damages of \$ 3650, and the punitive damages of \$ 7,950, which sum is greater than the treble damages. The treble damages being \$ 10,878.

As noted previously, the trial court later reversed itself and awarded the treble damages and attorneys' fees.

Query argues that [***54] the Cieris' attorney only requested statutory recovery after he realized that he could not recover attorneys' fees on the fraud claim. She contends that the Cieris chose their remedy and cannot vacillate between inconsistent positions and remedies.

¹⁷ We further agree with the Cieris' contention that *Eastern Star* differs procedurally from the present case in that, in *Eastern Star*, the trial court's verdict contained no fraud award and only a statutory award. The ICA thus had no choice but to remand for retrial on the fraud count. In contrast, the verdict in the present case contains findings both as to fraud and statutory recovery. Therefore, unlike *Eastern Star*, we need not remand the present action to the trial court for further proceedings. We need only affirm the trial court's judgment based on the jury's award on the statutory claim.

HN11 [+] The equitable doctrine of election of remedies is "not a rule of substantive law but rather is a technical rule of procedure or judicial administration." *Airgo v. Horizon Cargo Transp.*, 66 Haw. 590, 593, 670 P.2d 1277, 1280 (1983) (quoting *25 Am. Jur. 2d Election of Remedies* § 1 (1966)).

Election of remedies is the act of choosing between two or more concurrent but inconsistent remedies based upon the same state of facts. Ordinarily a plaintiff need not elect, and cannot be compelled to elect between inconsistent remedies during the course of trial. . . . If, however, a plaintiff has *unequivocally and knowledgeably* elected to proceed on one of the remedies he [or she] is pursuing, he [or she] may be barred recourse to the other. . . . [The doctrine] acts as a bar precluding a plaintiff from seeking an inconsistent remedy as a result of his [or her] previous conduct or election.

Wallis v. Superior [***55] Court, 160 Cal. App. 3d 1109, 1114, 207 Cal. Rptr. 123 (1984) (emphasis added and internal citations omitted).

[*72] [**47] Reviewing the "election" by the Cieris' counsel, it can hardly be said that he chose "unequivocally and knowledgeably." The Cieris' counsel specifically noted that "nothing has been withdrawn regarding the treble damages portion," and the court agreed that "it's not my understanding that he's withdrawing anything." The election was thus not "unequivocal."

Furthermore, prior to this opinion, whether attorneys' fees were considered as part of the statutory recovery for purposes of the choice of remedies was unsettled under Hawai'i law. Moreover, the trial court itself changed its decision twice, ultimately arriving at the correct conclusion. Therefore, the election was also not "knowledgeable." Accordingly, we hold that the Cieris are not estopped from recovering under their statutory claim.

C. Sufficiency-of-Evidence Issues

1. Fraud and Punitive Damages

Query next argues that the trial court erred in denying her motion for JNOV, or in the alternative, for new trial, asserting that there was no legal or factual basis to support a verdict for punitive damages or a finding of [***56] fraud. Because we have held that the trial court properly entered judgment on the HRS chapter 480 claim and not the common-law fraud count, we need not reach these issues. Moreover, Query does not appeal the jury's specific finding that her behavior was "a deceptive act or practice" distinct from a finding of fraud.

2. Special Damages

Query next argues that the trial court erred in denying her motion for JNOV or for new trial because the jury erroneously calculated the amount of special damages. The jury awarded the Cieris \$ 3,626.00, which represents the expenses from the sewer breakdown incurred by the Cieris after moving in, including costs of food and living expenses incurred while the sewer was being repaired.¹⁸ Receipts were submitted for each expense. Query argues that it was clear from the testimony in the case and the conduct of the Cieris during the case that the food expenses were, at best, distorted and, at worst, fabricated. We disagree.

[***57] Query claims that the special damages should be \$ 3,388.72 (as opposed to \$ 3,626.00), but bases the difference on exhibits that were not submitted into evidence. If the exhibits were not submitted, the jury should not have considered them in making the award. However, defendant's exhibit A-8, which was admitted into evidence and available for the jury to consider, indicates that the Cieris' damages were \$ 3,625.89. We hold that the jury's verdict is supported by substantial evidence.

3. Amount of Attorneys' Fees

¹⁸ The jury chose not to award \$ 6,800, representing the cost of replacing the entire sewer line.

Finally, Query contests the amount of attorneys' fees awarded by the trial court under [HRS § 480-13\(1\)](#). The reasonableness of an award of attorneys' fees is reviewed for abuse of discretion. [*Booker v. Midpac Lumber Co., Ltd.*, 65 Haw. 166, 171, 649 P.2d 376, 380 \(1982\)](#).

Query questions the form of the billing sheets, essentially arguing that the entries are not detailed enough. She also argues that the amount of \$ 12,252.00 is disproportionate to the actual award of special damages of \$ 3,626.00. Query notes that the Cieris did not prevail against Leticia Query Realty, Inc., Mr. Yamaji, or Mrs. Yamaji. Thus, she argues that the fees should be limited to twenty-five [***58] percent of the amount requested, at most.

Subsequent to the trial, the Cieris' counsel submitted verified affidavits and standard billing sheets for attorneys' fees of \$ 22,475.00, as well as an additional \$ 4,468.81 for fees generated by the Cieris' previous counsel. The trial court apparently reduced the amount sought by half, treating Mr. and Mrs. Yamaji as one party, and the Query entities as another. Because the Cieris prevailed against Query but not against the Yamajis, it was proper, although not required, [*73] [**48] for the trial court to have reduced the fee recovery by fifty percent. See, e.g., [*Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 980 \(10th Cir.\)](#) (under antitrust laws, such apportionment is not required), *cert. denied*, 497 U.S. 1005, 111 L. Ed. 2d 752, 110 S. Ct. 3241 (1990). With respect to Query's claim of disproportionality, contrary to her argument, the amount of fees need not be restricted to the amount of actual damages. Cf. [*Kelco*, 845 F.2d 404 \(2d Cir. 1988\)](#), (statutory award of \$ 153,438.00 in treble damages and \$ 212,500.00 in attorneys' fees and costs under [15 U.S.C. § 15](#)), *aff'd*, [*492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 \(1989\)*](#). Thus, we hold that the trial court did not abuse its discretion in awarding [***59] the Cieris' attorneys' fees.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

Ronald T.Y. Moon

Robert G. Klein

Steven H. Levinson

Paula A. Nakayama

Mario r. Ramil

End of Document



Audell Petroleum Corp. v. Suburban Paraco Corp.

United States District Court for the Eastern District of New York

September 29, 1995, Decided ; September 29, 1995, FILED

94-CV-3751 (DRH)

Reporter

903 F. Supp. 364 *; 1995 U.S. Dist. LEXIS 14982 **; 1995-2 Trade Cas. (CCH) P71,187

AUDELL PETROLEUM CORPORATION, and MCGRAW STREET REALTY CORPORATION, Plaintiffs, -against- SUBURBAN PARACO CORPORATION, d/b/a Paraco Gas, Defendant.

Core Terms

propane, tying arrangement, allegations, rule of reason, tied product, transportation, effects, seller, anticompetitive, Sherman Act, coercion, tying product, insubstantial, competitors, conditioned, antitrust, commerce, sales, buyer, cases, restraint of trade, distinct element, anti trust law, economic power, total volume, purchaser, Courts

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] Motions to Dismiss, Failure to State Claim

A Complaint should not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] Motions to Dismiss, Failure to State Claim

In reviewing the sufficiency of a complaint, the court takes the plaintiff's allegations as true and construes them in a light most favorable to the plaintiff.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] Motions to Dismiss, Failure to State Claim

A complaint should be summarily dismissed pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4 Motion Practice, Content & Form

The Second Circuit has repudiated the idea that some special pleading is required in antitrust cases, and the law of this circuit has been clear ever since. A short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the federal rules.

Antitrust & Trade Law > Sherman Act > General Overview

HN5 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](#).

Antitrust & Trade Law > Sherman Act > General Overview

HN6 Antitrust & Trade Law, Sherman Act

While the Sherman Act speaks of restraint of trade in absolute terms, it has long been established that [§ 1](#) proscribes only unreasonable restraints.

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 > Per Se Rule & Rule of Reason > Sherman Act

HN7 Antitrust & Trade Law, Sherman Act

Under the Sherman Act, a particular arrangement may be per se illegal, or illegal pursuant to a "rule of reason" analysis. Courts apply a per se rule only to 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. The legality of all other arrangements is governed by a rule of reason, which invites a more open inquiry into, and a balancing of, such factors as the power of the defendants, the effects of the arrangement, its possible redeeming virtues, and the availability of alternative ways of achieving any legitimate objectives with fewer threats to competition.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN8 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. A seller violates the antitrust laws through a tying arrangement when it uses its market power over one product to "force" a consumer to purchase a second product.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN9 [blue icon] Antitrust & Trade Law, Sherman Act

A "per se" illegal tying arrangement requires proof of the following five elements: (1) a tied and a tied product; (2) actual coercion by the seller that forced the buyer to accept the tied product; (3) sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; (4) anticompetitive effects in the tied market; and, (5) involvement of a "not insubstantial" amount of interstate commerce in the tied market.

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

HN10 [blue icon] Antitrust & Trade Law, Sherman Act

Courts in the Second Circuit have not been uniform in holding that anticompetitive effects in the tied market is a distinct element of a per se illegal tying claim.

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

HN11 [blue icon] Antitrust & Trade Law, Sherman Act

A seller's use of strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce the buyer to buy its full line of products does not amount to actual coercion. Rather, actual coercion is present only if the seller goes beyond persuasion and conditions its buyer's purchase of one product on the purchase of another product. Of course, not every refusal to sell two products separately can be said to restrain competition. 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 the tied product.

Antitrust & Trade Law > Sherman Act > General Overview

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN12**](#) [L] Antitrust & Trade Law, Sherman Act

Economic power is the most crucial element of an illegal tying arrangement. To sufficiently allege such economic power in the tying product market, a complaint must allege either that the seller's share of the market is high, or that the seller has some advantage not shared by his competitors in the market for the tying product.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

[**HN13**](#) [L] Antitrust & Trade Law, Sherman Act

Courts in the Second Circuit have not been uniform in their holdings as to whether or not anticompetitive effects in the tied market is a distinct element of a per se illegal tying claim. An allegation of anticompetitive effect is not required because such effects are presumed.

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

[**HN14**](#) [L] Tying Arrangements, Defenses

Under the Sherman Act, as a threshold matter there must be a substantial potential for impact on competition in the tied market in order to justify per se condemnation of an alleged tying arrangement. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

[**HN15**](#) [L] Antitrust & Trade Law, Sherman Act

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Under the Sherman Act, "substantial" in the context of a tying arrangement means "substantial enough in terms of dollar-volume so as not to be merely de minimis." For purposes of determining substantiality, a court measures the total volume of sales tied by the "policy" under challenge, not merely the portion of the total accounted for by the particular plaintiff who brings suit. There is no magic number that definitively establishes whether a plaintiff has foreclosed a "not insubstantial" amount of potential sales for the tied product. For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN16 [blue icon] Motion Practice, Content & Form

A complaint should contain a short and plain statement of the claim showing that the pleader is entitled to relief. [Fed. R. Civ. P. 8\(a\)](#).

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

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

HN17 [blue icon] Antitrust & Trade Law, Sherman Act

Even if the plaintiff fails to make a showing to establish a tying arrangement which is unlawful per se, he still can prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated. To make out a tie-in claim under the rule of reason it need not satisfy all the criteria laid down by the per se rule.

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

HN18 [blue icon] Antitrust & Trade Law, Sherman Act

The rule of reason standard focuses directly on the challenged restraint's impact on competitive conditions. It is not enough for the plaintiff to show that it was harmed in its capacity as a competitor. Rather, the plaintiff must prove

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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 antitrust laws were enacted for the protection of competition, not competitors. In other words, it is injury to the market, not to individual firms, that is significant.

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

HN19[] **Antitrust & Trade Law, Sherman Act**

To adequately allege a "rule of reason" claim, a complaint must allege contract, combination, or conspiracy in restraint of trade as well as "the relevant product market and how the net effect of the alleged violation is to restrain trade in the relevant market.

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[] **Antitrust & Trade Law, Sherman Act**

To adequately allege a restraint of trade under the rule of reason, a plaintiff must at least suggest the size of the relevant product and geographic markets, the amount of competition foreclosed, and how the acts of the defendants affected that competition. Nonetheless, certain core elements appear in the various "rule of reason" discussions, including the need for allegations identifying the relevant market, as well as the adverse effect on that market caused by the defendant's anticompetitive conduct.

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

HN21[] **Antitrust & Trade Law, Sherman Act**

Under the rule of reason, the plaintiff must demonstrate a precise harm to competition caused by defendants' activities. This is in contrast to his or her counterparts who rely on a per se approach, under which several courts have found that a restraint of trade is presumed.

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For Defendant: The Vincent A. Delorio Law Firm, Purchase, New York, By: PATRICK V. DEIORIO, ESQ..

Judges: Denis R. Hurley, U.S.D.J.

Opinion by: Denis R. Hurley

Opinion

[*366] MEMORANDUM AND ORDER

HURLEY, District Judge

Presently before the Court is a Motion to Dismiss by Suburban Paraco Corporation ("Defendant"), pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), for failure to state a claim for an illegal tying arrangement. For the reasons set forth below, Defendant's motion is denied.

Background

In July 1991, McGraw Street Realty Corporation ("McGraw") and Defendant entered into an agreement by which Defendant would sell to McGraw a propane-handling facility ("the Shirley Facility").¹ (See Compl. P 19; [*367] Delorio Sept. 2, 1994 Affid. P 5.) Audell and McGraw (collectively, "Plaintiffs") allege that the sale of the Shirley Facility was expressly conditioned upon the execution of a supply contract between Audell and Defendant ("the Propane Agreement"). (See Compl. PP 19-20, 21.) Plaintiffs indicate that the Propane Agreement provided that Audell would purchase [*2] "its minimum requirements of propane" as well as specified transportation services from Defendant. (Compl. PP 23-24.)

Plaintiffs filed the instant suit in August 1994, alleging that Defendant violated the Sherman Act, 15 U.S.C. § 1 et seq. Specifically, Plaintiffs contend that the requirement by Defendant that Audell purchase propane and transportation services from Defendant as a condition to McGraw's purchase of the Shirley Facility constitutes a tying arrangement prohibited by the Sherman Act. (Compl. P 26.)

DISCUSSION

HN1[] A Complaint should not be dismissed for failure to state a claim, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 [^{**31}] (1957); see also Austern v. Chicago Bd. Options Exch., Inc., 898 F.2d 882, 885 (2d Cir 1990), cert. denied, 498 U.S. 850, 112 L. Ed. 2d 107, 111 S. Ct. 141 (1990). **HN2**[] In reviewing the sufficiency of a Complaint, the Court takes the plaintiff's allegations as true and construe them in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) (citing Conley, 355 U.S. at 45-46); Stewart v. Jackson & Nash, 976 F.2d 86, 87 (2d Cir. 1992).

In short, **HN3**[] a Complaint should be summarily dismissed pursuant to Rule 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984) (citing Conley, 355 U.S. at 45-46). With these principles in mind, the Court turns to a discussion of the issues in the case at bar.

I. Pleading Requirements for Antitrust Claims

¹ The Complaint indicates that McGraw was "an affiliated real estate holding company" formed by Audell Petroleum Corporation ("Audell") for the purpose of acquiring the Shirley Facility. (Compl. P 15-16.)

As an initial matter, the Court addresses Defendant's argument that "the ordinary notice theory of pleading is not sufficient when measuring the sufficiency of complaints brought under [**4] the antitrust laws." (Def.'s Mem. Supp. at 3.) Specifically, Defendant contends that

because antitrust cases are considerably more complex than negligence or contract actions, the Federal Courts do require plaintiffs to plead with some particularity each of the elements of the claims alleged for relief identified, including a statement of matters and their relation to each other.

(*Id.*)

Plaintiffs, however, disagree with Defendant's contention that there is a heightened standard of pleading for antitrust cases. (Pls.' Mem. Opp. at 9.) Plaintiffs are correct. In 1957, [HN4](#) [↑] the Second Circuit "repudiated the idea that some special pleading is required in antitrust cases, and the law of this Circuit has been clear ever since." See [Three Crown Ltd. Partnership v. Caxton Corp., 817 F. Supp. 1033, 1047 \(S.D.N.Y. 1993\)](#) (citing [Nagler v. Admiral Corp., 248 F.2d 319, 322-23 \(2d Cir. 1957\)](#)) (footnote omitted). "[A] short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules." [George C. Frey Ready-Mixed Concrete, Inc., 554 F.2d 551, 554 \(2d Cir. 1977\)](#) (citations [**5] omitted).

In short, the Court finds that there is no heightened pleading requirement for antitrust claims.

II. Section 1 of the Sherman Act

The instant Complaint alleges a violation of [Section 1](#) of the Sherman Act. In part, that section provides as follows:

[HN5](#) [↑] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

[*368] [15 U.S.C. § 1. HN6](#) [↑] "While 'the Sherman Act speaks of restraint of trade in absolute terms, it has long been established that [§ 1](#) proscribes only unreasonable restraints.'" [Reborn Enters., Inc. v. Fine Child, Inc., 590 F. Supp. 1423, 1436 \(S.D.N.Y. 1984\)](#) (quoting [Borger v. Yamaha Int'l Corp., 625 F.2d 390, 396 \(2d Cir. 1980\)](#), in turn citing [Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 \(1911\)](#)), aff'd, 754 F.2d 1072 (2d Cir. 1985).

[HN7](#) [↑] Under the Sherman Act, a particular arrangement may be *per se* illegal, or illegal pursuant to a "rule of reason" analysis. *Id.*

Courts apply a *per se* rule only to "agreements or practices which because of their pernicious [**6] 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."

Id. (quoting [Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#)).

The legality of all other arrangements is governed by a *rule of reason*, "which invites a more open inquiry into, and a balancing of, such factors as the power of the defendants, the effects of the arrangement, its possible redeeming virtues, and the availability of alternative ways of achieving any legitimate objectives with fewer threats to competition."

Id. (citation omitted and emphasis added).

III. Illegal Tying Arrangement

[HN8](#) [↑] "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.'" [Yentsch v. Texaco, Inc., 630 F.2d 46, 56 \(2d Cir. 1980\)](#) (quoting [Northern Pac. Ry., 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514](#)). "A seller violates the antitrust laws through a tying

arrangement when it uses its market [**7] power over one product to 'force' a consumer to purchase a second product." [Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514, 1516 \(2d Cir. 1989\)](#) (citing [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#)).

If the Complaint presently under attack contains sufficient allegations to support either a *per se* violation of the Sherman Act or a violation based upon a "rule of reason" approach, the instant motion must be denied. However, counsel have framed the issue as whether or not the Complaint states a cause of action solely with respect to a *per se* analysis. Accordingly, the Court addresses that issue initially, and then reviews the Complaint's sufficiency under the alternate approach of "rule of reason."²

[8] A. Per Se Illegal Tying Claim**

[HN9](#) A "per se" illegal tying arrangement requires proof of the following five (5) elements:

- (1) a tied and a tied product;
- (2) actual coercion by the seller that forced the buyer to accept the tied product;
- (3) sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product;
- (4) anticompetitive effects in the tied market;³ and
- (5) involvement of a "not insubstantial" amount of interstate commerce in the tied market.

See, e.g., [Yentsch, 630 F.2d at 56-57](#) (citations omitted); see also [Telerate Sys., Inc. v. Caro, 689 F. Supp. 221, 234 \(S.D.N.Y. 1988\)](#); [Consolidated Terminal Sys., Inc. v. ITT World Communications, Inc., 535 F. Supp. 225, 231 \(S.D.N.Y. 1982\)](#).

[*369] 1. Existence of a Tying and a [9] Tied Product**

The first element of an illegal tying arrangement is the existence of a tying and a tied product. E.g., [Yentsch, 630 F.2d at 56](#). The Complaint alleges that the sale of the Shirley Facility was expressly conditioned upon the execution of a supply contract between Audell and Defendant by which Defendant agreed to sell, and Audell agreed to purchase, a supply of propane and services for the transportation of propane. (See Compl. PP 17-24.)

Upon review of the Complaint, the Court finds that it adequately alleges the existence of a tying product, the Shirley Facility, and tied products, propane supply and propane transportation. See, e.g., [Yentsch, 630 F.2d at 56-57](#).

2. Actual Coercion by Seller

The second element of an illegal tying arrangement is actual coercion by the seller that forces the buyer to purchase the tied product. E.g., [Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685 \(2d Cir. 1982\)](#). Defendant suggests that the Complaint does not adequately allege such coercion. Specifically, Defendant argues that

² Even though Plaintiffs' Complaint will stand if either a *per se* or a "rule of reason" violation is properly alleged, the proof at trial may differ depending on which theory is pursued by Plaintiffs. See Phillip E. Areeda, [Antitrust Law](#) § 1728(b) (1991) ("The *per se* rule is . . . a shortcut that allows us to condemn a restraint as unreasonable without the usual inquiries."). For that reason, the above-indicated bifurcated analysis will be undertaken.

³ [HN10](#) Courts in this Circuit have not been uniform in holding that anticompetitive effects in the tied market is a distinct element of a *per se* illegal tying claim. See *infra*, [1995 U.S. Dist. LEXIS 14982](#), at *13-15.

there is a complete absence of any coercion by Paraco. In fact, *nowhere* in the Complaint [**10] is it alleged that Plaintiffs were "coerced" into buying the Shirley Facility nor is there any factual allegation to be found (and therefore provided) within the four corners of the Complaint.

(Def.'s Mem. at 6-7 (emphasis in original).) A review of the Complaint reveals that Defendant is mistaken.

The Complaint contains the following allegations:

Paraco was unwilling to sell only the Shirley Facility.

(Compl. P 17.)

Rather, Paraco required as a condition of the sale that Audell simultaneously agree to certain provisions regarding the purchase and transportation of propane.

(Compl. P 18.)

The sale of the Shirley Facility was expressly conditioned upon the execution by the parties of a "Propane Agreement."

(See Compl. P 20.)

The Propane Agreement provides . . . that "the execution and closing of this Agreement and the contemporaneous agreement for the sale of the Shirley Facility are each conditioned upon each other".

(Compl. P 22.)

The Second Circuit has explained that [HN11](#)[] a seller's "use of 'strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce . . . [the buyer] to buy its [**11] full line of products' does not . . . amount to actual coercion." See [Unijax, 683 F.2d at 685](#) (citation omitted). Rather, "actual coercion . . . is present only if the [seller] goes beyond persuasion and *conditions its [buyer's] purchase of one product on the purchase of another product.*" See *id.* (citation omitted and emphasis added).

Of course, "not every refusal to sell two products separately can be said to restrain competition." [Jefferson Parish, 466 U.S. at 11](#). "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 the tied product . . ." *Id.* Such control, or leverage, will be the next element of a claim for a *per se* illegal tying arrangement, to be discussed at *infra*, [1995 U.S. Dist. LEXIS 14982](#), at *6-8.

In any event, the Court finds that by alleging that Defendant *conditioned* its sale of the Shirley Facility upon the purchase by Audell of propane and transportation services, Plaintiffs have sufficiently pleaded the element of actual coercion.

3. Economic Power in the Tying Product Market

The third element of an illegal tying arrangement [**12] is that the seller had sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product. See, e.g., [Yentsch, 630 F.2d at 57](#). At least one court has indicated that such [^{*}370] [HN12](#)[] economic power "is the most crucial element" of an illegal tying arrangement. [305 E. 24th Owners Corp. v. Parman Co., 714 F. Supp. 1296, 1305 \(S.D.N.Y. 1989\)](#) (citing [Jefferson Parish, 466 U.S. at 12](#)), aff'd, [994 F.2d 94 \(2d Cir. 1993\)](#).

To sufficiently allege such economic power in the tying product market, a Complaint must allege

either that the "seller's share of the market is high," [Jefferson Parish, 466 U.S. at 17](#), . . ., or that "the seller has some advantage not shared by his competitors in the market for the tying product. [Yentsch, 630 F.2d at 58](#) (citing [United States Steel Corp. v. Fortner Enters. \["Fortner II"\], 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 \[1977\]](#)).

See [305 East 24th Owners Corp., 714 F. Supp. at 1305-06](#) (emphasis added).

Plaintiffs suggest that they have sufficiently alleged both that Defendant has a high market share *and* that Defendant has some advantage not shared by its competitors in the [**13] market for propane-handling facilities. (See Pls.' Mem. Opp. at 13.) Because, as discussed in detail below, the Court finds that the Complaint insufficiently

alleges the fifth element of a *per se* claim (involvement of a "not insubstantial" amount of commerce), see *infra*, [1995 U.S. Dist. LEXIS 14982](#), at *15-19, the Court need not rule upon the sufficiency of the allegations as to the third element. The Court, however, notes that it finds more persuasive Plaintiffs' argument that they have sufficiently alleged that Defendant had an advantage not shared by its competitors,⁴ than it does Plaintiffs' argument *vis-a-vis* their allegations as to Defendant's market share.

4. Anti-Competitive Effects In The Tied Markets

[HN13](#)[] Courts in this Circuit have not been [**14] uniform in their holdings as to whether or not anticompetitive effects in the tied market is a distinct element of a *per se* illegal tying claim. Compare [Blaine v. Meineke Discount Muffler Shops, Inc., 670 F. Supp. 1107, 1113 \(D. Conn. 1987\)](#) (allegation of anticompetitive effect not required because such effects are presumed) and [Nordic Bank PLC v. Trend Group, Ltd., 619 F. Supp. 542, 558 \(S.D.N.Y. 1985\)](#) (allegation of anticompetitive effects not required) with [Telerate Sys., Inc., 689 F. Supp. at 234](#) (anticompetitive effects as distinct element), [Posa, Inc. v. Miller Brewing Co., 642 F. Supp. 1198, 1209 \(E.D.N.Y. 1986\)](#) (distinct element), and [Consolidated Terminal Sys., 535 F. Supp. at 231](#); see also [Gonzalez, 880 F.2d at 1516-17](#) (anticompetitive effects is distinct element of *per se* claim) and [Konik v. Champlain Valley Physicians Hosp., 733 F.2d 1007, 1017](#) (2d Cir.) (anticompetitive effects not listed as distinct element), cert. denied, 469 U.S. 884, 83 L. Ed. 2d 190, 105 S. Ct. 253 (1984).

In any event, the Court need not, and does not decide this matter because, as detailed below, Plaintiffs have not sufficiently alleged the final element [**15] of a *per se* illegal tying claim.

5. Involvement of a "Not Insubstantial" Amount of Interstate Commerce in the Tied Market

"The Supreme Court has stated that [HN14](#)[] as a threshold matter there must be a substantial potential for impact on competition in the tied market in order to justify *per se* condemnation of an alleged tying arrangement." [Gonzalez, 880 F.2d at 1518](#) (citing [Jefferson Parish, 466 U.S. at 16](#)). "If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of *antitrust law*."⁵ *Id.* (quoting [Jefferson Parish, 466 U.S. at 16](#)).

[**16] [*371] "The Supreme Court has defined [HN15](#)[] 'substantial' in this context as 'substantial enough in terms of dollar-volume so as not to be merely *de minimis*.'" *Id.* (citing [Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 501, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\)](#) ("Fortner I")). "For purposes of determining substantiality, a court measures the total volume of sales tied by the 'policy' under challenge, not merely the portion of this total accounted for by the particular plaintiff who brings suit." *Id.* (citing [Fortner I, 394 U.S. at 502](#)).

The Second Circuit has indicated that "there is no magic number that definitively establishes whether a plaintiff has foreclosed a 'not insubstantial' amount of potential sales for the tied product." [Gonzalez, 880 F.2d at 1518](#). The Supreme Court has provided the following guidance:

⁴ The alleged advantage possessed by Defendant and not shared by its competitors in the tying product market was the opportunity to sell, separate from the sale of its entire business, a propane-handling facility in Suffolk County. (See Compl. PP 12-15.)

⁵ The Court notes that the Complaint at issue merely alleges that a *single purchaser* (Audell) was "forced" with respect to the purchase of the tied items. If the total volume of propane and transportation services purchased by Audell was sufficiently alleged to have been "not insubstantial," then arguably its plight would implicate the antitrust laws, notwithstanding Audell's status as a "single purchaser." See Areeda, *supra* note 2, § 1721 ("If the dollar volume meets the usual test, excepting the single-purchaser tie seems inconsistent with the logic of that test."); but see [Reisner v. General Motors Corp. 511 F. Supp. 1167, 1178 \(S.D.N.Y. 1981\)](#), aff'd, [671 F.2d 91](#) (2d Cir.), cert. denied, [459 U.S. 858, 74 L. Ed. 2d 112, 103 S. Ct. 130 \(1982\)](#).

For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, . . . the relevant figure is the *total volume of sales tied by the sales policy under challenge*, not the portion of this total accounted for by the particular plaintiff who brings suit.

[**17] *Fortner I*, 394 U.S. at 502.

Although "the threshold for satisfying this [final] prong is low," 305 E. 24th *Owners Corp.*, 714 F. Supp. at 1308, the Court finds that the Complaint in the case at bar insufficiently alleges this element. The Complaint is devoid of *any* allegation as to the total volume of sales tied by the allegedly illegal tying arrangement. It merely alleges, without further detail or explanation, that "plaintiffs have been injured in their business or property by reason of defendant's illegal tie-in requirements in the sum[s] of \$ 240,000" and \$ 375,000. (Compl. PP 31, 33.) Again, however, the relevant inquiry is *not* the amount of damages allegedly suffered as a result of an illegal arrangement, but the *volume of sales* tied by that arrangement.

It may be that by these allegations Plaintiffs are suggesting that the total volume of sales of propane tied by the allegedly illegal arrangement at issue is \$ 240,000, and that the total volume of transportation services tied by the allegedly illegal arrangement is \$ 375,000. (See Compl. PP 27, 31, 33.) Such figures would appear to implicate a "not insubstantial" amount of commerce. See, e.g., *Gonzalez*, **18] 880 F.2d at 1518. However, a Complaint should not invite such extrapolation. Rather, *HN16*[↑] it should "contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." *Fed. R. Civ. P. 8(a)* (emphasis added). In short, the Complaint does not sufficiently allege that the amount of commerce allegedly foreclosed is "not insubstantial."

The Court's inquiry does not end here, however, for as previously discussed, *HN17*[↑] "even if plaintiff fails to make a showing to establish a tying arrangement which is unlawful per se, he still 'can prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated.'" *Posa*, 642 F. Supp. at 1210 (quoting *Fortner I*, 394 U.S. at 500) (further citations omitted); see also *Consolidated Terminal Sys.*, 535 F. Supp. at 231 ("To make out a tie-in claim under the rule of reason it need not satisfy all the criteria laid down in cases like *Yentsch*, which dealt with per se claims.") (citations omitted). Thus, the Court now turns its attention to whether or not the Complaint [**19] sufficiently alleges a claim for a tying arrangement that is illegal pursuant to the "rule of reason."

B. "Rule of Reason" Illegal Tying Claim

HN18[↑] "The rule of reason standard 'focuses directly on the challenged restraint's impact on competitive conditions.'" *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 725 F. Supp. 669, 677 (N.D.N.Y. 1989) (quoting *National Soc'y of Professional Eng'r's v. United States*, 435 U.S. 679, 688, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1977)). "It is not enough for the plaintiff to show that it was harmed in its capacity as a competitor. [*372] " *Id.* Rather, "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." *Id.* (emphasis and alteration in original) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)). "The antitrust laws were enacted for 'the protection of competition, not competitors.'" *Id.* (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)). [**20] "In other words, 'it is injury to the market, not to individual firms, that is significant.'" *Id.* (quoting *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292 (9th Cir.), cert. denied, 464 U.S. 822, 78 L. Ed. 2d 96, 104 S. Ct. 88 (1983)).

The courts in this Circuit have not been uniform in describing the type of allegations that a Complaint must include to sufficiently state a claim for a tying arrangement that is illegal pursuant to the "rule of reason." For example, the Court in *Retail Serv. Assocs. v. ConAgra Pet Prod. Co.*, indicated that *HN19*[↑] to adequately allege a "rule of reason" claim, a complaint must allege a contract, combination or conspiracy in restraint of trade, *759 F. Supp. 976, 979 (D. Conn. 1991)*, as well as "the relevant product market and . . . how the net effect of the alleged violation is to restrain trade in the relevant market." *Id.* (internal quotations omitted) (citing *North Jersey Secretarial School, Inc. v. McKiernan*, 713 F. Supp. 577, 583 (S.D.N.Y. 1989)).

Courts in the Northern District have "held that [HN20](#)[] to adequately allege a restraint of trade under the rule of reason, a plaintiff 'must at least suggest the size [**21] of the relevant product and geographic markets, the amount of competition foreclosed, and how the acts of the defendants affected that competition.'" [*Capital Imaging Assocs., 725 F. Supp. at 677*](#) (quoting [*Jim Forno's Continental Motors, Inc. v. Subaru Distrib. Corp.*, 649 F. Supp. 746, 754 \(N.D.N.Y. 1986\)](#)).

Nonetheless, certain core elements appear in the various "rule of reason" discussions, including the need for allegations identifying the relevant market, as well as the adverse effect on that market caused by the defendant's anticompetitive conduct.⁶

[**22] A juxtapositioning of the Complaint in the case at bar against the above standards indicates that Plaintiffs have adequately alleged an illegal tying agreement under the "rule of reason." The relevant markets are identified as the markets for the sale of propane within Suffolk County and for the transportation of propane within Suffolk County. (See Compl. P.28.) The adverse impact of the alleged tying agreement is delineated in, *inter alia*, the following paragraph of the Complaint:

- (a) Audell has been prevented from purchasing propane at lower prices than that charged by Paraco from suppliers other than Paraco;
- (b) Competitors of Paraco in the sale of propane have been prevented from selling propane to Audell;
- (c) Audell has been prevented from utilizing the services of propane transporters other than Paraco, including itself, at prices lower than or equal to that of Paraco;
- (d) Competitors of Paraco in the transportation of propane have been prevented from selling their services to Audell.

(Compl. P 27.) In short, the Court finds that Plaintiffs have sufficiently alleged a tying arrangement that is illegal pursuant to a "rule of reason."

[**23] Conclusion

Based upon the foregoing analysis, the Court denies Defendant's Motion to Dismiss.

SO ORDERED

Dated: Hauppauge, New York

September 29, 1995

Denis R. Hurley, U.S.D.J.

End of Document

⁶ [HN21](#)[] "Under the rule of reason, the plaintiff must demonstrate a precise harm [to competition] caused by defendants' activities." [*Jim Forno's Continental Motors*, 649 F. Supp. at 754](#). This is in contrast to his or her counterparts who rely on a *per se* approach, under which several courts have found, and this Court agrees, that a restraint of trade is presumed. *E.g.*, [*Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 \(7th Cir. 1984\)](#), cert. denied, [*470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 \(1985\)*](#).



Laitram Mach. v. Carnitech A/S

United States District Court for the Eastern District of Louisiana

September 29, 1995, Decided ; October 2, 1995, FILED; October 3, 1995, ENTERED

CIVIL ACTION NO. 92-3841 SECTION "S"(2)

Reporter

901 F. Supp. 1155 *; 1995 U.S. Dist. LEXIS 15315 **; 1995-2 Trade Cas. (CCH) P71,190

LAITRAM MACHINERY, INC. VERSUS CARNITECH A/S, a Danish corporation, SEAFOOD EQUIPMENT DEVELOPMENT CORP., and SKRMETTA MACHINERY CORP.

Disposition: [**1] Skrmetta Machinery Corporation's "Second Motion for Summary Judgment" GRANTED in part and DENIED in part.

Core Terms

summary judgment, conspiracy, genuine issue of material fact, allegations, patent, defame, lawsuit, trade-secrets, violations, customers, amended complaint, machine, summary judgment motion, trade secret, Lanham Act, antitrust, unfair trade practice, memorandum, contends, letters, shrimp, reasons, argues, sham, anti trust law, assigned, commerce, cooking

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > 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

HN1[] Supporting Materials, Discovery Materials

Fed. R. Civ. P. 56(c) provides that summary judgment is proper if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

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Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2 Case & Controversy Requirements, Actual Controversy

The non-movant's burden of showing a genuine issue of material fact is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, or by only a scintilla of evidence. Further, factual controversies are resolved in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3 Entitlement as Matter of Law, Genuine Disputes

In essence, the inquiry performed in a motion for summary judgment is the threshold inquiry of determining whether there is the need for a trial; whether, in other words, there are any 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 > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN4 Motions to Dismiss, Failure to State Claim

Where a party seeks dismissal for failure to state a claim, the moving party has the burden of showing that plaintiff can prove no set of facts consistent with the allegations in the complaint which would entitle it to relief. The purpose of a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion is to test the sufficiency of the complaint, not to decide the merits of the case, even if it appears on the face of the pleadings that a recovery is very remote and unlikely. The court must accept all well-pleaded factual allegations in the complaint as true and view the allegations in the light most favorable to the non-moving party. Motions to dismiss for failure to state a claim are viewed with disfavor and rarely granted.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN5 Antitrust & Trade Law, Sherman Act

In addition to the burden of proving there are genuine issues of material fact, to survive a summary judgment on a claim alleging conspiracy under [15 U.S.C.S. § 1](#), the evidence must tend to exclude the possibility that the defendants acted independently.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN6 [] **Summary Judgment, Opposing Materials**

On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. But antitrust law limits the range of permissible inferences from ambiguous evidence in a 15 U.S.C.S. § 1 case. Thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment 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. Respondents, 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 respondents.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Trade Secrets Law > Federal Versus State Law > Antitrust Law

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN7 [] **Exemptions & Immunities, Noerr-Pennington Doctrine**

According to the Noerr-Pennington doctrine, those who petition government for redress are generally immune from antitrust liability.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN8 [] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington extends to the approach of citizens, to administrative agencies, and to courts. A complaint that shows a sham is not entitled to immunity when it contains allegations that one group sought to bar competitors from meaningful access to adjudicatory tribunals and so to usurp the decision making process by instituting proceedings and actions, with or without probable cause, and regardless of the merits of the cases.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

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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

HN9[] Exemptions & Immunities, Noerr-Pennington Doctrine

There is a two-part definition of sham litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr-Pennington, and an antitrust claim premised on the sham exception must fail. Only if a challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under the second prong, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process as opposed to the outcome of that process as an anticompetitive weapon.

Evidence > Privileges > Trade Secrets > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN10[] Privileges, Trade Secrets

To the extent plaintiff's trade secrets are the subject of a valid patent, those secrets were disclosed at the time the patent issued.

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

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN11[] False Designation of Origin, Elements of False Designation of Origin

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

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN12[] False Designation of Origin, Elements of False Designation of Origin

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To be a violation of [15 U.S.C.S. 1125\(a\)](#), there must be: a false statement of fact about the product; the statement deceived or had the capacity to deceive a substantial segment of potential customers; the deception is material, i.e., it is likely to influence the purchasing decision; the alleged deceiver must have put the products into interstate commerce; and the complainant has been or is likely to be injured as a result.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN13](#) Public Enforcement, State Civil Actions

See [La. Rev. Stat. § 51:1405.A.](#)

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

[HN14](#) Public Enforcement, State Civil Actions

Under La. Rev. Stat. § 51:1409A creates a private right of action to recover actual damages and attorney fees.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN15](#) Public Enforcement, State Civil Actions

What constitutes unfair trade practices is left up to the courts. A trade practice is unfair when it offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

[HN16](#) Public Enforcement, State Civil Actions

The Unfair Trade Practices Act, [La. Rev. Stat. § 51:1405 et seq.](#), has been construed as penal in nature and subject to reasonably strict construction.

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Judges: OKLA JONES II, UNITED STATES DISTRICT JUDGE

Opinion by: OKLA JONES II

Opinion

[*1157] ORDER AND REASONS

Pending before the Court is "Defendant's Second Motion for Summary Judgment," filed by Skrmetta Machinery Corporation, which was taken under submission on a previous date without oral argument. After reviewing the memoranda of the parties, the record and the applicable law, the Court GRANTS the motion in part and DENIES the motion in part.

Background

Defendant Skrmetta Machinery Corporation (hereinafter "Skrmetta") moves for summary judgment on all claims of plaintiff Laitram Machinery (hereinafter "Laitram").

Laitram filed suit in November 1992 against three defendants, Seafood Equipment Development Corporation, a Florida corporation (hereinafter "SEDCO"); Carnitech A/S, a Danish corporation; and Skrmetta. The lawsuit, as amended in December 1992 (R.Doc. 2) alleges federal **antitrust law** violations, Louisiana **antitrust law** violations, and violations of the Lanham Act, [15 U.S.C. § 1125\(a\)](#), based upon alleged false representations about Laitram's products and **[**3]** alleged patent coverage for defendant's products. The lawsuit also seeks declaratory judgment that Laitram was not infringing on a patent allegedly assigned to SEDCO. Further, Laitram alleges claims pursuant to the Louisiana Unfair Trade Practices Law, LSA-R.S. 51:1405 *et seq.*, and claims of defamation and conspiracy to defame pursuant to Louisiana law.¹

The suit arises out of an alleged conspiracy between Skrmetta, SEDCO and Carnitech to harm Laitram by alleging to Laitram's customers that Laitram had used trade secrets for a shrimp processing machine, the rights of which had allegedly been assigned to SEDCO. The alleged conspiracy also related to the bringing of a frivolous lawsuit in Florida as to the alleged **[**4]** violation of the trade secrets agreement at issue.

[*1158] Laitram has since settled its claims against SEDCO and Carnitech (R.Docs. 33 and 83), and the only remaining defendant is Skrmetta.

Skrmetta seeks summary judgment as to alleged antitrust violations of Count I, brought under [15 U.S.C. § 1](#),² for two reasons. First, Skrmetta argues that the *Noerr-Pennington* doctrine³ immunizes its activities, if any were taken.

¹ The Court notes that, pursuant to an order of the Federal Circuit Court of Appeals (R.Doc. 238), Laitram has been granted leave to file a claim of infringement as to its patent number 4,862,794 (hereinafter the "794 patent"). Skrmetta's motion for summary judgment does not address this claim.

² This section provides, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Second, Skrmetta argues that there is no genuine issue of material fact that Ray, through whom Skrmetta, the corporation, allegedly acted, participated in any conspiracy. Skrmetta also relies on this latter argument in support of its motion as to the state antitrust violations and the alleged Lanham Act violations.

[**5] Skrmetta next contends that it is entitled to summary judgment on the claim of the invalidity, unenforceability and noninfringement of Laitram's shrimp processing machine of the patent assigned to SEDCO because it has neither procured nor has any interest in this patent.

As to Laitram's state-law claims, Skrmetta first contends that there is no genuine issue of material fact that Raphael Skrmetta did not engage in acts that constitute a claim under the Louisiana Unfair Trade Practices Act, LSA-R.S. 51:1405.A. and 1409. As to the claim of defamation, Skrmetta submits that Laitram has failed to state a claim under Louisiana law.

In opposition, Laitram argues that there are genuine issues of material fact which show that Ray Skrmetta, acting on behalf of Skrmetta, participated in the conspiracy to restrain trade with SEDCO and Carnitech against Laitram. Additionally, the *Noerr-Pennington* doctrine is inapplicable for two reasons. First, the doctrine does not extent to act of writing letters to Laitram's customers alleging violation of trade secrets. Second, the trade secrets lawsuit falls within the "sham" exception to the *Noerr-Pennington* doctrine.

As to the Lanham Act violations, [**6] Laitram contends that the genuine issues of material fact as to Ray Skrmetta's participation with SEDCO and Carnitech preclude summary judgment on this claim. Similarly, Laitram submits that there are genuine issues of material fact as to whether Ray Skrmetta's actions on behalf of Skrmetta rise to a level such that they violate the Louisiana Unfair Trade Practices Act.

Finally, Laitram argues that it has stated a claim of defamation and conspiracy to defame against Skrmetta.

Laitram offers no opposition, however, to Skrmetta's motion as to Court IV of the amended complaint alleging invalidity, unenforceability and noninfringement of the patent assigned to SEDCO. Therefore, for reasons which will be set forth herein, the Court grants Skrmetta's motion for summary judgment as to Count IV of the amended complaint.

Law and Application

I. Standard of Review

Although styled as a motion for summary judgment, Skrmetta's motion is hybrid in that it seeks summary judgment as to most counts but seeks dismissal for failure to state a claim as to the defamation count under [Fed.R.Civ.P. 12\(b\)\(6\)](#). Thus, the Court must apply two standards of review.

As to those counts on which summary judgment [**7] is sought, [Rule 56\(c\) of the Federal Rules of Civil Procedure](#) [HN1](#)³ provides that summary judgment is proper "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." [HN2](#)⁴ The non-movant's burden of showing a genuine issue of material fact "is not satisfied with 'some metaphysical doubt as to the material" facts,' by 'conclusory allegations,' or by only a 'scintilla' of evidence." [Little v. Liquid Air Corporation, 37 F.3d 1069, 1075 \(5th Cir. 1994\)](#)(*en banc*). Further, "factual controversies [are resolved] in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Id.*

[HN3](#)⁵ In essence, "the inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of

³ See [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, 85 S. Ct. 1585, 14 L. Ed. 2d 626 \(1965\)](#).

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fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 [**8] [U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 \(1986\)](#).

As to those counts on which Skrmetta [HN4](#) seeks dismissal for failure to state a claim, the moving party has the burden of showing that plaintiff can prove no set of facts consistent with the allegations in the complaint which would entitle it to relief. *Baton Rouge Building and Construction Trades Council AFL-CIO v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir. 1986), citing *Hishon v. King & Spalding*, 467 U.S. 69, 104 S. Ct. 2229, 2233, 81 L. Ed. 2d 59 (1984). The purpose of a *Rule 12(b)(6)* motion is to test the sufficiency of the complaint, not to decide the merits of the case, even if it "appear[s] on the face of the pleadings that a recovery is very remote and unlikely." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 40 L. Ed. 2d 90 (1974). The court must accept all well-pleaded factual allegations in the complaint as true and view the allegations in the light most favorable to the non-moving party. *American Waste & Pollution Control Company, Inc. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1386 (5th Cir. 1991). Motions to dismiss for failure to state a claim are viewed with disfavor [\[**9\]](#) and rarely granted. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988).

II. Antitrust Allegations

A. Conspiracy

[HN5](#) In addition to the foregoing principles against which a motion for summary judgment is tested, "to survive a summary judgment [on a claim alleging conspiracy under [15 U.S.C. § 1](#)], the evidence must tend to 'exclude the possibility' that the defendants acted independently." *Culberson, Inc. v. Interstate Electric Company, Inc.*, 821 F.2d 1092, 1093 (5th Cir. 1987), quoting *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).⁴

[**10] On the basis of these principles, the Court finds that a genuine issue of material fact exist that precludes summary judgment.

Skrmetta concedes that Ray Skrmetta met with Roy Ellis-Brown of SEDCO and expressed the opinion that Laitram's shrimp cooking machine copied Ellis-Brown's machine (the rights of which allegedly had been assigned to SEDCO). (Skrmetta's Statement of Material Facts, attached to the instant motion, R.Doc. 226.) Skrmetta also concedes that Skrmetta provided Ellis-Brown a copy of a publicly disseminated brochure on Laitram's shrimp-cooking machine and provided a list of Laitram customers using the shrimp cooking machine to the Florida corporation's attorney upon request. *Id.* However, Skrmetta argues that these facts do not constitute evidence of a conspiracy between Skrmetta with SEDCO or Carnitech. [*1160] Additionally, Skrmetta contends the trade-secrets lawsuit was filed by the Florida corporation upon its own determination after consulting with its attorney and not in reliance on or with the help of Ray Skrmetta or Skrmetta the corporation. *Id.*

Laitram counters with specific facts which the Court finds create a genuine issue of material fact. First and foremost, [\[**11\]](#) according to the affidavit of G. Charles Lapeyre (attached as Exh. 2 to Laitram's opposition memorandum, R.Doc. 229), before the trade-secrets lawsuit was filed, Raphael Skrmetta called Lapeyre and stated "we've got you

⁴ In *Matsushita*, the Supreme Court stated:

Respondents correctly note that [HN6](#) "on summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." But **antitrust law** limits the range of permissible inferences from ambiguous evidence in a [§ 1](#) case. Thus, . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment 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. Respondents . . . 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 respondents.

Id. at 587-88, 106 S. Ct. at 1356 (citations omitted).

now," referring to the trade-secrets issue. *Id.*, paragraph 15. This contention -- taken with the conceded facts set forth above -- constitutes a genuine issue of material fact as to whether Ray Skrmetta conspired with SEDCO and Carnitech in bringing the lawsuit. Further, in a letter written to the attorney for the Florida corporation in December 1992, Ray Skrmetta states that "he would prefer a court decision for the future conduct of Laitram" and invites the attorney to call on him "for all help possible." *Id.*, Exh. 37. Although these words seemingly are innocent, the inferences drawn from these words in the context of Skrmetta's statement to Lapeyre and in view of the uncontested facts constitute evidence that, for purposes of summary judgment, excludes the possibility that Skrmetta, SEDCO and/or Carnitech acted independently. *Matsushita, supra*. This is not a mere semantic quibble. As a result, "there are . . . genuine factual issues that properly can be [**12] resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202*.

Skrmetta also seeks summary judgment on Count II of the amended complaint, which alleges violations of state antitrust laws. Federal jurisprudence regarding federal **antitrust law** provides persuasive interpretations for the state **antitrust law**. *Reppond v. City of Denham Springs, 572 So. 2d 224, 228, n. 2 (La. App. 1st Cir. 1990)*, citing *Louisiana Power & Light v. United Gas Pipeline, 493 So. 2d 1149 (La. 1986)*. Therefore, because the Court finds that summary judgment is inappropriate on federal antitrust allegations, as set forth above, Skrmetta's motion for summary judgment on Laitram's claims of state antitrust violations also must be denied.

B. Noerr-Pennington Doctrine

Skrmetta contends that its participation in the trade-secrets lawsuit, if any, is protected by the *Noerr-Pennington* doctrine. **HN7** According to this doctrine, "those who petition government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., [**13] 508 U.S. 49, 56, 113 S. Ct. 1920, 1926, 123 L. Ed. 2d 611 (1993)*, citing *Noerr, supra*.

In *California Motor Transport Co. v. Trucking Unlimited*, we elaborated on *Noerr* in two relevant respects. First, we **HN8** extended *Noerr* to "the approach of citizens . . . to administrative agencies . . . and to courts." Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers "sought to bar . . . competitors from meaningful access to adjudicatory tribunals and so to usurp the decision making process" by "instituting . . . proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases."

Professional Real Estate Investors, 508 U.S. at 57, 113 S. Ct. at 1926 (citations omitted)(editing in original).

HN9 The Supreme Court has established a "two-part" definition of "sham" litigation. *Id. at 60, 113 S. Ct. at 1928*.

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the [**14] suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if a challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to [*1161] 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."

Professional Real Estate Investors, 508 U.S. at 61, 113 S. Ct. at 1928 (citations omitted)(editing in original).

Applying the *Noerr-Pennington* doctrine as explained in *Professional Real Estate Investors* to the present case, the Court finds that summary judgment is inappropriate for two reasons. First, the alleged conspiracy involves more than just the filing of the trade-secrets lawsuit but also the sending of three letters to Laitram's customers, informing them that Laitram's shrimp cooking machine incorporated trade secrets from its own patent and infringed [**15] on the Florida corporation's shrimp cooking machine patent. (Exhs. 39-41, attached to Laitram's memorandum in

opposition, R.Doc. 229.)⁵ The *Noerr-Pennington* doctrine does not extend to sending letters to a competitor's customers alleging violation of trade secrets and infringement of patents.

[**16] The second reason that the *Noerr-Pennington* doctrine is inapplicable is that there exists a genuine issue of material fact as to whether the trade-secrets lawsuit was a sham. According to one part of the opinion of one of Laitram's experts, which is based on SEDCO's answers to interrogatories in the trade-secrets lawsuit, the alleged trade secrets are essentially the same as those elements of Claim 1 of the patent for the shrimp cooking machine held by the Florida company. (Report of George N. Starr, p. 9, Exh. 3, attached to Laitram's memorandum in opposition, R.Doc. 229.) As such, the expert contends that there can be no trade-secret protection and/or violation because the information was disclosed in a U.S. patent. *Id.* Although Laitram provides no citation for this legal principle in its memorandum, the expert's statement appears to be an accurate assessment of the law. See, e.g., *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 683 (7th Cir. 1983), citing *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964) and *Compcorp Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669 (1964); Sanford Redmond, [**17] *Inc. v. Mid-America Dairymen, Inc.*, 1992 U.S. Dist. LEXIS 2376, 1992 WL 57090 (S.D.N.Y. 1992) at 2 ("HN10[↑] to the extent plaintiff's trade secrets were the subject of a valid patent, those secrets were disclosed at the time the patent issued").

Therefore, there is a genuine issue of material fact as to whether the Florida corporation objectively could have concluded that its trade-secrets suit was "reasonably calculated to elicit a favorable outcome." *Professional Real Estate Investors*, 508 U.S. at 60, 113 S. Ct. at 1928.

Additionally, for the same reasons that the Court found a genuine issue of material fact as to whether Skrmetta participated in the antitrust conspiracy, it naturally follows that there is a genuine issue of material fact as to whether the possibly baseless trade-secrets lawsuit concealed "an attempt to interfere directly with the business relationships of a competitor," *Id.*, quoting *Noerr*, 365 U.S. at 144, 81 S. Ct. at 533.

Therefore, Skrmetta's motion for summary judgment on the basis of the *Noerr-Pennington* doctrine fails.

III. Lanham Act Violations

As noted, Laitram also claims violations of Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*, which provides, [**18] in pertinent part:

HN11[↑] any person, who, on or in connection with any goods or services . . . uses in commerce [**1162] any . . . false or misleading representation of fact, which --
 (A) is likely to cause confusion, or to cause mistake, or to deceive another 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 . . .
 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.

In *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1490 (5th Cir. 1990), the Fifth Circuit recognized the elements necessary to establish a Lanham Act violation via implication through recognition of a district court opinion. *HN12[↑]* There must be a false statement of fact about the product; the statement deceived or had the capacity to deceive a substantial segment of potential customers; the deception is material, i.e., it is likely to

⁵The Court notes that Skrmetta does not object to the authenticity of any of the documents referred to herein as exhibits attached to Laitram's memorandum in opposition, presumably because they were produced in discovery. As such, the Court relies on them in finding that there are genuine issues of material fact under *Fed.R.Civ.P. 56(c)*.

The Court also notes that the three letters written to Laitram's customers also requested that these entities cease and desist from using Laitram's infringing equipment until they sign a license agreement SEDCO. (Exhs. 39-41, attached to Laitram's memorandum in opposition, R.Doc. 229.) Laitram alleges that Skrmetta participated in the conspiracy because Ray Skrmetta, among other things, provided the names of these customers to the Florida corporation's attorney. *Id.*, Exh. 37.

influence the purchasing decision; the alleged deceiver must have put the products into interstate commerce; and the complainant has been or is likely to [\[**19\]](#) be injured as a result. [*Id. at 1500.*](#)

Skrmetta seeks summary judgment on the basis that there is no showing that Skrmetta used in commerce a false or misleading description or representation of fact likely to cause mistake or deception as to Laitram's products. "Ray Skrmetta merely met privately with Ellis-Brown, and provided information that SEDCO could investigate and then act upon or not at is own option." (Skrmetta memorandum in support of motion, R.Doc. 226, p. 19.) Laitram counters that "in concert with Skrmetta" and Carnitech, SEDCO made false representations to Laitram's customers as to patent infringement in interstate commerce. (Laitram memorandum in opposition, R.Doc. 229, p. 33.)

Although the evidence as to Skrmetta's specific participation in the sending of the letters appears to be limited to Skrmetta's providing the Florida corporation's attorney with the names of Laitram's customers and offering "all help possible" (Exhs. 35 and 37, respectively), this evidence coupled with the questions of fact as to the overall role played by Skrmetta acting through Ray Skrmetta in this series of events precludes summary judgment on the Lanham Act claim.⁶ Construing all inferences [\[**20\]](#) in favor of Laitram on this motion for summary judgment, the Court finds that there is a genuine issue of material fact that prohibits entry of summary judgment on the Lanham Act count. There are factual questions more appropriately decided by a jury. [*Anderson v. Liberty Lobby, supra.*](#)

IV. Declaratory Judgment

In its amended complaint, as noted, Laitram seeks declaratory judgment as to invalidity, unenforceability and noninfringement of the patent the rights of which are held by SEDCO. Skrmetta [\[**21\]](#) seeks summary judgment on the basis that it has never procured or had any interest in this patent. Laitram does not oppose Skrmetta's motion on this issue. The Court finds that, because the Florida corporation has been dismissed from this matter following settlement (R.Doc. 33), and, further, because there is no allegation in the amended complaint that Skrmetta owns any interest in the patent allegedly held by SEDCO, Skrmetta is entitled to summary judgment on this issue.

V. Unfair Trade Practices

Under Louisiana law, [HN13](#)[↑] "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." LSA-R.S. 51:1405.A. [HN14](#)[↑] A private right of action exists to recover actual damages and attorneys' fees. LSA-R.S. 51:1409.A.

[HN15](#)[↑] What constitutes unfair trade practices is left up to the courts. A trade practice is unfair when it offends public policy and [\[*1163\]](#) when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

[*Jessen v. Wimberly, 610 So. 2d 252, 257 \(La. App. 3rd Cir. 1992\); American Waste, 949 F.2d at 1391.*](#) Notwithstanding this seemingly broad standard, [\[**22\]](#) [HN16](#)[↑] the Unfair Trade Practices Act has been construed as "penal in nature and subject to reasonably strict construction." [*Bryant v. Sears Consumer Financial Corporation, 617 So. 2d 1191, 1196 \(La. App. 3rd Cir. 1993\).*](#)

Because the Court has found that there exists a genuine issue of material fact as to whether Skrmetta through Ray Skrmetta participated in a conspiracy with SEDCO and Carnitech to sue Laitram and/or send allegedly false letters to Laitram's customers, as set forth above, the Court finds that summary judgment as to the unfair trade practices claim is improper. This decision is again underscored by Ray Skrmetta's statement, as reported by G. Charles Lapeyre in his affidavit, that "we've got you now," referring to the trade-secrets lawsuit. (Exh. 2, Paragraph 15, attached to Laitram's memorandum in opposition, R.Doc. 229.) Construing the inferences from this fact and those other facts delineated earlier in favor of Laitram, there is a genuine issue of material fact as to whether Skrmetta

⁶ As noted, these questions of fact include Ray Skrmetta's statement to G. Charles Lapeyre before the trade-secrets lawsuit was filed and -- according to the record -- before the letters at issue were sent Laitram's customers that "we've got you." (Affidavit of Lapeyre, paragraph 15, Exh. 2, attached to Laitram's memorandum in opposition, R.Doc. 229.) Another question of fact is Skrmetta's offer of "all help possible" to SEDCO's attorney. (Exh. 37, attached to Laitram's memorandum in opposition, R.Doc. 229.)

engaged in "immoral, unethical, oppressive, [or] unscrupulous" conduct that "offends public policy." [Bryant, 617 So. 2d at 1196.](#)

VI. Defamation and Conspiracy to Defame

The **[**23]** final issue is whether Count VI of Laitram's amended complaint states a claim under Louisiana law. In this count, Laitram incorporated all of the previous factual allegations of its complaint and alleges that the letters sent to its customers were false and defamatory and were published with malice. (Paragraphs 46 and 47, R.Doc. 2.) Further, "on information and belief," the amended complaint alleges that Carnitech conspired with SEDCO to publish the false and defamatory statements. *Id.*, Paragraph 48. Finally, as to this count, the amended complaint alleges that "Laitram has been damaged . . . as a result of *defendants'* defamation and conspiracy to defame." *Id.*, Paragraph 49 (emphasis added).

Skrmetta argues that Count VI fails to state a claim against it because the letters were sent by SEDCO and because the allegations specifically allege a conspiracy between SEDCO and Carnitech, both of which have been dismissed from this matter after settlement. (R.Docs. 33 and 83.) In opposition, Laitram contends that, notwithstanding the specific allegation of conspiracy between SEDCO and Carnitech with no reference to Skrmetta, all of the other paragraphs of the complaint incorporated **[**24]** by reference set forth the basis for the conspiracy to defame that includes Skrmetta.

Construing the complaint liberally, and accepting all well-pleaded factual allegations in favor of Laitram, as the Court must, see [Scheuer, supra](#), the Court finds that Laitram's amended complaint states a claim for conspiracy to defame against Skrmetta because it alleges that Laitram was damaged as a result of all *defendants'* conspiracy to defame. Although the Court believes that such a claim is stated by the slimmest of margins in light of the specific allegation of conspiracy between Carnitech and SEDCO, it is nevertheless stated. Conceivably, Laitram can prove a set of facts consistent with the allegations that all defendants conspired to defame Laitram, which would entitle it to relief. Thus, Skrmetta's motion fails.⁷

[25]** VII. Conclusion

Because there are genuine issues of material fact, the Court denies summary judgment as to Counts I, II, III and V. However, because there is no opposition from Laitram and because there is no genuine issue of material fact that Skrmetta holds any interest in the patent that is the subject of the declaratory judgment sought in Count IV, the Court will grant summary judgment as to this Count. Finally, the Court finds **[*1164]** that Count VI states a claim against Skrmetta for defamation and/or conspiracy to defame.

Accordingly,

IT IS ORDERED that Skrmetta Machinery Corporation's "Second Motion for Summary Judgment" is GRANTED in part and DENIED in part.

New Orleans, Louisiana, this 29th day of September, 1995.

OKLA JONES II

UNITED STATES DISTRICT JUDGE

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⁷ The Court would reach the same decision if Skrmetta's contention were tested under the standard for summary judgment. Because there are genuine issues of material fact as to the extent of Skrmetta's participation in the publication of the letters to Laitram's customers, as set forth above, summary judgment would be improper on this issue.



RX Sys. v. Medical Technology Sys.

United States District Court for the Northern District of Illinois, Western Division

September 29, 1995, Decided ; September 29, 1995, FILED

No. 94 C 50358

Reporter

1995 U.S. Dist. LEXIS 14214 *; 1995-2 Trade Cas. (CCH) P71,233

RX SYSTEMS, INC., a Missouri corporation, Plaintiff, v. MEDICAL TECHNOLOGY SYSTEMS, INC., a Delaware corporation, Defendant.

Notice: [*1] NOT FOR PUBLICATION

Core Terms

machine, cards, pill, pharmacies, monopolization, allegations, antitrust, Counts, warranty, amended complaint, sale agreement, manufacturer, filling, tying arrangement, lawsuit, templates, state law claim, purchaser, competitors, contractual, submarket, buyer, modification, restrictions, in-house, products, modify, probability, customers, monopoly

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN1 [down arrow] Price Fixing & Restraints of Trade, Tying Arrangements

A tying agreement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement is illegal under antitrust law if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.

Antitrust & Trade Law > Sherman Act > Claims

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > 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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > Sherman Act > General Overview

HN2 Sherman Act, Claims

In order to establish the per se illegality of a tying arrangement, a plaintiff must show: (1) the tying arrangement is between two distinct products or services (products only under § 3 of the Clayton Act, [15 U.S.C.S. § 14](#)); (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product; and (3) a not insubstantial amount of interstate commerce is affected. Alternatively, a plaintiff, even if it cannot show per se illegality, may prevail on an illegal tying claim under the rule of reason. A plaintiff can still prevail on the merits if he can prove that the general standards of the Sherman Act have been violated following a more thorough examination of the purposes and effects of the practices involved. Under both the per se and rule of reason analyses, a plaintiff must show, as a threshold matter, that there is a substantial danger that the tying seller will acquire market power in the tied product market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN3 Monopolies & Monopolization, Attempts to Monopolize

Generally, the filing of a lawsuit cannot be used as the basis for antitrust liability. Even if a party subjectively intends to disrupt competition via legal action, if such lawsuit is objectively reasonable it is not a sham and may not be used to evidence antitrust activity. Evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. Thus, the two-part test for defining sham litigation is: (1) the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits; and (2) the lawsuit conceals an attempt to directly interfere with the business relationships of a competitor.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN4 Scope, Monopolization Offenses

[Section 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), prohibits attempted monopolization but does not define it. The conduct of a single firm is unlawful under [§ 2](#) only when it threatens actual monopolization. Thus, the plaintiff must prove three elements: (1) the defendant has engaged in predatory or anticompetitive conduct; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. To determine whether there is a

dangerous probability of monopolization, a court must consider the relevant market and the defendant's ability to lessen or destroy competition in that market.

Counsel: ATTORNEY(s) FOR PLAINTIFF OR PETITIONER: Edward S. Bott, Jr., Thompson & Mitchell, Belleville, IL. James Dixon, Attorney at Law, Dixon, IL. Mark Sableman, Thompson & Mitchell, St. Louis, MO.

ATTORNEY(s) FOR DEFENDANT OR RESPONDENT: Constantine D. Kasson, Steve M. Kowal, Burditt & Radzus, Chicago, IL.

Judges: PHILIP G. REINHARD, JUDGE UNITED STATES DISTRICT COURT

Opinion by: PHILIP G. REINHARD

Opinion

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Plaintiff, RX Systems, Inc., filed a nine-count amended complaint ¹ against defendant, Medical Technology Systems, Inc., alleging an attempted monopolization under [15 U.S.C. § 2](#) (Counts I and II), an illegal tying arrangement under [15 U.S.C. § 14](#) (Counts V and VI) and various Illinois state law claims (Counts III, IV, VII, VIII and IX). Jurisdiction is premised upon [28 U.S.C. §§ 1332](#) and [1337](#). Defendant has moved to dismiss Counts I, II, V and VI pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) and seeks dismissal of the state law counts because "federal jurisdiction of [those] claims is dependent upon the federal antitrust counts."

[*2] FACTS

The following facts are taken from the allegations of plaintiff's amended complaint and are treated as true for purposes of defendant's motion to dismiss. Both plaintiff and defendant manufacture and sell pill packages known as "punch cards" or "blister packs." Plaintiff has been in the business since 1979 and defendant since the mid-1980's. There are also other unidentified pill card manufacturers. Plaintiff, defendant and the other manufacturers compete in interstate commerce.

The pill cards manufactured and sold by plaintiff and defendant are reasonably interchangeable by buyers and are sold to retail, institutional and in-house pharmacies throughout the United States. This constitutes the "Pill Card Product Market."

Within the pill card product market exists a submarket of institutional and in-house pharmacies that dispense large quantities of medication and purchase large amounts of pill cards. Most of the institutional and in-house pharmacies using pill cards also utilize machines which mechanically fill and heat-seal pill cards. The machines permit faster and more efficient filling of pill cards.

The institutional and in-house pharmacy market is distinct from [*3] the retail market because it has a higher average purchase volume than retail pharmacies and their customers have different needs. The institutional and in-house pharmacies only purchase pill cards which can be filled by using a filling machine.

¹ Although plaintiff has labeled its present complaint a "First Amendment Complaint," the court will refer to it as the amended complaint as it is the only amended complaint filed thus far.

From the late 1980's through 1993, defendant was the sole manufacturer of the filling machines. Plaintiff began manufacturing and selling its own machine in 1993. The machines sold by plaintiff and defendant are reasonably interchangeable by customers for the same purpose. Currently, defendant has more than ninety percent of the machine market and plaintiff has less than five percent of the market. No other producers of the machines have yet entered the market.² Thus, it is alleged that defendant currently possesses monopoly or near-monopoly power in the filling machine market.

[*4] It is further alleged in Count I that defendant has used its monopoly power in the filling machine market in an attempt to monopolize the institutional submarket. Defendant has willfully and knowingly attempted to exclude competitors, in that it has attempted to impose contractual restrictions on the modification of its machines and the use of templates, which would permit the machines to be used to fill pill cards other than those sold by defendant. Such restrictions are unrelated to any legitimate business considerations and substantially restrain trade. Plaintiff also alleges in Count I that defendant has attempted to enforce such contractual provisions or discourage pharmacies from challenging them by filing a suit in the circuit court of Lee County, Illinois, against the Dixon pharmacy, alleging that the pharmacy did not have the right to alter defendant's machine or use templates. It is further alleged that in certain instances, including the lawsuit, defendant attempted to restrict pharmacies from modifying or using templates even when those pharmacies have no contractual relationship with defendant.

Defendant has also brought a tortious interference with contract case against [*5] plaintiff in the United States District Court for the Middle District of Florida, alleging that plaintiff induced the Dixon pharmacy to break its contract with defendant. That suit seeks money damages from plaintiff as well as an injunction to prevent plaintiff from attempting to procure the business of any pharmacy currently using defendant's machine. Plaintiff alleges that by such conduct defendant has sought to discourage plaintiff and any other competitors from aiding pharmacies in overcoming the improper restrictions defendant seeks to impose on the modifications of defendant's machines or the use of templates.

It is further alleged in Count I that the above-described conduct of defendant constitutes predatory conduct in support of a scheme of attempted monopolization and demonstrates defendant's intent to monopolize the institutional and in-house submarket. As a result of defendant's activity, there is a dangerous probability that defendant has, or soon will, attain the power to exclude plaintiff and other competitors from the submarket. Specifically, if defendant prevents pharmacies from modifying its machines or using templates, then the pharmacies will be effectively limited [*6] to using defendant's pill cards, and defendant will be able to raise its prices. Market inefficiencies that have resulted from defendant's conduct which prevent pharmacies from choosing plaintiff's pill cards, permit defendant's to charge higher prices for its pill cards and limits the product choices of pharmacies. Plaintiff has lost profits and faces the potential loss of its continued opportunity to compete for sales of pill cards within the submarket.

Plaintiff also alleges an illegal tying arrangement. According to Count V, defendant has tied the sale of its machines to institutional pharmacies on the condition they also purchase defendant's pill cards. It has accomplished this by requiring, as part of the conditions for purchasing a machine, that the pharmacy buying the machine agree not to modify the machine in away that it could use plaintiff's pill cards or to use templates that would fit plaintiff's pill cards.

Specifically, defendant requires purchasers to sign a sales agreement which bars the purchaser from making any modifications to the machine and prohibits the purchaser from allowing anyone else to modify the machine. A sales agreement, included as an exhibit to the [*7] amended complaint, provides, In pertinent part:

"Warranty

² Defendant interprets these allegations, contained in paragraph 21 of the amended complaint, to state that there are other manufacturers of filling machines in the market. The court does not find defendant's interpretation to be reasonable, however. The fact that defendant and plaintiff possess less than one-hundred percent of the market does not reasonably imply that any other manufacturer has a market share, especially when paragraph 21 expressly states that "no other producers of filling/sealing machines have yet entered the market."

During the 90 day period of warranty, all components and accessories are fully guaranteed for the particular purpose of the design and fitness and shall be warranted free and clear from defects in material and workmanship. All warranties are cancelled if any unauthorized repairs are made by any person not authorized by MTS or the use of any parts or accessories not authorized by MTS, mishandling, modification or damaged by unreasonable use including failure to provide reasonable and necessary maintenance.

MTS shall have full and free access to the equipment to provide warranty service.

All equipment returned to manufacturer shall be F.O.B. Destination.

Exclusions

The warranty provided by MTS under this agreement does not include:

- Repair of damage caused by use of the machine for other than its intended purpose.
- Repairs of damage caused by accident, disaster, transportation, neglect, misuse or alterations."

Defendant also has attempted to prohibit pharmacies from using substitute templates. Without the use of such templates, pill cards manufactured by plaintiff and others cannot be used [*8] in defendant's machine.

It is further alleged that filling machines and pill cards are separate products and it is not essential that they be tied to each other. Furthermore, defendant has significant market power in the machine market, having sold more than ninety-percent of the filling machines currently in use. Because filling machines cost approximately \$ 9,000,³ pharmacies cannot readily replace defendant's machines with those of a different manufacturer. As a result, most pharmacies necessarily purchase pill cards from defendant.

It is further alleged that defendant's efforts at imposing contractual restrictions on its customers, which are unrelated to any legitimate business considerations, substantially restrain trade by preventing pharmacies that have purchased defendant's machines from utilizing plaintiff's and other competitors' [*9] pill cards by requiring those pharmacies to pay more for defendant's pill cards. It is also alleged that the two legal actions instituted by defendant are designed to enforce the contractual provisions and discourage pharmacies from challenging those restrictions.

Plaintiff claims that defendant's conduct constitutes an illegal tying arrangement in that defendant, through use of its monopoly power in the machine market, improper terms in the sales agreements, improper assertions to customers and the Dixon pharmacy suit, has improperly required owners of its machines to purchase defendant's pill cards and no others. Such conduct affects interstate commerce in that, if defendant succeeds, pharmacies throughout the United States will be deprived of free competition in the submarket and plaintiff will be deprived of the opportunity to sell its pill cards to owners of defendant's machines. Further, market inefficiencies have resulted from defendant's conduct which prevents pharmacies from choosing plaintiff's pill cards, permits defendant to charge higher prices for its pill cards and limits the product choices of pharmacies within the submarket. Plaintiff has lost profits and faces the [*10] potential loss of the continued opportunity to compete for pill card sales.

Counts I and II allege an attempted monopolization under [15 U.S.C. § 2](#) and seek, respectively, money damages and an injunction. Counts III and IV rely on the prior allegations and seek, respectively, money damages and injunctive relief pursuant to [740 ILCS 10/3\(3\)](#). Counts V and VI seek money damages and an injunction, respectively, under [15 U.S.C. § 14](#). Counts VII and VIII do so under [740 ILCS 10/3\(3\)](#). Lastly, Count IX claims, based on the prior allegations, that defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act, [815 ILCS 505/1 et seq.](#)

CONTENTIONS

Defendant contends the federal antitrust counts should be dismissed because plaintiff has failed to allege the essential elements of either an attempted monopolization or an illegal tying arrangement. Defendant seeks dismissal of those counts with prejudice because plaintiff has already had one opportunity to replead and has done

³Curiously, the sales agreement submitted as an exhibit to plaintiff's amended complaint shows a cost for that particular machine of \$ 6,690 less a ten percent discount.

so unsuccessfully. Defendant also seeks dismissal of the remaining state law claims because, if the federal claims are dismissed, there is no jurisdictional basis remaining for the state law [*11] claims.

Plaintiffs responds that it has in fact alleged the necessary elements of both attempted monopolization and illegal tying. Specifically, plaintiff points to the allegations that defendant has attempted to impose contractual restrictions on the modification of its machines and prohibited use of templates which are unrelated to any legitimate business considerations along with its filing of the two lawsuits related to the sales agreements as stating a claim under the federal antitrust statutes.

DISCUSSION

As an initial, but crucial, matter, defendant asserts that there is a heightened pleading standard for antitrust complaints, relying on *Sutliff, Inc. v. Donovan Cos., Inc.*, 727 F.2d 648 (7th Cir. 1984). *Sutliff* does not, as defendant suggests, create a heightened pleading standard in antitrust cases. Rather, *Sutliff* merely reiterates, albeit in the antitrust context, the need for a complaint to contain sufficient factual allegations to sustain a recovery under some viable legal theory. *Id. at 654*. Put another way, the pleader who claims an antitrust violation, just like any other plaintiff, cannot evade these pleading requirements by attaching a bare [*12] legal conclusion to the facts he narrates. *Id.* If the facts he pleads do not at least outline an antitrust violation, he will get nowhere by dressing them up in the language of antitrust. *Id.* As later explained by the author of *Sutliff*, Judge Posner, "*Sutliff* is simply another of those cases in which the plaintiff pleaded himself out of court." *Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994). An inference of a heightened pleading requirement in antitrust cases should not be drawn from *Sutliff*, especially after *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993). *Id.* Consequently, this court rejects defendant's assertion that a heightened pleading standard applies to plaintiff's amended complaint. Nonetheless, the court will carefully scrutinize the allegations, as it should under *Rule 12(b)(6)*, to determine if plaintiff could prevail under its alleged theories of liability.

As another preliminary matter, and one not raised by the parties, the court must clarify what law applies to plaintiff's illegal tying claim. Plaintiff has chosen to proceed under 15 U.S.C. § 1*131 14. See *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 473 n.2 (3d Cir. 1992) (while technically section 3 of the Clayton Act (15 U.S.C. § 14) is written to cover exclusive dealing contracts, Congress also intended it to cover tying arrangements); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 735 F. Supp. 231, 233 (E.D. Mich. 1990) (a tying agreement that pertains to products can violate either section 1 of the Sherman Act or section 3 of the Clayton Act). The parties here have, in part, applied caselaw arising under section 1 of the Sherman Act to plaintiff's tying claim based on section 3 of the Clayton Act. The court will also apply those cases as the parties point to, and the court is aware of, no reason why such law should not apply.

I. Tying Agreement

HN1 A tying agreement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different product, or at least agrees that he will not purchase that product from any other supplier. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 2079, 119 L. Ed. 2d 265 (1992). Such an arrangement is illegal under [*14] **antitrust law** if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. See *id.* (citing *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)). **HN2** In order to establish the *per se* illegality of a tying arrangement, a plaintiff must show: (1) the tying arrangement is between two distinct products or services (products only under section 3 of the Clayton Act); (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product; and (3) a not insubstantial amount of interstate commerce is affected. *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 207 (7th Cir. 1985).

Alternatively, a plaintiff, even if it cannot show *per se* illegality, may prevail on an illegal tying claim under the rule of reason. *Carl Sandburg, 758 F.2d at 210* (citing *Fortner Enter., Inc., 394 U.S. at 499-500*). A plaintiff can still prevail on the merits if he can prove that the general standards of the Sherman Act have been [*15] violated following a more thorough examination of the purposes and effects of the practices involved. *Id.* The goal of the antitrust laws in the tying context is to prevent the economically harmful effects of tie-ins in cases where a seller's power in the market for the tying product is used to create additional power in the market for the tied product. *Id.* (citing *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1571, 80 L. Ed. 2d 2 (1984)* (O'Connor, J., concurring, joined by Burger, C.J., Powell, J., and Rehnquist, J.)). Under both the *per se* and rule of reason analyses, a plaintiff must show, as a threshold matter, that there is a substantial danger that the tying seller will acquire market power in the tied product market. *Id.* (citing *Jefferson Parish, 104 S. Ct. at 1571-72*).

Turning to the amended complaint here, plaintiff's tying claim fails for two reasons. First, plaintiff's claim is clearly dependent upon a contractual provision contained in a sales agreement between defendant and the purchasers of its machines. That agreement, which is included as part of plaintiff's amended complaint, does not demonstrate, however, that [*16] a tying agreement concerning defendant's machine and defendant's pill cards existed.

The sales agreement does not expressly require a buyer to purchase only defendant's pill cards nor does it expressly prohibit purchase of plaintiff's, or any other competitor's, pill cards. Neither does it compel such a result by implication. The warranty provision conditions the efficacy of the warranty on a buyer's not modifying or altering the machine or using any unauthorized parts or accessories. Such language is a long way from requiring a buyer to purchase pill cards from defendant as a condition of purchasing defendant's machine. A purchaser remains free to buy pill cards from other suppliers and modify the machine accordingly so long as it is willing to forego the protections provided by the warranty. Such an approach would not be unreasonable as the warranty period provided in the agreement was for only ninety days. Furthermore, a potential customer of defendant retains the ultimate choice of whether to purchase one of defendant's machines under the sales agreement and can opt to purchase a machine from plaintiff.⁴ The sales agreement simply does not constitute a tying arrangement, illegal [*17] or otherwise.⁵

Nor do the alleged lawsuits to enforce, or to dissuade from enforcement, the warranty provisions of the sales agreement constitute a tying arrangement. *HN3*⁶ Generally, the filing of a lawsuit cannot be used as the basis for antitrust liability. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920, 1926 (1993)* (citing *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 F^{2d} 181 S. Ct. 523 (1961)*). Even if a party subjectively intends to disrupt competition via legal action, if such lawsuit is objectively reasonable it is not a sham and may not be used to evidence antitrust activity. *Id.* Evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. *113 S. Ct. at 1927*. Thus, the two-part test for defining sham litigation is: (1) the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits; and (2) the lawsuit conceals an attempt to directly interfere with the business relationships of a competitor. *Id. at 1928*.

In the present case, plaintiff has not alleged that the two lawsuits by defendant are objectively a sham. At best, plaintiff has merely alleged a subjective bad faith on the part of defendant in bringing the suits. That is not enough. Defendant may file suit to thwart plaintiff as a competitor so long as the suit is otherwise objectively reasonable. The fact that the lawsuits arise out of the warranty provision of the sales agreement does not make them objectively a sham. Especially, as this court has found the warranty provision [*19] does not constitute a tying arrangement. Accordingly, the court dismisses Counts V and VI of the amended complaint without prejudice.

II. Attempted Monopolization

⁴ At this juncture it is important to reiterate that plaintiff has not alleged, as defendant suggests, that there were other manufacturers of filling machines in the marketplace. Paragraph 21 of the amended complaint expressly states that "no other producers of filling/sealing machines have yet entered the market."

⁵ Interestingly, plaintiff has not alleged that any of defendant's conduct prohibits it from producing pill cards that would be usable with defendant's machine without any modification or template use.

HN4 [↑] Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits attempted monopolization but does not define it. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 122 L. Ed. 2d 247, 113 S. Ct. 884, 889 (1993). The conduct of a single firm, such as defendant here, is unlawful under section 2 only when it threatens actual monopolization. 113 S. Ct. at 890. Thus, the Supreme Court has established three elements that a plaintiff must prove: (1) the defendant has engaged in predatory or anticompetitive conduct; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. Id. at 890-91. To determine whether there is a dangerous probability of monopolization, a court must consider the relevant market and the defendant's ability to lessen or destroy competition in that market. Id. at 891.

Here, plaintiff has generally alleged that defendant's activities constitute predatory conduct in a scheme of attempted monopolization and that defendant intended to monopolize the institutional market for [*20] pill cards. The amended complaint further concludes that as a result of defendant's conduct there is a dangerous probability that defendant has, or soon will, attain the power to exclude plaintiff and others from the institutional market.

These general allegations are, however, belied by the specific factual allegations that underlie them. Including a warranty provision in a sales agreement that conditions the efficacy of that provision on not modifying or altering the machine does not demonstrate predatory conduct, an intent to monopolize or a dangerous probability of achieving monopoly power. Similar provisions commonly exist in the business world. There is nothing unusual or unreasonable about only warranting a product if it remains in its original, unaltered form. The fact that such a provision results in a buyer only being able to use certain other products with the principal product is a matter of design choice and function. If a buyer wanted to utilize different subproducts (in this case pill cards), all it need do is purchase a different type of machine. There is nothing out of the ordinary about a manufacturer designing a product that can only be used (without modification) [*21] with products also made by that same manufacturer. That is the essence of the competitive spirit that drives our economic system.

The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. Spectrum Sports, 113 S. Ct. at 892. As a result, courts have been careful to avoid constructions of section 2 which might chill competition, rather than foster it. Id. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects. Moreover, single firm conduct is unlike concerted activity under section 1 which is fraught with anticompetitive risk. Id.

At best, plaintiff's allegations here reflect nothing more than an individual business concern's efforts to increase its market share. In a competitive sense, the appropriate response by plaintiff should be an effort to sell more of its machines and, hence, more of its pill cards, or possibly, sell pill cards that fit defendant's machine. There is nothing in plaintiff's allegations that remotely suggest that defendant has engaged in any activity or conduct that would prevent plaintiff from doing [*22] so. While plaintiff points to the price of defendant's machines in arguing that it would be cost prohibitive for institutional users to replace their machines with plaintiff's, that allegation is vastly insufficient to state a claim of attempted monopolization, even when viewed with the other allegations. Similarly, absent any allegations that the two lawsuits are objectively baseless, they also do not support plaintiff's claim of attempted monopolization. This is simply a case where plaintiff has pleaded itself out of court. Therefore, the court dismisses Counts I and II of the amended complaint without prejudice.

III. State Law Claims

Defendant seeks dismissal of the state law claims should this court dismiss the federal antitrust counts, apparently treating the state law claims as supplemental. See 28 U.S.C. § 1367. Plaintiff, however, has claimed as its jurisdictional basis for those claims diversity jurisdiction under 28 U.S.C. § 1332. As such, the court lacks the direction to dismiss the state law claims under section 1367. Nonetheless, the court dismisses the state law claims without prejudice as plaintiff has failed to allege the jurisdictional amount [*23] and it cannot be reasonably inferred from the amended complaint.

CONCLUSION

For the foregoing reasons, the court dismisses the amended complaint without prejudice.

ENTER:

PHILIP G. REINHARD, JUDGE

UNITED STATES DISTRICT COURT

DATED: September 29, 1995

End of Document

Roma Constr. Co. v. aRusso

United States District Court for the District of Rhode Island

October 3, 1995, Decided

C.A. No. 94-0448B

Reporter

906 F. Supp. 78 *; 1995 U.S. Dist. LEXIS 16539 **

ROMA CONSTRUCTION COMPANY, INC. and PETER ZANNI v. RALPH aRUSSO; BENJAMIN ZANNI; DOMENIC DeCONTE; VINCENT IANNAZZI; ANTHONY IZZO; JOHN DOE; RICHARD ROE; TOWN OF JOHNSTON; XYZ ASSOC.; and OTHERS YET UNKNOWN

Core Terms

bribe, innocent, organized crime, Recommendation, municipal, damages, deprivation, installment, sanctions, bribery, motion to dismiss, town official, plaintiffs', antitrust, treble

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Remedies > Damages > Monetary Damages

HN1[] Motions to Dismiss, Failure to State Claim

A civil complaint seeking money damages should not be dismissed for failure to state an actionable claim unless it plainly appears that the plaintiffs can prove no set of facts which would entitle them to recover. The question must be resolved in the light most favorable to the plaintiffs with any doubt resolved on their behalf.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > Remedies

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Securities Law > RICO Actions > Standing

HN2[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

906 F. Supp. 78, *78 1995 U.S. Dist. LEXIS 16539, **16539

[18 U.S.C.S. § 1964](#) provides that any person injured in his business or property by reason of violation of the Racketeer Influenced and Corrupt Organizations Act may sue therefor in a United States district court and shall recover threefold damages.

Criminal Law & Procedure > ... > Bribery > Public Officials > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

[HN3](#) **Public Officials, Elements**

[R.I. Gen. Laws § 11-7-4](#) makes it illegal to give a bribe to a public official and provides that no person shall corruptly give any gift or valuable consideration to any public official as an inducement or reward for doing or forbearing to do any act in relation to the business of the state, city or town of which he or she is an official. [R.I. Gen. Laws § 11-7-4](#) (1994).

Antitrust & Trade Law > Clayton Act > Defenses

Securities Law > RICO Actions > Remedies

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[HN4](#) **Clayton Act, Defenses**

The imposition of civil remedies pursuant to the Racketeer Influenced and Corrupt Organizations Act requires a defendant's acts to be the proximate cause as well as cause in fact of the plaintiff's injuries.

Civil Rights Law > ... > Immunity From Liability > Local Officials > General Overview

Governments > Local Governments > Claims By & Against

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Classes

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

[HN5](#) **Immunity From Liability, Local Officials**

[42 U.S.C.S. § 1983](#) imposes liability on any person who acting under color of state law, deprives another rights or privileges guaranteed under the Constitution or laws of the United States. [42 U.S.C.S. § 1983](#). Municipalities may

be considered "persons" under the law. The constitutional deprivation must have its origin in what can fairly be said to be a policy of a municipality.

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Governments > Local Governments > Claims By & Against

Civil Rights Law > ... > Immunity From Liability > Local Officials > General Overview

Governments > Local Governments > Employees & Officials

HN6 Scope, Government Actions

Generally, a plaintiff must show two predicates in a [42 U.S.C.S. § 1983](#) claim against a municipality: (1) that the policy was so well settled and widespread that the policy-making officials had actual or constructive knowledge of it and yet did nothing; and (2) the custom or policy was the cause of, or moving force behind, plaintiffs' constitutional deprivation.

Civil Rights Law > ... > Immunity From Liability > Local Officials > General Overview

Governments > Local Governments > Employees & Officials

HN7 Immunity From Liability, Local Officials

An unconstitutional policy or custom may be inferred from a single decision or act. The isolated action must be taken by a municipal official with "final policy-making authority" in the relevant area of the city's business.

Civil Rights Law > ... > Immunity From Liability > Local Officials > General Overview

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

HN8 Immunity From Liability, Local Officials

There must be a "direct causal link" between a municipal policy or custom and the alleged constitutional violation to find any liability under [42 U.S.C.S. § 1983](#).

Civil Procedure > Attorneys > General Overview

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN9 Civil Procedure, Attorneys

[Fed. R. Civ. P. 11](#) sanctions may be imposed when an attorney presents a claim or files an action not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. [Fed. R. Civ. P. 11\(b\)](#).

Counsel: [**1] For Roma Construction Co., Peter Zanni, Plaintiffs: Ina P. Schiff, Providence, RI. Henry Spaloss, Nashua, NH.

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Judges: Francis J. Boyle, Senior Judge

Opinion by: Francis J. Boyle

Opinion

[*79] OPINION

BOYLE, Francis J., Senior Judge

Defendants, the Town of Johnston and Ralph aRusso, moved to dismiss the amended verified complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). The [**2] Court referred the motion to a Magistrate Judge for a Report and Recommendation. The Magistrate Judge issued his Report on April 18, 1995, recommending that the motion to dismiss be granted and that [Rule 11](#) sanctions be imposed on plaintiffs and plaintiffs' counsel. This Court heard Plaintiffs' objection to the Magistrate's Report and Recommendation. At that time the Court requested that the parties submit supplemental memoranda addressing the legislative history of the Racketeer Influenced and Corrupt Organizations Act (RICO). The Magistrate Judge also issued a second Report and Recommendation in which he recommended that the Motion to Dismiss submitted by Dominic DeConte should be granted as to all defendants. After consideration of the memoranda and argument, the Court adopts the recommendation of the Magistrate Judge that the complaint be dismissed as to all defendants. [Rule 11](#) sanctions, however, will not be imposed.

I. FACTS

Because this is a motion pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim, the facts are drawn from the verified amended complaint and in the light most favorable to the plaintiffs. See [Correa-Martinez v. Arrillaga-Belendez, \[**3\] 903 F.2d 49, 51 \(1st Cir. 1990\)](#). The facts, in accord with this standard, may be stated as follows.

Plaintiff, Roma Construction Company, is a Florida Corporation whose chairman is Anthony [*80] Compagnogne. Plaintiff, Peter Zanni, is a developer residing in Rhode Island.

In 1986, Harry and Russell DePetrillo were in the process of acquiring property in the Town of Johnston called Oak Hill Estates. They planned to develop this property into a residential subdivision which would ultimately comprise 50 homes and have an expected value of \$ 5 million. Early in this venture, upon seeking certain approvals and reviews, the DePetrillos encountered problems with officials employed by the Town of Johnston. After a meeting with some of the defendant officials, the DePetrillos agreed to pay a \$ 40,000 bribe in \$ 10,000 installments in order to secure the timely grant of all necessary approvals from the town.

Sometime in 1986, plaintiffs Peter Zanni and Roma Construction Company entered into a partnership agreement with the DePetrillos whereby the plaintiffs obtained a two-third's interest in the Oak Hill Properties. In December of

1990, the plaintiffs received approval from the Rhode Island Department [**4] of Environmental Management for the Oak Hill property. This approval was a prerequisite for its application to the Town of Johnston for further sewer and water permits. Although the plaintiffs satisfactorily completed this application to the Town of Johnston in early 1991, defendant Iannazzi, a town official, refused to sign this application for several months.

It was at this point that the plaintiffs became aware of the DePetrillos agreement to pay bribes to the defendants in return for their cooperation. Thereafter, plaintiff Peter Zanni met with defendant Benjamin Zanni, a member of the Johnston town council. Benjamin Zanni informed him that \$ 40,000 was outstanding on the bribe. Plaintiff Peter Zanni agreed to continuing bribing the town officials by making \$ 10,000 installments. After the first of the installments was paid, defendant Iannazzi signed the sewer and water application.

In July of 1991, plaintiff Peter Zanni's attorney requested \$ 10,000 to bribe Johnston town officials in order to secure official approval of another development project at Belknap Farms. Peter Zanni paid this bribe and approval for the Belknap Farms development was given in August of 1991.

This [**5] scenario was repeated in late 1991. Plaintiffs were having a difficult time obtaining town permission for a certain manhole for the Oak Hill development. Plaintiff Peter Zanni called defendant Benjamin Zanni and was told that approval had not been forthcoming until another \$ 10,000 installment was paid. Peter Zanni paid this amount and the next day the manhole was approved.

In the Fall of 1992, defendant Anthony Izzo asked an Oak Hill Partnership employee Mike Casale for the next bribe installment of \$ 10,000. Izzo repeated this request to Casale in the Spring and Summer of 1993.

In November of 1993, the plaintiffs sold almost all of their assets in the Oak Hill Partnership. On August 29, 1994, plaintiffs filed this action against the defendants seeking damages for the diminution in value of their interests in the Oak Hill Estates property as well as exemplary damages, attorney's fees and costs pursuant to the RICO Act.

II. ANALYSIS

A. Fed. R. Civ. P. 12 (b)(6) Standard.

HN1[A civil complaint seeking money damages should not be dismissed for failure to state an actionable claim unless it plainly appears that the plaintiffs can prove no set of facts which would entitle [**6] them to recover. See Miranda v. Ponce Federal Bank, 948 F.2d 41, 44 (1st Cir. 1991), citing Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Furthermore, the question must be resolved in the light most favorable to the plaintiffs with any doubt resolved on their behalf. See Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).

B. The Purpose of the Racketeer Influenced and Corrupt Organizations Act.

HN2[Section 1964, Title 18 of the United States Code provides that "any person injured in his business or property by reason of violation of . . . [the RICO statute] . . . may sue therefor in a United States district court and shall recover threefold damages . . ." Although [*81] this may appear to create a private action without limitations, for any person injured by such a violation, this Court must consider whether Congress intended such an open ended meaning. See Holmes v. Securities Investor Protection Corp. et al., 503 U.S. 258, 265-66, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992); Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529-30, 74 L. Ed. 2d 723, [**7] 103 S. Ct. 897 (1983). As the Supreme Court stated in Price Waterhouse v. Hopkins, 490 U.S. 228, 241, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989): "We need not leave our common sense at the doorstep when we interpret a statute."

The language and the legislative history of the RICO Act, codified at 18 U.S.C. § 1961 et seq., illustrate that Congress intended that RICO both eradicate "organized crime from the social fabric" by divesting 'the association of the fruits of the ill-gotten gains", Genty v. Resolution Trust Corp., 937 F.2d 899, 910 (3rd Cir. 1991), quoting United

States v. Turkette, 452 U.S. 576, 585, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981), and to provide innocent victims with proper redress. See Organized Crime Control: Hearings on S.30 Before the Subcomm. No. 5 of the House Committee on the Judiciary, 91st Cong., 2nd Sess. 519-520 (1970) (statement of Hon. Sam Steiger, U.S. Rep.).

Through RICO, Congress granted certain powers to the United States District Courts which allowed the seizure of ill-gotten property and the forced divestment of interests in similar activities as well as the award of treble damages. See 18 U.S.C. §§ 1963, [**8] 1964 (1984). The legislative history also shows that Congress intended not only to strike at the wrongdoers but to protect the innocent and provide them with adequate compensation. Although it appears that Congress did not consider the exact circumstances that now face the Court, it is clear from the record that the civil remedies provided by the statute were designed to protect innocent parties only.

The RICO statute was passed by both houses of Congress as part of the Organized Crime Control Act of 1970 (O.C.C.A.), P.L. 91-452. The "Findings and Purpose" of the Organized Crime Bill states that "Congress finds that . . . organized crime activity in the United States . . . harms innocent investors and competing organizations." S. 30, 91st Cong., 2d Sess. (1970). Moreover, the sponsor of the provision that eventually created a private civil remedy, Rep. Samuel Steiger, stated, "I want to make it very clear that the record we are making here is a record of significance. It is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a right to obtain proper redress." 116 Cong. Rec. H35346-47 (Oct. 7, 1970) (statement of Rep. Steiger).

C. [**9] *The Plaintiffs Are Not Innocent Victims*

Plaintiffs strenuously argue that they fit within the class of persons meant to be protected by the RICO statute; that they are victims of an extortion scheme to which they had no viable alternative but to comply and that this scheme caused delays which diminished the value of their investment in Oak Hill Properties.

HN3[] Rhode Island General Law § 11-7-4 makes it illegal to give a bribe to a public official. That section states that "no person shall corruptly give . . . any gift or valuable consideration to . . . any public official as an inducement or reward for doing or forebearing to do . . . any act in relation to the business of . . . the state, city or town of which he or she is an official." R.I. Gen. Laws § 11-7-4 (1994). Although it is not necessary to determine here whether the plaintiffs are criminally liable under this section of the Rhode Island General Laws, it is important to note that denial of the defendants' purported extortion defense is correct as a matter of policy. See Model Penal Code § 240.1, commentary at 41 (1980). Commentary to section 240.1 of the Model Penal Code addresses this issue. The commentary to the [**10] Model Penal Code states that,

the private citizen who responds to an official's threat of adverse action by paying money to secure more favorable treatment evidences thereby a willingness to subvert the legitimate processes of government. It is not acceptable to pay . . . under-the-table [**82] compensation to a public servant, even if such payment is required in order to obtain official action rightfully due. Such conduct constitutes a degree of cooperation in the undermining of governmental integrity that is inconsistent with the complete exonerations from criminal liability.

Model Penal Code § 240.1, commentary at 41 (1980).

The plaintiffs here are neither innocent nor victims. According to the verified amended complaint, the plaintiffs agreed to pay a \$ 40,000 bribe in order to assure timely processing of the permits and approvals necessary for the development of the Oak Hill Estates properties. When first approached they had the opportunity, and more importantly the obligation, to avoid whatever damage may have resulted from the extortionate demands by reporting the defendants to the appropriate law enforcement officials.¹ Instead they chose another course whereby, [**11] over a period of many months, they continued to make installment payments on this illegal \$ 40,000 graft whenever they needed another approval or permit from the Johnston officials.

¹ Indeed, the plaintiffs may not be able to recover damages under RICO because their purported damages may not have been proximately caused by the defendants' actions but rather by the plaintiffs' failure to timely report the extortion to the authorities. See Holmes v. Securities Investor Protection Corp. et al., 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992) (Supreme Court found that **HN4**[] the imposition of civil remedies pursuant to the RICO Act required the defendant's acts to be the proximate cause as well as cause in fact of the plaintiff's injuries).

This Court is aware that plaintiff Zanni vigorously argues that he is a victim, not a collaborator. Furthermore, plaintiff Zanni uses his alleged innocence to propose that a motion to dismiss cannot be supported by the equitable defense of in pari delicto.² Plaintiff **[**12]** contends that RICO is modeled after § 4 of the Clayton Act, and because the Supreme Court generally does not permit in pari delicto defenses in antitrust, then by extension, neither should this Court in RICO cases.

However, Plaintiff's analogy **[**13]** to antitrust law is not satisfactory because the public policy aims of antitrust law, such as § 4 of the Clayton Act, and RICO are different. Private antitrust litigation serves the public interest of economic competition. Admittedly, the anti-competitive plaintiff who receives 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." [Bieter Co. V. Blomquist, 848 F. Supp. 1446, 1448 \(D.Minn. 1994\)](#) (developer brought RICO charges against former town officials), quoting [Perma Life Mufflers, Inc. V. International Parts Corp., 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981 \(1968\)](#). Rather than encouraging a positive result, i.e., competition, Plaintiff's view of RICO would encourage crime, obviously a negative result.

The court in [Bieter Co.](#) was careful to point out that the defendants did not claim Bieter was involved in the same alleged bribery for which Bieter sought relief. [848 F. Supp. at 1450](#). Here, the complaint portrays plaintiffs and defendants as merely opposite sides of the same filthy lucre. The plaintiffs were completely involved in the illicit venture **[**14]** as were the defendants. There is no bribery unless there is someone willing to pay it. Plaintiff had a plethora of administrative and judicial remedies available to enforce their legitimate claims. Rather, they chose a "short cut" and greased the outstretched palm. Plaintiffs provided the grease.

In contrast to antitrust laws, a private cause of action under RICO is calculated to **[*83]** discourage criminal acts and to compensate victims. This divergence of policy reasons, renders the Plaintiff's analogy unpersuasive. Permitting the plaintiff to recover in this action would, as demonstrated hereafter, encourage crime and would certainly not compensate victims, a purpose not attributed to Congress.

D. Allowing Plaintiffs To Recover Would Subvert the Purpose and Policy of the RICO Act

Allowing wrongdoers, such as the plaintiffs, to recover treble damages under RICO would subvert the twofold purpose of that act, to eliminate the economic incentives driving organized crime and to compensate the innocent victim. Such a result would provide no incentive for those approached by public officials for illegal payments to report such activity to law enforcement. Persons, such as the plaintiffs, **[**15]** could engage in bribery of public officials with full knowledge that if the bribery scheme (viewed as an effort to expedite official approval) broke down for whatever reason, they could seek a treble return on their illicit, but failed investment, from those with whom they once illegally dealt. It would be a no loss situation for criminal activity. It would be a pay now and recover later deal.

Instead of supplying innocent victims of organized crime with compensation, the civil remedies provided by the RICO Act would become *de facto* an insurance windfall for those who willingly engage in illegitimate schemes. Moreover, in this reading of the act, the Court heeds the congressional admonition that RICO be "liberally construed to effectuate its remedial purposes." RICO, s. 904(a), 84 Stat. 947 (1970). It is the plaintiffs' construction that would, in the end, turn the purpose of the act on its head by rewarding criminal wrongdoers and actually inciting criminal activity through an economic incentive of treble damages.

Such a result is contrary to the intent of Congress and the policy of the act and thus cannot be permitted.

E. Plaintiff's [Section 1983](#) Claim

² In pari delicto means "in equal fault" and is a common law doctrine which bars a plaintiff's recovery due to his own wrongful conduct. This defense is grounded on two premises: "first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." [Bateman Eichler, Hill Richards, Inc. V. Berner, 472 U.S. 299, 306, 86 L. Ed. 2d 215, 105 S. Ct. 2622 \(1985\)](#) (holding that in pari delicto not available defense for securities violations unless plaintiff bears equal responsibility for violation). See also [Sullivan v. National Football League, 34 F.3d 1091 \(1st Cir. 1994\)](#), cert. denied, 1995 WL 75506 (U.S. 2/27/95).

Count III avers [**16] that defendants aRusso, DeConte, Izzo, Zanni, Iannazzi and the Town of Johnston were acting under the color of state authority and municipal practice and deprived the plaintiffs of property and rights in violation of [42 U.S.C. § 1983](#).

HN5 [↑] [Section 1983](#) imposes liability on any person who acts under color of state law, deprives another rights or privileges guaranteed under the Constitution or laws of the United States. [42 U.S.C. § 1983](#). Municipalities may be considered "persons" under the law. [Monell v. City of New York Dept. Of Social Services, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018](#). "The constitutional deprivation must have its origin in what can fairly be said to be a policy of a municipality." [Manor Healthcare Corp. V. Lomelo, 929 F.2d 633, 637 \(11th Cir. 1991\)](#) (finding no [§ 1983](#) liability for town due to mayor's bribery).

HN6 [↑] Generally, a plaintiff must show two predicates in a [§ 1983](#) claim against a municipality: (1) that the policy was so well settled and widespread that the policy-making officials had actual or constructive knowledge of it and yet did nothing; and (2) the custom or policy was the cause of, or moving force behind, plaintiffs' constitutional [**17] deprivation. [Bordanaro v. McLeod, 871 F.2d 1151, 1156 \(1st Cir. 1989\)](#). In the facts alleged, there is no evidence that the Town of Johnston had any policy endorsing or advocating extortion and the acceptance of bribes by town officials.

It may be argued that Mayor aRusso's actions, or acquiescence, constituted a town policy under which a plaintiff could recover. **HN7** [↑] "An unconstitutional policy or custom may be inferred from a single decision or act...the isolated action must be taken by a municipal official with 'final policy-making authority' in the relevant area of the city's business." [Rodriguez v. Furtado, 771 F. Supp. 1245, 1257 \(D.Mass. 1991\)](#) (internal citations omitted), *citing*, [City of St. Louis v. Praprotnik, 485 U.S. 112, 99 L. Ed. 2d 107, 108 S. Ct. 915 \(1989\)](#). In the present state of this action, there is no indication in the record of the extent of the Mayor's authority in the [*84] Town of Johnston. See [Manor Healthcare Corp. V. Lomelo, 929 F.2d 633 \(11th Cir. 1991\)](#). The extent of the Mayor's authority remains a fact in issue.

Even assuming *arguendo* that there was a de facto municipal policy of extortion promulgated by aRusso and perpetrated by the other [**18] named defendants, the plaintiffs cannot succeed in their [§ 1983](#) claim because the alleged policy is not the cause of any constitutional harm.

HN8 [↑] There must be a "direct causal link" between a municipal policy or custom and the alleged constitutional violation to find any [§ 1983](#) liability. [City of Harris v. Canton, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 \(1989\)](#). See also [Chaudhry v. Prince George's County, MD, 626 F. Supp. 448, 453 \(D.Md 1985\)](#). Yet in this case, the "casual link" or "moving force" behind any perceived constitutional violations is the plaintiffs' own actions, that is their continual, voluntary payment of bribes to the defendants. Simply said, any substantive or procedural deprivations are the fault of the plaintiffs. Perhaps a bribery demand by municipal officials in order to facilitate zoning, permits, and the like, deprives a citizen of constitutional due process rights; however, once payment is made the citizen becomes the "causal link" and essentially waives any future right to protest, using [42 U.S.C. § 1983](#) as a vehicle.

Because the plaintiffs cannot provide any "moving force" or "casual link" other than their active complicity, there is [**19] not sufficient causation to sustain a [§ 1983](#) claim. Defendants' Motion to Dismiss Count III is granted.

F. Plaintiff's State Law Claims

The state law claims in Count IV-VI, Rhode Island RICO statutes §§ 7-15-2, 7-15-4 and [R.I.G.L. § 9-1-2](#), are dismissed for lack of supplemental jurisdiction. See Judicial Improvements Act of 1990, [28 U.S.C. § 1367\(c\)](#).

G. [Rule 11](#) Sanctions

HN9 [↑] [Rule 11](#) sanctions may be imposed when an attorney presents a claim or files an action "not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." [Fed.R.Civ.P. 11\(b\)](#). The conduct in this case does not warrant [Rule 11](#) sanctions. The Magistrate's Report and Recommendation is not adopted with regard to sanctions.

CONCLUSION

For the reasons stated, the Report and Recommendation of the Magistrate Judge is adopted as stated in this opinion. The complaint is hereby dismissed as to all defendants.

Francis J. Boyle, Senior Judge

10-3-95

Date

End of Document



Morsani v. Major League Baseball

Court of Appeal of Florida, Second District

October 4, 1995, Filed

Case No. 94-01780

Reporter

663 So. 2d 653 *; 1995 Fla. App. LEXIS 10391 **; 1995-2 Trade Cas. (CCH) P71,146; 20 Fla. L. Weekly D 2266

FRANK L. MORSANI, individually and for the use and benefit of TAMPA BAY BASEBALL GROUP, INC. and TAMPA BAY BASEBALL GROUP, INC., a Florida corporation, Appellants, v. MAJOR LEAGUE BASEBALL; BOWIE KUHN; PETER V. UEBERROTH; EDWIN M. DURSO; FRANCIS T. VINCENT, JR.; NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS; CHARLES S. FEENEY; WILLIAM D. WHITE; AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS; LELAND S. MACPHAIL, JR.; ROBERT W. BROWN, M.D.; NATIONAL ASSOCIATION OF PROFESSIONAL BASEBALL LEAGUES, INC., a Florida Corporation; ATLANTA NATIONAL LEAGUE BASEBALL CLUB, INC., d/b/a ATLANTA BRAVES; CHICAGO NATIONAL LEAGUE BALL CLUB, INC., d/b/a CHICAGO CUBS; THE CINCINNATI REDS, d/b/a CINCINNATI REDS; FLORIDA MARLINS, INC., d/b/a FLORIDA MARLINS, a Florida Corporation; HARRY WAYNE HUIZENGA; BLOCKBUSTER ENTERTAINMENT CORP., a Delaware Corporation registered to do business in Florida; HOUSTON SPORTS ASSOCIATION, INC., d/b/a HOUSTON ASTROS; LOS ANGELES DODGERS, INC., d/b/a LOS ANGELES DODGERS; PETER O'MALLEY; MONTREAL BASEBALL CLUB, LTD., d/b/a MONTREAL EXPOS; STERLING DOUBLEDAY ENTERPRISES, L.P., d/b/a NEW YORK METS; FRED WILPON; THE PHILLIES, d/b/a PHILADELPHIA PHILLIES; BILL GILES; PITTSBURGH ASSOCIATES, d/b/a PITTSBURGH PIRATES; DOUGLAS D. DANFORTH; CARL F. BARGER; ST. LOUIS BASEBALL CLUB, INC., d/b/a ST. LOUIS CARDINALS; FRED L. KUHLMANN; SAN DIEGO NATIONAL LEAGUE BASEBALL CLUB, INC., d/b/a SAN DIEGO PADRES; LURIE SPORTS, INC., d/b/a SAN FRANCISCO GIANTS; THE ORIOLES, INC., d/b/a BALTIMORE ORIOLES; BOSTON RED SOX BASEBALL CLUB, d/b/a BOSTON RED SOX; HAYWOOD SULLIVAN; GOLDEN WEST BASEBALL COMPANY, d/b/a CALIFORNIA ANGELS; CHICAGO WHITE SOX; JERRY M. REINSDORF; CLEVELAND INDIANS BASEBALL CO., d/b/a CLEVELAND INDIANS; DETROIT BASEBALL CLUB, INC., d/b/a DETROIT TIGERS; KANSAS CITY ROYALS BASEBALL CORP., d/b/a KANSAS CITY ROYALS; MILWAUKEE BREWERS BASEBALL CLUB, d/b/a MILWAUKEE BREWERS; ALAN H. SELIG; MINNESOTA TWINS PARTNERSHIP, d/b/a MINNESOTA TWINS; MTI ACQUIRING CO.; CARL POHLAD; MINNESOTA TWINS, INC., d/b/a MINNESOTA TWINS BASEBALL CLUB, a/k/a MINNESOTA TWINS; CALVIN R. GRIFFITH; THELMA GRIFFITH HAYNES; PETER DORSEY; PETER DORSEY, P.A.; NEW YORK YANKEES, INC., d/b/a NEW YORK YANKEES; GEORGE M. STEINBRENNER; OAKLAND ATHLETICS BASEBALL COMPANY, d/b/a OAKLAND ATHLETICS; THE BASEBALL CLUB OF SEATTLE, INC., d/b/a SEATTLE MARINERS; TEXAS RANGERS, LTD., d/b/a TEXAS RANGERS; EDDIE CHILES; EDWARD GAYLORD; TORONTO BLUE JAYS BASEBALL CLUB, d/b/a TORONTO BLUE JAYS, Appellees.

Subsequent History: [**1] Rehearing Denied November 30, 1995. Released for Publication December 27, 1995. As Corrected. Petition for Review Denied April 9, 1996, Reported at: [1996 Fla. LEXIS 692](#).

Prior History: Appeal from the Circuit Court for Hillsborough County; John M. Gilbert and James D. Whittemore, Judges.

Disposition: Reversed and remanded.

Core Terms

team, major league baseball, baseball, anti trust law, business relationship, antitrust, exemption, cause of action, rights, tortious interference, defendants', interfered, demanded, promise

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

HN1 [] Motions to Dismiss, Failure to State Claim

A reviewing court's function when reviewing an order of dismissal entered pursuant to [Fla. R. Civ. P. 1.140\(b\)](#) is confined to whether the trial court properly concluded that the complaint did not state a cause of action. In reaching that determination, a reviewing court must take the pleaded facts as true and should not be concerned with the quality of the allegations or how they will ultimately be proved.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN2 [] Intentional Interference, Elements

To establish the tort of interference with a contractual or business relationship, the plaintiff must allege and prove (1) the existence of a business relationship under which the plaintiff has legal rights, (2) an intentional and unjustified interference with that relationship by the defendant and (3) damage to the plaintiff as a result of the breach of the business relationship.

Torts > ... > Commercial Interference > Contracts > General Overview

HN3 [] Commercial Interference, Contracts

A cause of action for tortious interference does not exist against one who is himself a party to the contract allegedly interfered with.

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

HN4 [] Sales (Article 2), Form, Formation & Readjustment

It is clear that the privilege to interfere in a contract because of a financial interest is not unlimited. The better view is that it is necessary for the interfering party to have a financial interest in the business of the third party which is in

the nature of an investment in order to justify the interference. Furthermore, a privilege to interfere with a third party's conduct does not include the purposeful causing of a breach of contract.

Torts > ... > Commercial Interference > Contracts > General Overview

[HN5](#) Commercial Interference, Contracts

Where there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN6](#) Sports, Baseball

State antitrust laws not in direct conflict with federal antitrust laws are neither preempted nor precluded by any federal considerations.

Counsel: Joel D. Eaton of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, and Cunningham Law Group, P.A., Tampa, for Appellants.

John W. Foster, Sr. of Baker & Hostetler, Orlando, for Appellees.

Ben J. Hayes, St. Petersburg and Douglas E. Hart of Frost & Jacobs, Cincinnati, Ohio, for Appellee National Association of Professional Baseball Leagues, Inc.

Judges: RYDER, Acting Chief Judge. DANAHY and LAZZARA, JJ., Concur.

Opinion by: RYDER

Opinion

[*654] RYDER, Acting Chief Judge.

Frank Morsani and the Tampa Bay Baseball Group (TBBG) seek review of the trial court's dismissal of their complaint alleging tortious interference with advantageous contractual and business relationships and antitrust violations in connection with their attempt to acquire a major league baseball team. We hold that the trial court erred in its dismissal for failure to state a cause of action for tortious interference because the complaint sufficiently alleged that the appellees **[**2]** exceeded the scope of their approval **[*655]** rights. We further conclude that the antitrust exemption for baseball is limited to the reserve clause. Because our decision renders the third and fourth issues moot, we do not address them. Accordingly, we reverse the dismissal and remand for further proceedings consistent with this opinion.

Appellants were plaintiffs in a multi-count suit against sixty defendants, nearly all of whom were associated with major league baseball in one capacity or another at the relevant times. The complaint alleged that the defendants had tortiously interfered with various contractual rights and advantageous business relationships which the plaintiffs had developed over the years in their efforts to acquire ownership of a major league baseball team in Tampa,

Florida, and, that, by conspiring together to prevent the plaintiffs from succeeding in that endeavor, the defendants had violated Florida's antitrust laws.

The trial court dismissed the complaint as to fifty-eight of the sixty defendants pursuant to a motion for failure to state a cause of action pursuant to [Florida Rule of Civil Procedure 1.140\(b\)\(6\)](#). The plaintiffs and the remaining two defendants stipulated [**3] without prejudice to the plaintiffs' rights to challenge the propriety of the final judgment itself, that the two defendants would be deemed included in the order of dismissal.

Counts I through III of the complaint alleging tortious interference correspond to the plaintiffs' attempts to purchase a team through negotiations with owners of Minnesota Twins, Inc. and Texas Rangers, Ltd. and to acquire an expansion team, respectively. Count IV alleged that the defendants' acts of tortious interference constituted an antitrust violation.

HN1[ Our function when reviewing an order of dismissal entered pursuant to [Rule 1.140\(b\), Florida Rules of Civil Procedure](#), is confined to whether the trial court properly concluded that the complaint did not state a cause of action. In reaching that determination, we must take the pleaded facts as true and we are not concerned with the quality of the allegations or how they will ultimately be proved.

[Troupe v. Redner, 652 So. 2d 394, 395 \(Fla. 2d DCA 1995\)](#), citing [Cook v. Sheriff of Collier County, 573 So. 2d 406, 408 \(Fla. 2d DCA 1991\)](#).

The complaint alleges that in 1982, Morsani attended the major league baseball winter meetings, [**4] expressed his desire to purchase a major league baseball team and sought advice from various defendants concerning the team's purchase and relocation to the Tampa Bay area. Upon the defendants' advice, TBBG was formed. Various defendants told the plaintiffs that they would support and approve the sale of the Minnesota Twins, Inc. to them if they would secure a site to build a major league baseball stadium in the Tampa Bay area. At an expense in excess of \$ 2 million, the plaintiffs secured a long-term lease with the Tampa Sports Authority for the construction of a baseball stadium and entered into negotiations with the shareholders of Minnesota Twins, Inc. for the purchase of their stock.

In 1984, the owners of 51% of the stock of Minnesota Twins, Inc., Calvin Griffith and Thelma Griffith-Haynes, agreed to sell their controlling interest to the plaintiffs for approximately \$ 24 million on condition that they first buy H. Gabriel Murphy's 42.14% minority interest in the corporation. The plaintiffs then negotiated and entered into a fully-executed written contract with Murphy for the purchase of his interest, at a purchase price of \$ 11.5 million. The contract provided that its closing [**5] was conditioned upon prior approval by the owners of other American League teams, as the Constitution of the American League required, and any other approvals which might validly be required. Thereafter, with full knowledge of these agreements, various of the defendants conspired together and used improper means to prevent the plaintiffs from consummating their purchase. They caused Griffith and Griffith-Haynes to sell their 51% interest to Carl Pohlad. They also demanded that the plaintiffs assign their contract with Murphy to Pohlad, and that Murphy consent to the assignment. At the time this assignment was demanded, the value of the minority interest purchased by the plaintiffs had increased from \$ 11.5 million to \$ 25 million.

[*656] The plaintiffs balked at the demand and sought payment for the \$ 13.5 million increase in value of the contract, as well as reimbursement of the \$ 2 million previously expended, as a condition to assigning the contract to Pohlad. The relevant defendants then threatened the plaintiffs. These threats were that plaintiffs would never own an interest in a major league baseball team, and that there would never be a major league baseball team in the Tampa Bay [**6] area, unless the plaintiffs assigned the contract as demanded and accepted only \$ 250,000.00 for the assignment, and, further, that they agree to forebear pursuing any legal remedies for the additional \$ 15 million plus in damages in exchange for obtaining an ownership interest in another major league baseball team in time to begin the 1993 season. In exchange for the promise of another team, the plaintiffs assigned their contract to Pohlad.

The complaint also alleged that in 1988, several defendants informed the plaintiffs that they would support and approve the sale of Texas Rangers, Ltd. to the plaintiffs. The plaintiffs then reached an agreement with Eddie

Gaylord for the purchase of his 33% interest in the partnership, and entered into a written contract with Eddie Chiles for the purchase of his 58% controlling interest in the partnership. Thereafter, with full knowledge of these agreements, various defendants conspired together and used improper means to prevent the plaintiffs from consummating their purchase. They caused both Gaylord and Chiles to breach their agreements with the plaintiffs in favor of a Texas investor. They then, again, threatened the plaintiffs that they [**7] would never own an interest in a major league baseball team, and that there would never be a major league baseball team in the Tampa Bay area, unless the plaintiffs agreed to forbear pursuing any legal remedies in exchange for obtaining an ownership interest in another major league baseball team in time to begin the 1993 season. In exchange for the renewed and continuing promise of another team, the plaintiffs once again withheld their claims.

Some of the defendants informed the plaintiffs in 1988 that, consistent with the prior promises made to obtain their forbearance, the plaintiffs would be awarded an expansion team in time to begin the 1993 season. Thereafter, various defendants conspired together and used improper means to prevent the plaintiffs from obtaining the promised team. In 1989, they interfered with the plaintiffs' advantageous business relationships by demanding that one of the investors in TBBG relinquish his interest as a condition of obtaining the team, and thereby reduced the corporation's financial viability. The defendants then prohibited the plaintiffs from obtaining any additional financial backing from persons or entities not located in the Tampa Bay area, [**8] including Sam Walton. These interferences reduced the financial viability of the plaintiffs well below that of a competitor group led by H. Wayne Huizenga, and effectively eliminated the plaintiffs from contention for the promised expansion team which began the 1993 season as The Florida Marlins in Miami.

HN2[] To establish the tort of interference with a contractual or business relationship, the plaintiff must allege and prove (1) the existence of a business relationship under which the plaintiff has legal rights, (2) an intentional and unjustified interference with that relationship by the defendant and (3) damage to the plaintiff as a result of the breach of the business relationship. [Serafino v. Palm Terrace Apartments, Inc., 343 So. 2d 851 \(Fla. 2d DCA 1976\)](#).

The appellants acknowledge that **HN3**[] a cause of action for tortious interference does not exist against one who is himself a party to the contract allegedly interfered with. [United of Omaha Life Ins. Co. v. Nob Hill Associates, 450 So. 2d 536, 539 \(Fla. 3d DCA\), review dismissed and denied, 458 So. 2d 273, 274 \(Fla. 1984\)](#). They urge, however, that none of the defendants except Calvin Griffith and Thelma Griffith-Haynes [**9] owned stock in Minnesota Twins, Inc., and only they and Gabriel Murphy could contract to sell their stock in the Twins to the plaintiffs. They further contend that the various defendants' approval rights do not make them parties to the contract.

The trial court concluded that the existence of the defendants' approval rights made them, as the leagues and teams, the [*657] source of the business opportunity allegedly interfered with, and, therefore, were incapable of interference. See [Genet Co. v. Anheuser-Busch, Inc., 498 So. 2d 683 \(Fla. 3d DCA 1986\)](#). Genet, however, is distinguishable because the brewer's decision to disapprove the proposed transfer was based entirely on business considerations. No malice was shown. Here, the appellants have alleged the use of threats, intimidation and conspiratorial conduct.

HN4[] It is clear that the privilege to interfere in a contract because of a financial interest is not unlimited. [Frank Coulson, Inc.-Buick v. General Motors Corp., 488 F.2d 202 \(5th Cir. 1974\)](#). The better view is that it is necessary for the interfering party to have a financial interest in the business of the third party which is in the nature of an investment in order [**10] to justify the interference. . . . Furthermore, a privilege to interfere with a third party's conduct does not include the purposeful causing of a breach of contract.

[Yoder v. Shell Oil Co., 405 So. 2d 743, 744 \(Fla. 2d DCA 1981\), review denied, 412 So. 2d 470 \(Fla. 1982\)](#).

HN5[] Where there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper. [McCurdy v. Collis, 508 So. 2d 380, 384 \(Fla. 1st DCA 1987\)](#). As the appellants have pleaded their cause of action, the defendants' approval rights were exercised outside the context of the proper exercise of their rights. See [Peacock v. General Motors Acceptance Corp., 432 So. 2d 142 \(Fla. 1st DCA 1983\)](#). We conclude, therefore, that Counts I, II and III state a cause of action for tortious interference with advantageous contractual and business relationships and reverse their dismissal.

Turning to the antitrust claim, the defendants, relying on the United States Supreme Court decisions supporting baseball's exemption from antitrust laws, *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200, 42 S. Ct. 465, 66 [**11] L. Ed. 898 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64 (1953); and *Flood v. Kuhn*, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972), argued that these cases exempt from the antitrust laws the entire business of baseball. The trial judge thoroughly reviewed those cases and a more recent case pertinent to the antitrust cause of action, *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993). In *Piazza*, Judge Padova concluded that the precedential value of the trilogy of Supreme Court decisions regarding baseball's exemption is limited to the reserve system. Although the trial judge here found Judge Padova's decision well-reasoned, he ultimately concluded that he was bound by the decision of the Fifth District in *Butterworth v. National League of Professional Baseball Clubs*, 622 So. 2d 177 (Fla. 5th DCA 1993), which granted a petition to set aside the state's civil investigative demands pursuant to state **antitrust law**. On appeal, the Florida Supreme Court answered in the negative the following question certified by the Fifth District as one of great public importance:

Does the antitrust exemption for baseball [**12] recognized by the United States Supreme Court in *Federal Baseball Club of Baltimore* . . . and its progeny exempt all decisions involving the sale and location of baseball franchises from federal and Florida **antitrust law**?

Butterworth, 622 So. 2d 177, 178. The trial judge below did not have the benefit of the Florida Supreme Court's decision which reversed the appellate court and held that federal and state antitrust laws applied to decisions involving sales and locations of baseball franchises, and that the antitrust exemption for baseball extended only to the reserve system. *Butterworth v. National League of Professional Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994).

The appellees argue that despite the Florida Supreme Court's pronouncement in *Butterworth*, the Commerce Clause bars application of state antitrust laws to interstate professional sports leagues even in the absence of a baseball antitrust exemption. We disagree. **HN6** [↑] State antitrust laws not in direct conflict with federal antitrust laws are neither preempted nor precluded by any federal considerations. *Postema v. National League* [*658] of *Professional Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. [**13] 1992), reversed in part on other grounds, 998 F. 2d 60 (2nd Cir. 1993); *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L. Ed. 2d 86 (1989). Reversed and remanded.

DANAHY and LAZZARA, JJ., Concur.



Borgeson v. Archer-Daniels Midland Co.

United States District Court for the Central District of California

October 12, 1995, DATED ; October 12, 1995, FILED; October 16, 1995, ENTERED

CASE NO.: CV 95-5745 ABC (AJWx), CV 95-5746 ABC (AJWx)

Reporter

909 F. Supp. 709 *; 1995 U.S. Dist. LEXIS 20457 **

PATRICIA BORGESON, on behalf of herself and all others similarly situated, Plaintiff, vs. ARCHER-DANIELS MIDLAND CO., a Minnesota corporation; CARGILL, INC., a Delaware corporation; A.E. STALEY MANUFACTURING COMPANY, a Delaware corporation; CPC INTERNATIONAL, INC. a Delaware corporation; and DOES 1 through 50, Defendants. NEDRA GOINGS, on behalf of herself and all others similarly situated, Plaintiff, vs. ARCHER-DANIELS MIDLAND CO., a Minnesota corporation; CARGILL, INC., a Delaware corporation; A.E. STALEY MANUFACTURING COMPANY, a Delaware corporation; CPC INTERNATIONAL, INC. a Delaware corporation; and DOES 1 through 50, Defendants.

Core Terms

amount in controversy, punitive damages, class action, treble damages, aggregated, district court, corn syrup, supplemental jurisdiction, removal, cases, diversity jurisdiction, legislative history, state court, undivided interest, asserts, member of the class, class member, Cartwright Act, citizenship, diversity, undivided, purposes, damages, prices, rights

LexisNexis® Headnotes

[Civil Procedure > ... > Diversity Jurisdiction > Citizenship > Business Entities](#)

[Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction](#)

[Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview](#)

[Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination](#)

[Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview](#)

[Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview](#)

[Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview](#)

[Civil Procedure > Preliminary Considerations > Removal > General Overview](#)

[Civil Procedure > ... > Removal > Specific Cases Removed > General Overview](#)

[Civil Procedure > ... > Removal > Specific Cases Removed > Diversity of Citizenship](#)

909 F. Supp. 709, *709 1995 U.S. Dist. LEXIS 20457, **20457

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN1 [down] Citizenship, Business Entities

When an action could have been brought originally in federal court based on diversity jurisdiction, [28 U.S.C.S. § 1332](#), a district court has removal jurisdiction pursuant to [§ 1441](#). District courts have original jurisdiction under [§ 1332](#) where the civil action is between citizens of different states, and the amount in controversy exceeds \$ 50,000. In a class action, only the domicile of the class representative (plaintiff) is considered, rather than that of the class members. For the purposes of diversity jurisdiction, a corporation is deemed to have two states of citizenship--its state of incorporation and the state wherein it has its principal place of business. [§ 1332\(c\)\(1\)](#).

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

HN2 [down] Removal, Specific Cases Removed

On removal, the burden of establishing grounds for federal jurisdiction rests on the defendant. Indeed, there is a "strong presumption" against removal jurisdiction. Accordingly, when there is doubt as to removability, it is resolved in favor of remanding the case to state court.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy

HN3 [down] Subject Matter Jurisdiction, Amount in Controversy

The long-standing judicial interpretation is that separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement. In a case with two or more plaintiffs, aggregation is permitted only when the plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN4 [down] Supplemental Jurisdiction, Ancillary Jurisdiction

See [28 U.S.C.S. § 1367\(a\)](#).

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN5 [down] Subject Matter Jurisdiction, Supplemental Jurisdiction

The broad grant of jurisdiction under [28 U.S.C.S. § 1367\(a\)](#) is limited by subsection (b) that specifies the circumstances in which the district courts shall not have jurisdiction. In addition, the grant is limited as otherwise provided in federal statutes, such as [28 U.S.C.S. § 1332](#).

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN6 **Subject Matter Jurisdiction, Supplemental Jurisdiction**

See [28 U.S.C.S. § 1367\(b\)](#).

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy

HN7 **Subject Matter Jurisdiction, Amount in Controversy**

While the general rule is that claims cannot be aggregated in order to satisfy the amount in controversy requirement, there is a long-recognized exception to this rule. When parties have a "common and undivided" interest, claims can be aggregated to satisfy the amount in controversy requirement.

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN8 **Antitrust & Trade Law, Consumer Protection**

In addition to establishing a public cause of action (enforced by the State Attorney General), the Cartwright Act, [Cal. Bus. & Prof. Code § 16750 et seq.](#) (1987), gives a private right to sue for damages and treble damages to each person who suffers harm from price fixing.

Counsel: **[**1]** For PATRICIA BORGESON, on behalf of herself & all others similarly situated, plaintiff: Kevin M Prongay, [COR LD NTC], Prongay & Mikolajczyk, Pacific Palisades, CA.

For ARCHER-DANIELS-MIDLAND CO, a Minnesota corp, defendant: Robert S Brewer, Jr, [COR LD NTC], McKenna & Cuneo, San Diego, CA.

For CARGILL INC, a Delaware corp, defendant: Niel M Soltman, [COR LD NTC], Jerome M Jauffret, [COR LD NTC], Mayer Brown & Platt, Los Angeles, CA. Mark William Ryan, [COR LD NTC], Mayer Brown & Platt, Washington, DC.

For A E STANLEY MANUFACTURING CO, a Delaware corp, defendant: Steven B Katz, [COR LD NTC], Seyfarth Shaw Fairweather & Geraldson, Los Angeles, CA. Jerry M Hill, David D. Jacobson, Barash & Hill, Los Angeles, CA.

Judges: AUDREY B. COLLINS, UNITED STATES DISTRICT JUDGE. Discovery Andrew J. Wistrich.

Opinion by: AUDREY B. COLLINS

Opinion

[*711] ORDER RE: REMAND TO STATE COURT

These related jurisdictional matters were taken under submission on September 22, 1995. After reviewing the materials submitted by the parties and the case file, the Court hereby REMANDS these actions to state court.

I. Background

A. Procedure

On July 21, 1995, Plaintiff PATRICIA BORGESON, on behalf of herself **[**2]** and all others similarly situated, filed a Complaint against ARCHER-DANIELS-MIDLAND CO. ("ADM"), CARGILL, INC. ("Cargill"), A.E. STALEY MANUFACTURING CO. ("Staley"), AND CPC INTERNATIONAL, INC ("CPC"), in the Los Angeles County Superior Court.¹ Also on July 21, 1995, Plaintiff NEDRA GOINGS, on behalf of herself and all others similarly situated, filed a Complaint against the same Defendants in the Orange County Superior Court.

On August 25, 1995, Defendant Staley filed a Notices of Removal, asserting diversity jurisdiction over these actions under [28 U.S.C. § 1332](#).² After receiving Staley's Notices of Removal of the *Borges* case, the Court issued an Order to Show Cause ("OSC") why the action should not be remanded to state court for failing **[**3]** to show a proper basis for federal court jurisdiction.³ The Court listed two grounds for its OSC. First, Staley failed to show that the other defendants (Cargill, ADM, and CPC) had joined in the removal. Staley has satisfied the Court's concern on this ground.⁴ Second, and more importantly, the Court ordered Staley to show that the requirements for diversity jurisdiction were satisfied.

[4]** On September 11, 1995, Defendant Staley filed a Response to OSC re: Remand. On September 15, 1995, Plaintiff filed a Memorandum of Points and Authorities in Response **[*712]** to OSC re: Remand, in support of remand to state court.⁵ On September 22, 1995, Defendant Staley filed a Reply.⁶

On September 11, 1995, Defendants filed a joint motion before the Judicial Panel on Multi-District Litigation to transfer this action and others to the Southern District of Iowa for coordinated and consolidated pretrial proceedings. On September 29, 1995, Plaintiffs in the actions filed a response.

B. Plaintiff's Allegations

In both the *Borges* and *Goings* Complaints, Plaintiffs allege as follows:

1.) At least as early as July 1992 and through the present, **[**5]** Defendants entered into and have engaged in a contract, combination, and conspiracy to suppress competition and unreasonably restrain commerce and trade, by

¹ This case has not been certified as a class action, but the Court will assume, without deciding, that it would be certified solely for the purposes of determining jurisdiction. See [City of Inglewood v. City of Los Angeles, 451 F.2d 948, 951-5 \(9th Cir. 1971\)](#).

² The *Goings* action was originally assigned to Judge Phaelzer in this district. On September 26, 1995, the *Goings* case was transferred to this Court.

³ The *Borges* OSC was issued on August 31, 1995. However, the *Goings* action was not transferred to this Court's docket until September 26, 1995. Therefore, the Court's OSC only related to the *Borges* case. Because the *Goings* and *Borges* cases are fundamentally identical, this Court's Order will apply to both matters.

⁴ On August 28, 1995, Defendant ADM filed Notices of Joinder in both of Staley's Notices of Removal (in the *Borges* and *Goings* actions). On August 28, 1995, Defendant Cargill filed a Notices of Joinder in Staley's Notices of Removal. On August 25, 1995, Defendant CPC filed Notices of Removal in both actions. On August 30, 1995, Defendant CPC filed Notices of Joinder in Staley's Notices of Removal.

⁵ On September 15, 1995, Plaintiff Goings joined in the Response by Plaintiff Borgeson to the OSC, supporting remand to state court.

⁶ Because the Court finds this issue well briefed by the Parties, the Court has taken the matter under submission.

fixing the prices of high-fructose corn syrup and/or its by-products ("corn syrup") sold to consumers in the State of California. Corn syrup is a corn-derived sweetener sold in pure form and used in most soft drinks, as well as some baked goods and other food products. There is no substitute for corn syrup in the production, manufacture, distribution, and sale of many consumer products. Corn syrup is a fungible product, and the corn syrup produced by one company is completely interchangeable with that of any other company.

2.) As a result Defendants' conduct, the price of corn syrup has increased in recent years at a substantially faster rate than the price of the raw materials.

3.) During the relevant time period, Defendants have sold many millions of dollars of corn syrup in the United States, and a significant portion of those sales has occurred in the State of California.

4.) Because of Defendants' conduct, there are significant barriers to new competitors wishing to enter the corn syrup industry.

5.) In **[**6]** 1992, Mark E. Whitacre ("Whitacre"), an executive of ADM, agreed to cooperate with a federal investigation into possible **antitrust law** violations after company officials had asked him to participate in collusive pricing agreements. Since that time, Whitacre has recorded hundreds of conversations and meetings involving employees of Defendants ADM, Cargill, Staley, and CPC.

6.) In June and July of 1995, the national press reported that Defendants were the subject of a major criminal antitrust investigation by the Federal Bureau of Investigation ("FBI"). ADM is the primary target of the federal investigation. Numerous managers and executives of ADM, as well as each of the other Defendants, have received subpoenas and/or have had search warrants executed against them. A grand jury in Chicago has begun hearing evidence as a result of that investigation.

7.) As a result of Defendants' alleged wrongdoing, corn syrup prices have remained at an artificially high and uncompetitive level. In addition, competition for the sale of corn sweetener products has been unreasonably restrained in the State of California.

8.) Therefore, the prices that Plaintiffs and other members of the **[**7]** classes have paid are higher than the prices would be in a free and competitive market.

Plaintiffs pray for the following relief: an order certifying these actions as class actions, with Plaintiffs as the representatives of the classes and Plaintiffs' counsel as class counsel; judgment that the acts of the Defendants constitute unlawful and unreasonable restraint of trade and unfair competition; treble damages; fees; costs; disgorgement and restitution; and, such other relief as the Court deems just and proper.

II. Discussion

A. Removal Jurisdiction Standard

HN1 When an action could have been brought originally in federal court based on diversity jurisdiction, see [28 U.S.C. § 1332](#), a district court has removal jurisdiction pursuant to [28 U.S.C. § 1441](#). District courts have original jurisdiction under [28 U.S.C. § 1332](#) **[*713]** where the civil action is between *citizens* of different states, and the amount in controversy exceeds \$ 50,000. In a class action, only the domicile of the class representative (plaintiff) is considered, rather than that of the class members. William W. Schwarzer, et al., *Federal Civil Procedure Before Trial* P 10:394 (citing Supreme Tribe **[**8]** of [Ben Hur v. Cauble](#), [255 U.S. 356, 65 L. Ed. 673, 41 S. Ct. 338 \(1921\)](#); see also [Friedman v. Meyers](#) [482 F.2d 435 \(2nd Cir. 1973\)](#)). For the purposes of diversity jurisdiction, a corporation is deemed to have two (2) states of citizenship--its state of incorporation and the state wherein it has its principal place of business. See [28 U.S.C. § 1332\(c\)\(1\)](#).

HN2 [↑] On removal, the burden of establishing grounds for federal jurisdiction rests on the defendant. Indeed, there is a "strong presumption" against removal jurisdiction. See [*Gaus v. Miles, Inc.*, 980 F.2d 564, 566 \(9th Cir. 1992\)](#). Accordingly, when there is doubt as to removability, it is resolved in favor of remanding the case to state court. Schwarzer, et al., *supra*, P 2:606 (citing [*Gaus*, 980 F.2d 564; Shamrock Oil & Gas Corp. v. Sheets](#), 313 U.S. 100, 85 L. Ed. 1214, 61 S. Ct. 868 (1941)).

B. Analysis

1. Diversity of Citizenship

Plaintiffs Borgeson and Goings are citizens of the State of California. Defendant STALEY is incorporated in the state of Delaware and its principal place of business is in Illinois. Defendant ADM is a Minnesota Corporation with its principal place of business in [**9] the State of Illinois.⁷ Defendant CPC is a Delaware Corporation with its principal place of business in New York. Since no Defendant is a citizen of the same state as the Plaintiff, and the Court need not consider the citizenship of defendants sued under fictitious names (Does), there is diversity of citizenship. [28 U.S.C. § 1441\(a\)](#) ("For purposes of removal. . .the citizenship of defendants sued under fictitious names shall be disregarded.").)

2. Amount in Controversy

Defendant Staley argues that the amount in controversy requirement can be satisfied in one of two ways. First, Staley asserts that the entire amount of the attorneys' fees should be allocated to the named Plaintiffs, giving the Court jurisdiction over their [**10] claims, and that the Court should then assert supplemental jurisdiction over the other members of the classes based on [28 U.S.C. § 1367](#). Alternatively, Defendant Staley contends that punitive damages should be considered a "common and undivided" interest shared by all the class members, giving the Court jurisdiction over both of the entire classes.

a. The Validity of the United States Supreme Court's Decision in *Zahn v. Int'l. Paper Co.*

Defendant Staley's argument that all attorneys' fees should be attributed to the named Plaintiffs, and that the Court should use supplemental jurisdiction, contradicts the rulings in [*Zahn v Int'l Paper Co.*, 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 \(1973\)](#), and [*Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1366-67 \(9th Cir. 1982\)](#), cert. denied, 459 U.S. 945 (1982). Staley first argues that *Zahn* has been legislatively overruled, and, because the *Goldberg* court relied on *Zahn*, suggests that *Goldberg* is no longer sound authority. The Court must therefore address the threshold issue of the validity of the Supreme Court's decision in *Zahn*.

i. *Zahn* and its History

In [*Snyder v. Harris*, 394 U.S. 332, \[**11\] 22 L. Ed. 2d 319, 89 S. Ct. 1053 \(1969\); reh'g denied 394 U.S. 1025, 23 L. Ed. 2d 50, 89 S. Ct. 1622 \(1969\), the United States Supreme Court was faced with the issue of whether the 1966 amendments to \[Federal Rule of Civil Procedure 23\]\(#\) changed the law regarding the aggregation of claims in class actions. In *Snyder* the Supreme Court consolidated two cases, one in which a shareholder brought a class action against corporation directors, \[*714\] and the other in which a customer brought a class action against a gas company to recover alleged overpayment. Both cases involved separate and distinct claims, and *no member* of the class alleged damages satisfying the amount in controversy \(at that time \\$ 10,000\).](#)

⁷ In their Notice of Removal, Defendant STALEY states that Defendant ADM is a Delaware corporation, when in fact, Defendant ADM is a Minnesota corporation. Notice of Removal, p.4, P 7. However, this misstatement is irrelevant for the purposes of determining diversity jurisdiction.

In its opinion, the *Snyder* Court traced the development of the jurisdictional amount in controversy requirement since the first congressional grant of jurisdiction in 1789. The Court emphasized that [HN3](#)¹ the long-standing judicial interpretation has been that "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement". [*Id. at 334-35*](#). In a case with two or more plaintiffs, aggregation is permitted [\[**12\]](#) only when the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest". [*Id. at 335*](#).

In deciding that the 1966 amendments to [Rule 23](#) did not change the rules of aggregation, the Supreme Court reasoned that the doctrine of aggregation of claims was not and had never been based on the categories of [Rule 23](#), nor on any rule of procedure. Rather, the doctrine is in fact based on the Supreme Court's interpretation of "matter in controversy," within the meaning of the diversity statute. [*Id. at 336*](#). The Supreme Court's interpretation of "matter in controversy" dates back to 1911, and has been applied to class actions since 1939. [*Id. at 336-37*](#). Congress, well aware of the Supreme Court's settled interpretation of the language, has never changed the wording of the statute, despite its numerous increases of the actual "amount" required for jurisdiction. [*Id. at 338-39*](#).

In *Zahn*, the Court was presented with a similar, yet distinct question. In *Zahn*, the main plaintiffs satisfied the amount in controversy requirement, but the rest of the class did not. On these facts, the *Zahn* Court refused to extend diversity jurisdiction [\[**13\]](#) to the remaining members of the class. In essence, the Court again found that the amount in controversy requirement could not be aggregated or shared.

In reaching its decision, the *Zahn* Court specifically *reaffirmed* the reasoning of the *Snyder* court. [414 U.S. at 293-302](#). Acknowledging that *Snyder* involved class actions in which *no member* of the class had claims that satisfied the amount in controversy requirement, the *Zahn* court stated "there is no doubt that the rationale of that case controls this one". [*Zahn, 414 U.S. at 300*](#). In sum, the *Snyder* rule holds that separate and distinct claims may not be aggregated for the purposes of the amount in controversy requirement, thus forcing the remand of cases in which no member of the class meets the amount in controversy requirement. *Zahn* follows *Snyder* by requiring the dismissal of class members who do not meet the amount in controversy requirement, even if some members do. [*Zahn, 414 U.S. at 300*](#); see also [*Clark v. Paul Gray, Inc., 306 U.S. 583, 83 L. Ed. 1001, 59 S. Ct. 744 \(1939\)*](#) (dismissing from the suit all plaintiffs who did not have a sufficiently large claim).

In addition, the *Zahn* [\[**14\]](#) Court reasoned that if Congress wanted to change the Supreme Court's interpretation of the statutory language, there would have been some "express statement" to that effect in either the amendments or in the official commentaries. [*Zahn, 414 U.S. at 302*](#). In the absence of such an express statement, the Supreme Court declined to alter its prior rulings.

ii. The Effect of the Judicial Improvements Act of 1990

In 1990, Congress passed the Judicial Improvements Act of 1990 ("the Act") amending [28 U.S.C. § 1367](#) to create "supplemental" jurisdiction out of pendent and ancillary jurisdiction. [HN4](#)¹ [Section 1367](#) now states in relevant part:

- (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States [\[*715\]](#) Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional [\[**15\]](#) parties.

[28 U.S.C. § 1367 \(a\)](#) (emphasis added). [HN5](#)¹ This broad grant of jurisdiction is limited by subsection (b) which specifies the circumstances in which the district courts shall not have jurisdiction.⁸ [\[**16\]](#) In addition, the grant is

⁸ [HN6](#)¹ [28 U.S.C. § 1367\(b\)](#) states:

limited as otherwise provided in federal statutes (such as [28 U.S.C. § 1332](#)). Congress' creation of supplemental jurisdiction has led many to question the validity of prior Supreme Court rulings such as *Zahn* and *Snyder*.⁹

Defendant Staley asserts that the supplemental jurisdiction amendments legislatively [\[**17\]](#) overruled the Supreme Court's decision in *Zahn*. The Ninth Circuit has not yet spoken on this issue. In support of its position, however, Staley cites a recent Fifth Circuit case, *In re: Abbott Laboratories*, [51 F.3d 524 \(5th Cir. 1995\)](#) *reh'g and sug. reh'g en banc denied*, [65 F.3d 33, 1995 WL 522975 \(5th Cir. 1995\)](#), which involved a similar class action based on state antitrust violations. In *Abbott*, the Fifth Circuit reasoned that because the restrictions listed in subsection (b) do not refer to [Rule 23](#) or class actions, then class actions must be included in the general rule of subsection (a). That would mean that district courts would have supplemental jurisdiction over the claims of class members who did not meet the amount in controversy requirement. [Abbott, 51 F.3d at 527-28](#). This interpretation directly contradicts the Supreme Court's *Zahn* ruling.

In reaching its conclusion, the *Abbott* court applied a plain meaning approach to statutory interpretation, declining to examine the legislative history of the Act. Indeed, the Fifth Circuit reached this conclusion even though the legislative history clearly indicates that Congress did not intend to overrule *Zahn* [\[**18\]](#) or *Snyder*. The House Report accompanying the Act states that "district courts may exercise supplemental jurisdiction, except when to do so would be inconsistent with the jurisdictional requirements of the diversity statute." H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875. In addition, supplemental jurisdiction "is not intended to affect the jurisdictional requirements of [28 U.S.C. § 1332](#) in diversity-only class actions, as those requirements were interpreted prior to *Finley* [v. [United States, 490 U.S. 545 \(1989\)](#)]." *Id.* at 6875.¹⁰ Further, the House Report cites *Supreme Tribe of Ben Hur* and *Zahn* as representing the pre-*Finley* interpretation. *Id.* at 6875 & n.17. The *Abbott* court stated that it is improper to search the legislative history for congressional intent unless the statute is unclear or ambiguous. [Abbott, 51 F.3d at 528-29](#) (citations omitted). Other than the Fifth Circuit case, the Court has found only a few district court cases finding that [Section 1367](#) legislatively overrules *Zahn*.¹¹ However, a plethora of cases hold that *Zahn* is untouched by the supplemental jurisdiction amendments.¹² See, e.g. [Duet v. Lawes, 1994 U.S. Dist. LEXIS 4755, 87, 1994 WL 151095](#), at *2 (E.D. La. 1994) (holding that *Zahn* is not overruled based on argument that the claims of the co-plaintiffs are part of the initial civil action, not "other claims" and therefore [Section 1367](#) does not apply to the claims of co-plaintiffs); [LeRoy Cattle Co., Inc. v.](#)

In any civil action of which the district courts have original jurisdiction founded solely on [section 1332](#) of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under [Rule 14](#), [19](#), [20](#), or [24 of the Federal Rules of Civil Procedure](#), or over claims by persons proposed to be joined as plaintiffs under [Rule 19](#) of such rules, or seeking to intervene as plaintiffs under [Rule 24](#) of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of [section 1332](#).

⁹ See generally, Joan Steinman, [Section 1367 - Another Party Heard From](#), [41 Emory L.J. 85, 102-3 \(1992\)](#) (suggesting that the courts interpret the Act to legislatively overrule *Zahn*); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, [40 Emory L.J. 445, 485-86 \(1991\)](#) (stating that the plain language of the Act overrules *Zahn*, but contradicts the legislative history); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, [40 Emory L.J. 963, 981 \(1991\)](#) (same). Contra Thomas D. Rowe, Jr., Stephen B. Burbank, & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, [40 Emory L.J. 943, 949](#) n. 27, 960 n. 90 (1991) (authors who drafted the Act stating that the legislative history was "an attempt to correct an oversight" in the Act that led some commentators to assert that the Act overruled *Zahn*).

¹⁰ In *Finley* the Supreme Court prevented a plaintiff who had satisfied original subject matter jurisdiction under the Federal Tort Claims Act from adding a transactionally-related state claim against a different, non-diverse defendant.

¹¹ See, e.g. *Lindsay v. Kvortek*, [865 F. Supp. 264 \(W.D.Pa. 1994\)](#) (determining based on a plain language reading of the statute that [Section 1367](#) legislatively overrules *Zahn*; case did not involve a class action); *Garza v. National Am. Ins. Co.*, [807 F. Supp. 1256, 1258 \(M.D. La. 1992\)](#) (same); *Patterson Enter., Inc. v. Bridgestone/Firestone, Inc.*, [812 F. Supp. 1152, 1154 \(D. Kan. 1993\)](#) (same); *Booty v. Shoney's, Inc.*, [872 F. Supp. 1524 \(E.D. La. 1995\)](#) (holding that if the requirements of [§ 1367\(a\)](#) are met and the case does not fit one of the exceptions enumerated in (b), the district court has jurisdiction; case was not a class action).

Fina Oil & Chemical Co., 1994 U.S. Dist. LEXIS 4802, 1994 WL 151105 (D. Kan. 1994) (holding *Zahn* is not overruled and noting that Congress could not list *Rule 23* in subsection (b) because to do so would have the effect of overruling the Supreme Court's decision in *Supreme Tribe*, that only named parties have to meet the diverse citizenship requirement); *Stoumen v. Public Service Mut. Ins. Co., 1994 U.S. Dist. LEXIS 4021, 1994 WL 111355 (E.D. Pa. 1994)* (upholding *Zahn* based on an examination of the legislative history and agreement with the reasoning in the preponderance of district courts that have reached a like decision); *Clement v. Occidental Chem. Corp., 1994 U.S. Dist. LEXIS 12387*, *19, 1994 WL 479155, *11-20 (E.D. La. 1994) (examining the legislative history to find that the Act does not weaken the *Zahn* doctrine); *Leung v. Checker Motors Corp., 1993 U.S. Dist. LEXIS 17174*, *5, [1993 WL 515470](#), *2 (N.D. Ill. 1993) ("Although this provision does not directly [**20] address the issue of supplemental jurisdiction over original plaintiffs whose claims do not meet the jurisdictional requirements, . . . the implication is that plaintiffs without an independent ticket of entry to federal court should not be able to get into federal court by "piggybacking" onto other claims which do satisfy the jurisdictional requirements."); *Griffin v. Dana Point Condominium Ass'n, 768 F. Supp. 1299, 1301-02 & n.4 (N.D. Ill. 1991)* ("a close look at both the language of the statute and its legislative history teaches that the new provision does not change the old law in this area at all.").
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[**22] Furthermore, it is evident that the plain language of subsection (a) is entirely *consistent* with *Zahn*. Through the incorporation of the language "or as expressly provided otherwise by federal statute", Congress specifically included as an exception to *§ 1367 (a)* any other federal statute, including *§ 1332* (and its most relevant judicial interpretations *Zahn* and *Snyder*) (emphasis added). Despite references to diversity jurisdiction and *§ 1332*, and with full knowledge of the Supreme Court's long-standing interpretation of that language, nowhere in the Act did Congress change the language of *§ 1332*. In choosing once again to keep the language of *§ 1332* in its original form, Congress reaffirmed the Supreme Court's historical treatment of the language "matter in controversy".

Taking into account the plain language of *§ 1367*, the purpose of the Act (as expressed in the legislative history), and the fact that Congress has raised the amount in controversy limit steadily over the years, without [*717] ever indicating that the Supreme Court's interpretation of the "matter in controversy" in class actions was contrary to Congressional intent, the Court finds no basis for [**23] holding that *Zahn* has been legislatively overruled. Therefore, the Court, unpersuaded by Defendant Staley's arguments, must follow the established rule that in a class action involving separate and distinct claims, every member must satisfy the requirements of *§ 1332* in order for a federal court to exercise diversity jurisdiction over the entire class action.¹³

¹² See also *Riverside Transp., Inc. v. BellSouth Telecommunications, Inc.*, 847 F. Supp. 453, 455-56 (M.D. La. 1994); *Pierson v. Perrier*, 848 F. Supp. 1186 (E.D. Pa. 1994); *North American Mechanical Servs. Corp. v. Hubert*, 859 F. Supp. 1186, 1188-89 (C.D. Ill. 1994); *Neve Bros. v. Potash Corp. (In re Potash Antitrust Litig.)*, 866 F. Supp. 406, 414 (D. Minn. 1994); *Henkel v. ITT Bowest Corp.*, 872 F. Supp. 872, 877 (D. Kan. 1994); *Aspe Arquitectos, S.A. de C.V. v. Jamieson*, 869 F. Supp. 593, 595 (N.D. Ill. 1994); *Dirosa v. Grass*, 1994 U.S. Dist. LEXIS 15100, 1994 WL 583276, at *2 (E.D. La. 1994); *Kaplan v. Mentor Corp.*, 1994 U.S. Dist. LEXIS 15779, at *3 (N.D. Ill. 1994), supplemented, *1994 U.S. Dist. LEXIS 15410* (E.D. Ill. 1994); *Benninghoff v. Tolson*, 1994 U.S. Dist. LEXIS 13428, 1994 WL 519745, at *4 (E.D. Pa. 1994); *Mayo v. Key Fin. Serv., Inc.*, 812 F. Supp. 277, 278 (D. Mass. 1993); *Chouest v. American Airlines, Inc.*, 839 F. Supp. 412, 414-415 (E.D. La. 1993); *Hairston v. Home Loan and Inv. Bank*, 814 F. Supp. 180, 181 n.1 (D. Mass. 1993); *Benfield v. Mocatta Metals Corp.*, 1993 U.S. Dist. LEXIS 5856, 1993 WL 148978 (S.D. N.Y. 1993); *Averdick v. Republic Fin. Serv., Inc.*, 803 F. Supp. 37, 45-46 (E.D. Ky. 1992); *Bradbury v. Robertson-Ceco Corp.*, 1992 U.S. Dist. LEXIS 10888 (N.D. Ill. 1992); *Fink v. Heath*, 1991 WL 127664, at *3 (N.D. Ill. 1991); *Cheramie v. Texaco, Inc.*, 1991 WL 236784 (E.D. La. 1991).

¹³ Defendant Staley's argument that the Court should exercise supplemental jurisdiction over the claims of the class members hinges on the additional argument that the named Plaintiffs meet the amount in controversy requirement.

Defendant Staley argues that the amount in controversy requirement can be met for the named Plaintiffs in these cases by attributing all the attorneys' fees to them. Defendant Staley suggests that the Court should be persuaded on this issue by the Fifth Circuit's reasoning in *Abbott*, 51 F.3d at 526. This argument *directly contradicts* Ninth Circuit authority holding that attorney's fees must be attributed to each member on a pro rata basis, and more specifically that attorneys' fees *cannot* be aggregated for jurisdictional purposes. *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1366-67 (9th Cir. 1982), cert. denied, 459 U.S. 945 (1982); *Czechowski v. Tandy Corp.*, 731 F. Supp. 406, 409-10 (N.D. Cal. 1990).

[**24] b. Common and Undivided Interest

HN7 While the general rule is that claims cannot be aggregated in order to satisfy the amount in controversy requirement, there is a long-recognized exception to this rule. When parties have a "common and undivided" interest, claims can be aggregated to satisfy the amount in controversy requirement. [Zahn, 414 U.S. at 293](#); [Snyder, 394 U.S. at 334](#). Staley asserts that punitive damages are the "common and undivided" interest of all members of the class, and should therefore be aggregated to establish the necessary amount in controversy.

The Ninth Circuit has stated that claims are properly aggregated only when the claims "derive from rights which [the plaintiffs] hold in group status." [Potrero Hill Community Action Comm. v. Housing Authority, 410 F.2d 974 \(9th Cir. 1969\)](#); see also [Eagle v. American Tel. & Tel. Co., 769 F.2d 541 \(9th Cir. 1985\)](#), cert. denied, 475 U.S. 1084, 89 L. Ed. 2d 721, 106 S. Ct. 1465 (1986); [United States v. Southern Pac. Trans. Co., 543 F.2d 676 \(9th Cir. 1976\)](#); [Snow v. Ford Motor Co., 561 F.2d 787 \(9th Cir. 1977\)](#). In *Potrero*, the Ninth Circuit held that because each Plaintiff's rights [**25] arose from the contract between each plaintiff and the Housing Authority, their rights were individual rather than common and undivided. [Potrero, at 978](#). *Potrero* is analogous to the facts before the Court in this case: here, each member of the class derives his or her claim from individual purchases of corn syrup. The Ninth Circuit has further stated that even though plaintiffs' claims may present common questions of law and fact, if the statute authorizing the cause of action bestows the right on the *individual*, not the group, then plaintiffs' claims arise from their *individual rights* rather than their group status. [Southern Pacific, 543 F.2d at 683](#). See also [Kasky v. Perrier Group of America, Inc., 1991 U.S. Dist. LEXIS 21177, 1991 WL 577038 \(S.D. Cal. 1991\)](#) (reaffirming the validity of the Ninth Circuit's opinion in *Southern Pacific*).

HN8 In addition to establishing a public cause of action (enforced by the State Attorney General), the Cartwright Act gives a private right to sue for damages and treble damages to *each person* who suffers harm. West's Ann. [Cal.Bus. & Prof. Code §§ 16750 et seq.](#) (1987). The plain language of the Cartwright Act demonstrates that the California legislature [**26] intended to vindicate *individual* rights through private causes of action.¹⁴ Therefore, each purchaser of corn syrup could theoretically sue individually for treble damages under the Cartwright Act.

Furthermore, in order to determine whether the claims may be aggregated, the [*718] Court must first characterize the claim under the law in the state that creates the cause of action. [Eagle, 769 F.2d 541](#). Defendant asserts that the Court should find persuasive the reasoning of a Fifth Circuit case that finds that punitive damages are a common and undivided interest. See [Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1995 WL 509350 \(5th Cir. 1995\)](#). In *Allen*, the Fifth Circuit stated that under Mississippi law, 1) punitive damages are fundamentally collective; 2) the nature of punitive damages is to punish the wrongdoer and to protect society; 3) the benefits are meant [**27] to accrue to society; 4) because it is within the discretion of the judge or jury to award or withhold them, plaintiffs do not have a claim of right to punitive damages; and, that this unique nature of punitive damages requires:

"that the full amount of alleged damages be counted against each plaintiff in determining the jurisdictional amount. As punitive damages are collective awards, each plaintiff has an integrated right to the full amount of the award."

[Allen v. R & H Oil & Gas Co., 63 F.3d at 1333, 1995 WL 509350](#), at *4 (5th Cir. 1995). California law attributes those same qualities to punitive damages. See [Chronicle Publishing Co. v Legrand, 1992 U.S. Dist. LEXIS 20225, 1992 WL 420808 \(N.D. Cal. 1992\)](#) (discussing and summarizing California law on punitive damages).

Staley asserts that *Goldberg* is no longer sound authority due to the *Goldberg* court's reliance on *Zahn*. As discussed above, *Zahn* is still good authority; therefore, so is *Goldberg*. Because the Court finds the doctrine of *Zahn* to be unaffected by the Act, thereby erasing any grounds for the extension of supplemental jurisdiction in this case, Defendant Staley's arguments on the subject of attorneys' fees are irrelevant.

¹⁴ The Cartwright Act provides for group rights through the public cause of action. West's Ann. [Cal.Bus. & Prof. Code §§ 16750 et seq.](#) (1987).

However, in the cases before the Court, the Plaintiffs seek only the *treble damages* authorized in the Cartwright Act. Plaintiffs do not seek "punitive damages."¹⁵ While treble damages are punitive in nature, and therefore a portion of the Fifth Circuit's discussion of punitive damages would apply to them with equal force, the Cartwright Act gives plaintiffs a *specific right to these damages*. The fact that treble damages [**28] are guaranteed distinguishes the instant case from the Fifth Circuit case, in which punitives were left to the discretion of the court or jury. Here, each individual plaintiff could sue for treble damages independently. This differentiates the instant case from the Fifth Circuit's holding in *Allen*.

In addition, even if the Court [**29] were to analogize treble damages to punitive damages, the Ninth Circuit has not ruled on the issue of whether punitive damages constitute a common and undivided interest, and the district courts that have addressed the subject are split in their decisions. A case from the Northern District of California held that punitive damages are a common and undivided interest that could be used to satisfy the amount in controversy requirement. However, the district court also held that jurisdiction was proper on an alternative ground. See *In re: Northern Dist. of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887 (N.D. Cal. 1981).¹⁶ However, the Court is reluctant to be guided by the Northern District court's reasoning because that court based its punitive damages holding on *Berman v. Narragansett Racing Association, Inc.*, 414 F.2d 311 (1st Cir. 1969). The Ninth Circuit specifically disapproved *Berman*, stating that it had probably been overruled by *Zahn. United States v. Southern Pacific Trans. Co.*, 543 F.2d 676, 683 (9th Cir. 1976).

[**30] Moreover, district courts in the Central and Southern Districts of California have held that members of a class *do not* have a common and undivided interest in punitive [*719] damages. See *Smiley v. Citibank (South Dakota), NA.*, 863 F. Supp. 1156 (C.D. Cal. 1993) (Credit cardholder brought putative class action in state court seeking damages and injunctive relief against credit card issuer, alleging that issuer's practice of charging late fees violated California law); *Kasky v. Perrier Group of America, Inc.*, 1991 U.S. Dist. LEXIS 21177, 1991 WL 577038 (S.D. Cal. 1991) (Class action brought against Perrier on allegations of misrepresentation through advertising and product labelling).

Because of the difference in nature between punitive damages and the treble damages involved in this case, the Court is not inclined to accept the reasoning of the *Allen* court. Further, even if one were to analogize treble damages to punitive damages, the Court still concludes that treble damages cannot be aggregated for the purposes of the amount in controversy requirement. The treble damages in these cases must be attributed pro rata to each member of the classes for the purposes of determining if the amount in controversy [**31] requirement has been met.

Nowhere in the Complaints, the Notices of Removal, or in Defendant Staley's Response to the OSC is it alleged that each individual class member has a claim, including treble damages and attorneys' fees, that exceeds \$ 50,000. Rather, in asserting diversity jurisdiction as a basis for removal jurisdiction, Defendant Staley relies on the above theories to either change the amount in controversy requirement or to consider the treble or punitive damages as a "common and undivided" interest. Having found neither of Defendant's theories persuasive, the

¹⁵ Defendant Staley argues that Plaintiffs could amend their Complaints to ask for punitive damages in lieu of treble damages. But the Court is bound to evaluate jurisdiction based on the claims in the Complaints as they now stand. If in the future, Plaintiffs amend their Complaints to pray for punitive damages, and the Defendant believed that the Amended Complaint stated a basis for federal jurisdiction, then Defendant could seek to remove once again. The Defendants' right to remove would commence when first put on notice that federal jurisdiction might exist. Schwarzer, et al., P 2:666 (citing *28 U.S.C. § 1446(b)*). However, the Court is not presented with this question today.

¹⁶ It has been argued that the Ninth Circuit impliedly gave its approval to the Northern District court's reasoning, but when the Ninth Circuit vacated and remanded that decision, the Ninth Circuit said only that the district court asserted "jurisdiction on the basis of diversity of citizenship" without stating whether jurisdiction was proper and if so, on which of the two (2) alternative grounds. *In re: Northern Dist. of California "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847, 849 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

909 F. Supp. 709, *719 1995 U.S. Dist. LEXIS 20457, **31

Court finds that Plaintiff fails to satisfy the amount in controversy requirement. The Court therefore has no jurisdiction over these cases.

IV. Conclusion

For all of these reasons, the Court hereby REMANDS these cases to state court.

SO ORDERED.

DATED: Oct. 12, 1995

AUDREY B. COLLINS

UNITED STATES DISTRICT JUDGE

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Johnson v. Greater Southeast Community Hosp. Corp.

United States District Court for the District of Columbia

October 19, 1995, Decided ; October 19, 1995, FILED

Civil Action No. 90-1992 (RCL)

Reporter

903 F. Supp. 140 *; 1995 U.S. Dist. LEXIS 15475 **; 69 Fair Empl. Prac. Cas. (BNA) 280; 1995-2 Trade Cas. (CCH) P71,175

HAROLD D. JOHNSON, M.D., Plaintiff, v. GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION, et al., Defendants.

Core Terms

patient, privileges, defendants', terminated, staff member, ripeness, summary judgment motion, antitrust claim, civil rights claim, membership, supervision, monitoring, conspiracy, hospital privileges, reappointment, rights, Staff, plaintiff's claim, civil rights, conspired, appointment, parties, employment relationship, summary judgment, federal court, proceedings, expiration, antitrust, terms, allegations

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Ripeness > General Overview

HN1 [] **Justiciability, Ripeness**

Questions of ripeness go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

Civil Procedure > ... > Justiciability > Ripeness > General Overview

HN2 [] **Ripeness, Tests for Ripeness**

Questions of ripeness turn on the fitness of the issues for judicial decisions and the hardship to the parties of withholding consideration. The ripeness inquiry involves a balancing of the interests of the party seeking relief from an alleged or perceived injury with the court's interest in postponing review until the question arises in a more concrete fashion. Ripeness issues, by their very nature, require a subtle and subjective assessment.

Civil Procedure > ... > Justiciability > Ripeness > General Overview

Constitutional Law > The Judiciary > Case or Controversy > Ripeness

903 F. Supp. 140, *140 1995 U.S. Dist. LEXIS 15475, **15475

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN3 Justiciability, Ripeness

The question of ripeness goes to our subject matter jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.

Civil Procedure > ... > Justiciability > Ripeness > General Overview

HN4 Justiciability, Ripeness

The question of ripeness is of such importance that federal courts are required to raise it *sua sponte* even though the parties do not.

Governments > State & Territorial Governments > Licenses

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

HN5 State & Territorial Governments, Licenses

The expiration of the physician's monitoring and supervision agreement with the hospital cannot be said to trigger [D.C. Code Ann. § 32-1307\(f\)](#).

Evidence > Privileges > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Facilities > General Overview

Civil Procedure > ... > Justiciability > Ripeness > General Overview

Healthcare Law > ... > Actions Against Facilities > Facility Liability > General Overview

Healthcare Law > Business Administration & Organization > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN6 Evidence, Privileges

Where a physician officially retains his hospital privileges and, consequently, his ability to admit patients to the hospital, the physician cannot sustain a claim of injury based solely on the allegation that he would not be permitted to exercise his privileges if he had wished to do so. The physician must do more than speculate. At a minimum, the physician must show some failed attempt to exercise his privileges.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

903 F. Supp. 140, *140 1995 U.S. Dist. LEXIS 15475, **15475

HN7 [blue download icon] Antitrust & Trade Law, Sherman Act

Plaintiff bears the burden of pleading and proving an illegal conspiracy under the Sherman Antitrust Act. To do so, plaintiff must: (1) demonstrate that each defendant made a conscious commitment to an illegal conspiracy; (2) present competent evidence that each defendant took acts in furtherance of that conspiracy; and (3) make a showing that the conspiracy was the proximate cause of antitrust injury to the plaintiff.

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination

Civil Rights Law > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Classes

HN8 [blue download icon] Equal Rights Under the Law (sec. 1981), Proof of Discrimination

[42 U.S.C.S. § 1981\(a\)](#) provides in pertinent part that any persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts as is enjoyed by white citizens.

Civil Rights Law > Protection of Rights > Contractual Relations & Housing > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Civil Rights Law > General Overview

Labor & Employment Law > Affirmative Action > General Overview

Labor & Employment Law > Employment Relationships > Employment Contracts > Breaches

HN9 [blue download icon] Protection of Rights, Contractual Relations & Housing

[42 U.S.C.S. § 1981](#) prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract, only on discriminatory terms. But the right does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract.

Civil Rights Law > General Overview

HN10 [blue download icon] Civil Rights Law

[42 U.S.C.S. § 1981](#) is only applicable when a new contractual relationship is contemplated. Contract modification, by contrast, is governed by the existing contract.

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Civil Rights Law > General Overview

HN11 [blue icon] Civil Rights Law

42 U.S.C.S. § 1981 does not apply to contract terminations.

Civil Rights Law > General Overview

HN12 [blue icon] Civil Rights Law

42 U.S.C.S. § 1981 does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.

Civil Rights Law > General Overview

HN13 [blue icon] Civil Rights Law

Renewals, like postformation modifications, are governed by the existing contract. Accordingly, allegations of failure to renew a contract are not actionable under 42 U.S.C.S. § 1981.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Civil Rights Law > General Overview

HN14 [blue icon] Conspiracy Against Rights, Elements

42 U.S.C.S. § 1985(3) provides in pertinent part that if two or more persons conspire for purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws the party so injured or deprived may have an action for recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Civil Rights Law > General Overview

Constitutional Law > Privileges & Immunities

HN15 [blue icon] Civil Rights Law

42 U.S.C.S. § 1985(3) is purely remedial in nature, embodying no substantive rights of its own. Consequently, the claimant must demonstrate that the defendant's conduct violates the rights, privileges, and immunities under the Fourteenth Amendment that § 1985(3) was intended to vindicate.

Civil Rights Law > General Overview

HN16 [blue icon] Civil Rights Law

A violation of federal rights secured by 42 U.S.C.S. § 1981 may serve as the basis of a 42 U.S.C.S. § 1985 claim.

Civil Rights Law > General Overview

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Elements

Governments > Federal Government > Employees & Officials

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > General Overview

HN17 [blue icon] Civil Rights Law

[42 U.S.C.S. § 1985\(1\), \(2\)](#) prohibit acts that may prevent a federal law enforcement official from performing his duty or otherwise obstruct justice.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

HN18 [blue icon] Governments, Civil Rights Act of 1964

[42 U.S.C.S. § 2000e-2\(a\)\(1\)](#) provides in pertinent part that it shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Employers

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Labor & Employment Law > Discrimination > Racial Discrimination > Scope & Definitions

HN19 [blue icon] Title VII Discrimination, Employers

An "employer" is defined in [42 U.S.C.S. § 2000e\(b\)](#) as a person engaged in an industry affecting commerce who has fifteen or more employees.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > Employees & Independent Contractors

HN20 [blue icon] Governments, Civil Rights Act of 1964

An "employee" is simply an individual employed by an employer, under [42 U.S.C.S. § 2000e\(f\)](#).

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Labor & Employment Law > Employment Relationships > Independent Contractors

HN21 [blue icon] At Will Employment, Definition of Employers

An independent contractor is a person who contracts to work with another to do something for him but who is not controlled by the other nor subject to the other right of control with respect to his physical conduct in the performance of the undertaking.

Evidence > Privileges > Doctor-Patient Privilege > Elements

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

Tax Law > Federal Taxpayer Groups > S Corporations > Basis of Stock

Healthcare Law > Business Administration & Organization > Employment Issues > Employment Discrimination

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

HN22 [blue icon] Doctor-Patient Privilege, Elements

An evaluation of the physician-patient relationship under the Spirides criteria indicates a classic independent contractor relationship: (1) a physician's work is normally conducted without supervision by the patient; (2) the practice of medicine is a highly skilled and specialized profession; (3) neither the equipment nor the place of work is provided by the patient; (4) a physician's work with respect to individual patients is usually brief and/or episodic; (5) the method of payment varies with patient and the particular services rendered; (6) the work relationship can be terminated at will by either the patient or the physician; (7) no annual leave is provided by the patient; (8) the services provided by the physician are typically not an integral part of the work of the patient; (9) the patient provides no retirement benefits for the physician; (10) the patient pays no social security taxes; and (11) patients generally do not intend to become a physician's employer.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

HN23 [blue icon] Governments, Civil Rights Act of 1964

A Title VII of the Civil Rights Act of 1964 (Title VII) claim is not always cognizable where the defendant controls access to such employment. Although "control" is an important aspect to be considered, it is neither the sole nor determinative factor as to whether a particular claim falls under the purview of Title VII.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Rights Law > General Overview

HN24 [blue icon] Subject Matter Jurisdiction, Supplemental Jurisdiction

D.C. Code Ann. § 1-2512 (1981) outlaws employment discrimination and conspiracies to deprive persons of their rights.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

Constitutional Law > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Jurisdiction

Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN25 [blue icon] Supplemental Jurisdiction, Same Case & Controversy

A federal court may exercise pendent jurisdiction over municipal law claims when such claims are so inextricably intertwined with the facts and circumstances giving rise to the federal claims that they form part of the same case or controversy under Article III. [28 U.S.C.S. § 1337](#).

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN26 [blue icon] Supplemental Jurisdiction, Pendent Claims

There must be a valid federal claim against each defendant for whom plaintiff seeks to present a claim of pendent jurisdiction under the District of Columbia Human Rights Act, D.C. Code § 1-2512 (1981).

Counsel: [**1] FOR Plaintiff: SHELLEY HAYES, WASHINGTON, D. C.

FOR Defendants: CHRISTINE ANGELINE NYKIELE, ARTHUR DAVID BURGEN, NICHOLAS STILLWELL McCONNELL, JACKSON & CAMPBELL, P.C., WASHINGTON, D. C.

Judges: Royce C. Lamberth, United States District Judge

Opinion by: Royce C. Lamberth

Opinion

[*143] MEMORANDUM OPINION

This case comes before the court on remand from the Circuit Court of Appeals for the District of Columbia. On August 17, 1990, Harold D. Johnson, M.D., an African-American obstetrician-gynecologist, filed a discrimination lawsuit in this court against Greater Southeast Community Hospital of Washington, D.C. ("Greater Southeast" or "Hospital") as well as some individually named defendants. In his complaint, Dr. Johnson set forth a number of

antitrust, civil rights, and tort claims involving defendants' alleged conspiracy to terminate his Medical Staff membership and patient privileges at Greater Southeast, Johns Hopkins Health Plan ("Johns Hopkins"), United Health Services, and Columbia Hospital for Women Medical Center ("Columbia Hospital") because of his race. Complete dismissal of this case without prejudice was granted by Judge Revercomb on December 12, 1990. The court ruled that none of Dr. [**2] Johnson's claims were ripe for adjudication because Dr. Johnson had not been officially terminated by Greater Southeast.¹ On December 13, 1991, the D.C. Circuit reversed the dismissal and remanded the case for additional fact-finding on the issue whether plaintiff's membership and privileges had been terminated. [Johnson v. Greater Southeast Community Hosp. Corp., 293 U.S. App. D.C. 1, 951 F.2d 1268, 1273 \(D.C. Cir. 1991\)](#). This court was further instructed to consider plaintiff's claims in the event that they were cured of any ripeness defect. The court now addresses the issues presented on remand.

I.

BACKGROUND

Harold D. Johnson, M.D., is a board-certified physician who specializes in obstetrics and gynecology. His relationship with Greater Southeast Community Hospital began with his appointment to the Active Medical Staff of the Hospital in 1981. In addition to Staff membership, the appointment provided Dr. Johnson [**3] with hospital privileges that permitted him to present his patients for hospitalization and treatment at Greater Southeast. From 1981 until 1988, Dr. Johnson applied for, and was granted, reappointment to the Active Medical Staff and continued hospital privileges without limitation. In January 1989, however, the Chairman of the Hospital's Department of Obstetrics and Gynecology, Victor Nelson, M.D., reported to the Medical Staff Executive Committee ("MSEC") that he had become aware of some issues related to the quality of health care being received by Dr. Johnson's patients. The MSEC established a six-member *ad hoc* committee to investigate Dr. Johnson's practice.

The MSEC completed its investigation on August 14, 1989 and concluded that Dr. Johnson should be subjected to "a severe reprimand, focused review, [and] concurrent monitoring and supervision of surgical cases for a minimum of 24 months." [Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140](#), Memorandum Opinion ("Mem. Op.") at 4 (D.D.C. Dec. 12, 1990). Three days later, the Medical Staff President, Odell [*144] McCants, M.D., notified Dr. Johnson that the MSEC's recommendation would be reviewed by the Hospital [**4] Board of Directors, but that in the meantime, the MSEC had placed Dr. Johnson on summary suspension.

An informal hearing before the MSEC to discuss the summary suspension issue was held on August 21, 1989. At the hearing, the MSEC asked Dr. Johnson if he would be willing to accept the MSEC's recommendation for close monitoring and supervision. Dr. Johnson indicated that he would, and signed an agreement setting forth the terms of the monitoring and supervision program on August 23, 1989. Following the signing of the agreement, the MSEC rescinded Dr. Johnson's summary suspension. After further review and approval of the MSEC's actions by both the Hospital Board of Directors and the Board's Quality Assurance Committee, the Board of Directors convened to render a final decision regarding Dr. Johnson's case on October 19 and 23, 1989. At some point during September 1989, Dr. Johnson submitted an application to Greater Southeast for reappointment to the Active Medical Staff for the 1990-91 cycle. The Hospital took no action on the reappointment application.

During the October meetings, the Board considered two courses of action. The first option considered was to retain Dr. Johnson on [**5] the Medical Staff subject to the 24-month monitoring and supervision program. The Board, however, chose to exercise the second option of terminating Dr. Johnson's membership and medical privileges altogether. Nevertheless, Dr. Johnson was allowed to continue his practice subject to the monitoring and supervision agreement while he pursued any hearing or appeal rights pursuant to the Hospital's by-laws. On October 24, 1989, the President of the Hospital, Thomas Chapman, informed Dr. Johnson of the Board's decision to terminate his privileges, and indicated that Dr. Johnson would have forty-five days in which to request a formal hearing. Chapman also conveyed to Dr. Johnson the Board's determination that "pending your decision concerning a formal hearing, and during any hearing proceedings, your Medical Staff membership and privileges may continue under the monitoring agreement you signed on August 23, 1989." [Id. at 6.](#)

¹ The case was reassigned to the undersigned Judge upon Judge Revercomb's untimely death.

Dr. Johnson requested a formal hearing on the matter. Kurt Darr was appointed Hearing Officer, and hearings were conducted on February 15 and 16, 1990. The hearings were scheduled to resume on March 22, 1990. On March 21, 1990, Dr. Johnson filed an action for breach [**6] of contract against Darr in the Superior Court of the District of Columbia, alleging that Darr's decision, in his capacity as Hearing Officer, to permit the Hospital to call an independent expert witness violated the Hospital's bylaws. Dr. Johnson's request for immediate injunctive relief was denied, and the hearing continued on the next day as planned. However, the case against Darr remained pending in Superior Court.

The final day of hearings was scheduled for April 5, 1990. However, Darr notified the parties on April 4 that he would not complete the hearing until the lawsuit in Superior Court was resolved. On April 18, 1995, Dr. Johnson served each member of the Hospital Board of Directors with a brief requesting that the Board reconsider its decision to terminate his Medical Staff membership and privileges. The Board voted to refrain from making any final decision regarding Dr. Johnson's status at the Hospital until the completion of the hearings and the filing of the Hearing Officer's report.

On May 8, 1990, the Superior Court dismissed Dr. Johnson's lawsuit against Darr as unripe. Darr nevertheless refused to continue the administrative proceedings until the parties stipulated [**7] that the proceedings were covered by the immunity provisions of the Health Care Quality Improvement Act of 1986, [42 U.S.C.A. § 11111 \(1988\)](#) ("HCQIA"). Although the Hospital agreed to stipulate, Dr. Johnson refused. Darr subsequently resigned as Hearing Officer on August 2, 1990.

Prior to Darr's formal resignation Dr. Johnson applied for reappointment to the Courtesy Staff of Columbia Hospital. As part of the reviewing procedure, Columbia Hospital requested that Greater Southeast forward copies of the patient histories at issue during Greater Southeast's investigation of Dr. Johnson's practice along with a [*145] questionnaire completed by Dr. Nelson. Dr. Johnson submitted Columbia Hospital's request to Dr. Nelson by certified mail. According to Dr. Johnson, Dr. Nelson failed to respond promptly, which resulted in the temporary suspension of his privileges at Columbia Hospital.

On August 10, 1990, Greater Southeast contacted Dr. Johnson through counsel to determine how he wished to proceed in light of the Hearing Officer's resignation. The Hospital proposed that the existing hearing record be submitted to the Board so that the Board might make a final determination as to Dr. Johnson's status [**8] at Greater Southeast. Dr. Johnson responded by filing this lawsuit on August 17, 1990.

In his complaint, Dr. Johnson alleged a number of antitrust, civil rights, and tort violations.² Dr. Johnson's antitrust claims are all rooted in the allegation that the Hospital and certain named defendants conspired to remove him from the existing market of obstetricians by: (1) terminating his Medical Staff membership and privileges at Greater Southeast; (2) precluding him from gaining privileges at Johns Hopkins and United Health Services; and (3) interfering with his reappointment at Columbia Hospital. Dr. Johnson maintained that these actions constituted a

² Dr. Johnson's claims were filed against Greater Southeast as well as individually named defendants. At the time of the filing of the complaint, plaintiff had separated the individually named defendants into two classes. The first class -- "Individual Non-Medical Defendants" -- included: Thomas Chapman, President of the Greater Southeast Community Hospital; Raymond Turner, M.D., President for Medical Affairs; Mary Lou Meyers, Vice President and General Counsel of Greater Southeast. Complaint P 12. The second class of defendants -- "Individual Medical Defendants" -- included: Mahmood Mohamadi, M.D., Chairman of the Credentials Committee and member of the Hospital Board of Directors; Odell McCants, M.D., President of the Medical Staff; Victor Nelson, M.D. Chairman of the Department of Obstetrics and Gynecology; William R. Coyle, M.D., member of the Department of Obstetrics and Gynecology; and Gail Van Wingerden, M.D., member the Department of Obstetrics and Gynecology. Complaint P 14. One final defendant -- Edward Hinman, member of the Hospital Board of Directors -- was not classified. Complaint P 13.

Since the initiation of this suit, plaintiff's claims against Mr. Darr, Dr. Mohamadi, and Dr. Van Wingerden have been dismissed. Plaintiff's antitrust claims remain pending against Greater Southeast and all remaining defendants. Complaint PP 43, 47, 50. Plaintiff's civil rights were originally filed and remain pending against Greater Southeast, and individual defendants Chapman, Turner, Mayers, Hinman, McCants, and Nelson. Complaint PP 56, 61. Plaintiff's claim of tortious inducement to breach was originally filed and remains pending only against defendant Hinman. Complaint P 67.

clear restraint on trade and commerce in inpatient obstetrical services in violation of [§§ 1](#) and [2](#) of the Sherman Antitrust Act, [15 U.S.C. §§ 1, 2 \(1988\)](#), and the comparable provisions of the District of Columbia Code, [D.C. Code Ann. §§ 28-4502, 28-4503](#) (1981).

[**9] Dr. Johnson also alleged a series of civil rights violations. Dr. Johnson claimed that the defendants refused to contract with him on racially neutral grounds, in violation of the Civil Rights Act of 1866, [42 U.S.C. § 1981](#) and the Civil Rights Act of 1871, [42 U.S.C. § 1985](#). In addition, Dr. Johnson claimed that the defendants unlawfully discriminated against him in the terms, conditions, and privileges of his employment, in violation of Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e](#) and the District of Columbia Human Rights Act, D.C. Code § 1-2512 (1981), by their refusal to grant him unrestricted Medical Staff membership and hospital privileges, and their failure to act on his 1989 reappointment application.

Finally, Dr. Johnson claimed that Dr. Edward Hinman, the principal advocate for termination of Dr. Johnson's membership and privileges at Greater Southeast, violated the common law of the District of Columbia when he tortiously induced the Hospital to breach its appointment contract with him by terminating his Staff membership and hospital privileges.

Defendants first moved for dismissal and, in the alternative, for summary judgment on all of Dr. Johnson's [**10] claims primarily on the grounds that the claims were not ripe for adjudication because the Hospital had not completed its administrative termination proceedings. Dr. Johnson then moved for summary judgment on the civil rights claims, arguing that the defendants had failed to [*146] meet the burden of articulating a legitimate, non-discriminatory reason that would explain their collective actions against him. The district court denied plaintiff's motion for summary judgment on his civil rights claims and granted defendant's motion to dismiss all claims based on a finding that "because plaintiff's privileges and membership at the hospital remain intact, subject to the monitoring program agreed to by the plaintiff, the plaintiff has suffered no injury which is ripe for judicial consideration at this time under either [antitrust law](#), civil rights law, or in tort." ³ Mem. Op., at 10.

[**11] Dr. Johnson appealed the dismissal of his lawsuit and the denial of his motion for partial summary judgment on the civil rights claims. The D.C. Circuit reversed this court's dismissal of Dr. Johnson's case and remanded it for additional fact-finding on the issue whether Dr. Johnson's membership and privileges were in fact terminated at the time of the appeal. The court also instructed this court to consider any of Dr. Johnson's claims that did not suffer a ripeness defect.⁴

II.

DISCUSSION

A. Ripeness: Antitrust Claims

The Court of Appeals remanded the case to the district court for "additional fact-finding on the key jurisdictional fact of whether appellant's Medical Staff membership and privileges at the Hospital have been terminated." See [Johnson, 951 F.2d at 1273](#). [**12] The D.C. Circuit was concerned that plaintiff's privileges, although intact at the time of the court's dismissal of plaintiff's case, might have terminated with the expiration of the monitoring and supervising agreement. "If they have, [plaintiff's] claims of injury stemming from his termination no longer suffer any ripeness defect and the court should go on to consider them on the merits." *Id.* (footnote omitted). The D.C. Circuit held that plaintiff's civil rights claims did not suffer any ripeness defect and instructed the court to proceed directly

³ The court rejected plaintiff's argument that the terms of the monitoring and supervision agreement constituted "injury" based on a finding that plaintiff had entered into the agreement voluntarily and that plaintiff had demonstrated neither temporary nor permanent damage to his practice as a result of compliance with the agreement. See Mem. Op., at 9.

⁴ The D.C. Circuit declined to rule on the district court's denial of Dr. Johnson's motion for summary judgment because a court ordered denial of a summary judgment motion is not appealable. See [Johnson, 951 F.2d at 1270](#).

with consideration of these claims. However, the court reserved judgment as to the ripeness of defendant's antitrust claims. This court therefore begins with an inquiry into whether plaintiff's antitrust claims still suffer a ripeness defect.

HN1[¹] Questions of ripeness "go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary*, 501 U.S. 312, 316, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991). In *Abbott Lab. v. Gardner*, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), the Supreme Court set forth a practical formula for the resolution of ripeness questions. According to [**13] the Court, **HN2**[¹] questions of ripeness turn on "the fitness of the issues for judicial decisions" and "the hardship to the parties of withholding consideration." *Id. at 149*. The ripeness inquiry involves a balancing of the interests of the party seeking relief from an alleged or perceived injury with the court's interest in postponing review until the question arises in a more concrete fashion. Ripeness issues, by their very nature, require a subtle and subjective assessment. As the D.C. Circuit noted in *Continental Airlines, Inc. v. Civil Aeronautics Bd.*, 173 U.S. App. D.C. 1, 522 F.2d 107 (D.C. Cir. 1975) "The law of ripeness, once a tangle of special rules and legalistic distinctions, is now very much a matter of common sense." 522 F.2d at 124. The court went on to remark: "We do not pretend that the science of assessing an issue's ripeness is an exact one." *Id. at 128*.

The ripeness doctrine derives ultimately from the requirement in Article III of the United States Constitution that federal courts decide only cases and controversies. As the D.C. Circuit aptly pointed out in *DKT* [*147] *Memorial Fund Ltd. v. Agency for Int'l Dev.*, 281 U.S. App. D.C. 47, 887 F.2d 275 (D.C. Cir. [**14] 1989), **HN3**[¹] "the question of ripeness goes to our subject matter jurisdiction" 887 F.2d at 298 (quoting *Duke City Lumber Co. v. Butz*, 176 U.S. App. D.C. 218, 539 F.2d 220, 221 n.2 (D.C. Cir. 1976)). If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. See *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1991). **HN4**[¹] The question of ripeness is of such importance that federal courts are required to raise it *sua sponte* even though the parties do not. See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1361 (6th 1995) *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994); *Acierno v. Mitchell*, 6 F.3d 970, 974 (3rd Cir. 1993); *Volvo N. Amer. Corp. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 63 (2nd Cir. 1988).

There is clear precedent for dismissal of antitrust claims on ripeness grounds. See, e.g., *Unity Ventures v. Lake County*, 841 F.2d 770 (7th Cir. 1987), cert. denied, 488 U.S. 891, 102 L. Ed. 2d 216, 109 S. Ct. 226 (1988); *Suburban Trails, Inc. v. New Jersey Transit Corp.*, 800 F.2d 361 (3rd Cir. 1986); *United States Steel Workers v. U.S. Steel Corp.*, 492 F. Supp. 1 (N.D. Ohio 1980). [**15] Furthermore, there is considerable precedent for dismissal of antitrust claims where the plaintiff has commenced a suit in federal court prior to completion of a hospital's internal peer review procedures. In *Cooper v. Amster*, 645 F. Supp. 46 (E.D. Pa. 1986), aff'd, 845 F.2d 1010 (3rd Cir.), cert. denied, 488 U.S. 852, 102 L. Ed. 2d 110, 109 S. Ct. 138 (1988), a physician claimed that two hospitals and three physicians violated § 1 of the Sherman Act by failing to refer emergency patients to him. The court, in dismissing plaintiff's action for lack of jurisdiction, stated: "It is little enough to ask that plaintiff get a definitive no from the hospital before he comes to court for an injunction, treble damages, and the whole panoply of Sherman Act relief." *Id. at 47*. In *Colorado Chiropractic Council v. Porter Memorial Hosp.*, 650 F. Supp. 231 (D. Colo. 1986), a group of chiropractors and several hospitals demanded \$ 20 million in damages under antitrust laws for defendant's failure to grant them hospital privileges. The court dismissed plaintiff's claim as "remote and speculative and not ripe for adjudication." *Id. at 236*. Similarly, in *Hendrix v. Poonai*, [**16] 662 F.2d 719 (11th Cir. 1988), hospital officials sought a declaratory judgment that the hospital would be immune from antitrust claims if it were to deny a physician's pending application for readmission to staff membership. In affirming the district court's dismissal of the claim, the Eleventh Circuit noted that "in this case, the federal courts can become involved, if at all, only after the decision is made to deny Dr. P.V. Poonai's readmission application." *Id. at 722*.

In the judgment of this court, plaintiff's antitrust claims simply are not ripe for review. Plaintiff asserts that he was injured by the termination of his hospital membership and privileges. However, there is no evidence that plaintiff's membership and privileges have *in fact* been terminated. It is undisputed that as of August 23, 1989, plaintiff retained his Active Medical Staff membership and full hospital privileges at Greater Southeast, subject only to administrative monitoring and supervision of his surgical cases as set forth in the agreement signed by the plaintiff on that day. It is equally undisputed that immediately before and during the arbitration hearing, Dr. Johnson retained

his Medical Staff [**17] membership and privileges. Plaintiff was notified by the President of the Hospital of the Board's determination that "pending your decision concerning a formal hearing, and during any hearing proceedings, *your Medical Staff membership may continue under the monitoring agreement you signed on August 23, 1989.*" Letter of Thomas Chapman to Plaintiff of Oct. 24, 1989 (emphasis added). Plaintiff displayed similar knowledge of his continuing privileges in his request for an arbitration hearing: "This notice is submitted with the understanding that Dr. Johnson will retain his medical privileges at the Greater Southeast Community Hospital until such time as the termination proceedings are concluded and there has been a final decision on the proposed termination." Letter from Plaintiff to Thomas Chapman of Dec. 6, 1989. The arbitration hearing in which the termination issue was being discussed [*148] stalled midstream with the resignation of the Hearing Officer, Kurt Darr. No official recommendation was made by Darr as to whether plaintiff's membership and privileges should or should not be terminated. In the absence of a definitive recommendation, the Hospital Board of Directors has refused [**18] to make a final decision to terminate Dr. Johnson's membership and privileges. It is clear, then, that plaintiff's Medical Staff membership and hospital privileges remain in effect.

Plaintiff contends that his Staff membership and hospital privileges expired by operation of law on August 23, 1991 when the Hospital failed to grant or deny his application for reappointment to the Medical Staff within the 120-day period prescribed by D.C. Code Ann. § 32-1307(f) (1981) following the termination of the monitoring and supervision agreement. Plaintiff's argument, however, misconstrues the statutory provision. Nowhere does § 32-1307(f) indicate, let alone suggest, that a health professional's staff membership or clinical privileges automatically terminate following the expiration of the 120-day period. Section 32-1307(f) regulates appointment applications and the speed at which applications for reappointment are to be acted upon. The provision imposes on the hospital an obligation to act on an application within 120 days. To invoke § 32-1307(f), plaintiff must submit an application for reappointment and provide evidence that the hospital failed to act on the application within 120 days. [**19] Following the expiration of the 120-day period, plaintiff would be able to file suit under the statute to enforce hospital review of the pending application, and, if successful, plaintiff would be entitled to an appointment to the Medical Staff.

Section 32-1307(f) appears wholly inapplicable to the present proceedings. HN5[¹⁵] The expiration of plaintiff's monitoring and supervision agreement with the hospital cannot be said to trigger § 32-1307(f). When plaintiff's monitoring and supervision agreement expired, plaintiff returned to full and unencumbered membership and privilege status. In accordance with the letter sent by the President of the Hospital, plaintiff's membership and privileges were intended to remain at this level until the termination of the administrative proceedings. The court therefore finds that plaintiff's Medical Staff membership and privileges were terminated neither by administrative proceeding nor by operation of law.

The gravamen of Dr. Johnson's alleged injury is that he was unable to present patients for treatment at the hospital. Dr. Johnson has provided no evidence whatsoever that this ever occurred. At no point has Dr. Johnson indicated that he presented a [**20] patient for treatment that was summarily turned away from Greater Southeast. HN6[¹⁶] Where a physician officially retains his hospital privileges and, consequently, his ability to admit patients to the hospital, the physician cannot sustain a claim of injury based solely on the allegation that he would not be permitted to exercise his privileges if he had wished to do so. Plaintiff must do more than speculate. At a minimum, plaintiff must show some failed attempt to exercise his privileges. Dr. Johnson never presented a patient for treatment at the Greater Southeast during this period. Had Dr. Johnson done so, and been unable to secure the patient's admittance to the hospital, there is little doubt that this would constitute actionable harm. However, the court will not infer injury in the absence of such an evidentiary showing. Since plaintiff still has the ability to admit patients to the hospital, the significance of the antitrust claims in terms of actual damages or ability to prove damages evaporates. In light of plaintiff's failure to make a sufficient showing of injury, the court finds plaintiff's antitrust claims unripe for review and therefore not justiciable in federal court. Accordingly, [**21] plaintiff's antitrust claims under the

Sherman Act, with respect to his Staff membership and hospital privileges as Greater Southeast, shall be dismissed for lack of jurisdiction.⁵

Plaintiff also alleged that defendants conspired to preclude his membership in the [*149] Johns Hopkins Health Plan and United Health Services, and to interfere with his application to the Courtesy Staff at Columbia Hospital. The D.C. Circuit correctly pointed out that if plaintiff were able to prove such a conspiracy, plaintiff would be entitled to damages under § 4 of the Clayton Act, regardless of whether plaintiff's membership and privileges had been terminated at Greater Southeast. See [Johnson, 951 F.2d at 1275](#).

HN7 Plaintiff bears the burden of pleading and proving [**22] an illegal conspiracy under the Sherman Act. To do so, plaintiff must: (1) demonstrate that each defendant made a conscious commitment to an illegal conspiracy; (2) present competent evidence that each defendant took acts in furtherance of that conspiracy; and (3) make a showing that the conspiracy was the proximate cause of antitrust injury to the plaintiff. See [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#); [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#); [Cooper v. Forsyth County Hosp. Auth., Inc., 789 F.2d 278 \(4th Cir. 1985\)](#), cert. denied, 479 U.S. 972, 93 L. Ed. 2d 418, 107 S. Ct. 474 (1986).

Plaintiff alleged in his complaint that defendants conspired to preclude his membership from Johns Hopkins and United Health Services. In July 1989, Greater Southeast entered into an exclusive agreement with Johns Hopkins to provide in-patient services to the Plan's subscribers in the District of Columbia. At the same time, Greater Southeast entered into a separate agreement with United Health Services, an affiliate of Greater Southeast, to offer prepaid health care [**23] services to members of Johns Hopkins. In September 1989, plaintiff's applications for membership in the Johns Hopkins and in United Health Services were denied on quality of patient care grounds.

The D. C. Circuit construed plaintiff's pleadings on this matter as alleging a separate conspiracy -- that is, in addition to conspiring to preclude plaintiff's membership and privileges from Greater Southeast, defendants also conspired to prevent plaintiff from being able to contract with Johns Hopkins and United Health Services. Plaintiff's pleadings, however, plainly indicate that the allegations regarding Johns Hopkins and United Health Services were intended to serve as examples of acts "in furtherance of said combination and conspiracy [to boycott plaintiff from maintaining Medical Staff membership and privileges at Greater Southeast]" and were *not* intended to allege a separate conspiracy. Complaint P 45. Plaintiff therefore did not allege a separate antitrust claim regarding Johns Hopkins and United Health Services, but rather supported his existing antitrust claims with evidence of the denial of his application to these two Plans. The court, however, has dismissed as unripe [**24] the antitrust claims that this evidence was intended to support. Accordingly, the court need not consider the evidence of the denial of plaintiff's applications any further.

It should be noted, however, that if plaintiff had intended alleged a separate conspiracy, he has provided little, if any, evidence in support of it. Plaintiff provided no evidence that any defendant made a conscious commitment to such a conspiracy. Moreover, plaintiff made no showing that defendants' conduct was linked in any way to the Johns Hopkins and United Health Services appointment decisions. In fact, plaintiff fails to allege that defendant engaged in any conduct whatsoever with respect to Johns Hopkins and the United Health Services. The court therefore finds in the alternative that, if plaintiff's allegations regarding the appointment decisions made by Johns Hopkins and United Health Services were intended to constitute a separate antitrust claim, defendants would be entitled to summary judgment because plaintiff failed to make a sufficient showing that defendants in fact conspired to preclude plaintiff from obtaining membership in Johns Hopkins and United Health Services.

Plaintiff also alleged in [**25] his complaint that defendants conspired to interfere with defendant's application for reappointment at Columbia Hospital. According to plaintiff, the Credentials Committee of Columbia Hospital asked plaintiff to secure a completed [*150] questionnaire from the Chief of Obstetrics and Gynecology at each hospital

⁵ In light of the court's dismissal of plaintiff's antitrust claims with respect to plaintiff's membership and privileges at Greater Southeast, on ripeness grounds, the court also shall deny all of defendant's pending motions for summary judgment on this issue as moot.

at which he had privileges. Plaintiff provided the questionnaire to defendant Nelson and alleges that defendant Nelson failed to return the questionnaire in a timely fashion. Plaintiff contends that he suffered antitrust injury as a result.

The facts, as set forth in plaintiff's complaint, fail to properly allege an antitrust conspiracy. As an initial matter, it is unclear under plaintiff's recitation of the facts whether any other defendants conspired with Dr. Nelson to delay Dr. Nelson's response. Plaintiff provided no evidence that the other defendants were aware of Dr. Nelson's conduct or that each of them had made conscious commitment to support Dr. Nelson in that regard. Moreover, plaintiff's alleged conspiracy implicated the conduct of only one of the defendants. Plaintiff made his request to the Chief of the Obstetrics and Gynecology department, and it was the Chief of the [**26] department that delayed in his response. Plaintiff simply has not demonstrated that any defendant other than Dr. Nelson engaged in conduct in furtherance of the alleged conspiracy. Thus, plaintiff also failed to make a sufficient showing of multiplicity to sustain his conspiracy allegations. Accordingly, the court shall grant defendants' motion for summary judgment dismissing plaintiff's claims involving Columbia Hospital.⁶

[**27] B. Civil Rights Claims

Defendants filed a number of dispositive motions during May of 1993, including a motion for summary judgment on plaintiff's civil rights claims.⁷ Thereafter, the parties became mired in discovery disputes. In the meantime, plaintiff filed a motion to stay the briefing schedule so that he could continue discovery. On January 31, 1995, the court denied plaintiff's motion to stay the briefing schedule and advised plaintiff that he would have 30 days from the date of the court's Order in which to file oppositions to defendants' dispositive motions; otherwise, the court would treat defendants' motions as conceded.

The following week, plaintiff filed a motion for reconsideration and for extension of time. Plaintiff's counsel indicated that, due to ongoing and incomplete discovery and the press of litigation [**28] in other cases, she would be unable to meet the court ordered filing deadline. In a court Order dated April 12, 1995, the court granted plaintiff's motion to extend the deadline for filing oppositions an additional four months until June 1, 1995. However, the court made clear in the Order that "this date will not be further enlarged." *Id.*

Despite a clear pronouncement from this court that no additional time to respond would be granted, plaintiff failed to oppose four of defendants' motions for summary judgment by the June 1, 1995 deadline.⁸ On June 2, 1995, plaintiff filed a motion for a trifurcated briefing schedule and an enlargement of time in which to file his opposition. Two weeks later, plaintiff filed a motion for leave to file an opposition to defendants' motion for summary judgment on the civil rights claims, out of time. Plaintiff's counsel reiterated many of the same arguments asserted [*151] in her previous request for extension of time, including the press of litigation in other cases. Plaintiff's counsel also indicated that the briefing schedule set up by the court placed "an unfair burden" upon plaintiff and plaintiff's counsel to require an "instantaneous response" [**29] to defendant's motions. Plaintiff's counsel therefore requested leave of court to file plaintiff's oppositions out of time.

⁶ It should be noted that, even if plaintiff's antitrust claims were ripe for adjudication, the court would nevertheless be compelled to grant defendants' motion for summary judgment on all antitrust claims because plaintiff did not oppose any of them, except for defendants' motion for summary judgment on the grounds of HCQIA immunity. Although plaintiff opposed defendants' original motion for summary judgment, which was filed prior to the appeal, plaintiff did not oppose any of defendants' subsequent motions for summary judgment on all antitrust claims filed after the case was remanded to this court for further proceedings. Under local Rule 108(b), a court may treat an unopposed motion for summary judgment as conceded by the non-moving party.

⁷ During this time, defendants also filed motions for summary judgment on the antitrust claims and a motion for summary judgment on plaintiff's claims against defendant Hinman.

⁸ These four motions were: Motion of Defendants for Summary Judgment on Counts I, II, III, and IV of the Complaint; Motion for Defendants for Summary Judgment on Antitrust Claims For The Absence of Antitrust Injury; Motion of Defendants For Summary Judgment on Civil Rights Claims; and Motion of Defendant Edward J. Hinman, M.D., For Summary Judgment on Count VI.

Plaintiff's contention that the Order required an "instantaneous response" is completely unfounded. All of defendants' motions for summary judgment, including defendants' motion for summary judgment on plaintiff's civil rights claims, had been pending before this court for nearly two years when plaintiff's June 1, 1995 due date expired. Plaintiff was served with defendants' motion for summary judgment on the civil rights claims on April 27, 1993, and from that point forward, was in a position to prepare a response. Moreover, even [**30] if plaintiff had ignored the defendants' motion when it was served, plaintiff was made aware of the need to respond to the motion five months prior to the June 1, 1995 deadline in the Court's January 31, 1995 Memorandum Opinion.

What is more disturbing about plaintiff's argument, however, is his claim that the June 1, 1995 deadline set forth in the April 12, 1995 Order is "an unfair burden" on plaintiff and plaintiff's counsel. Plaintiff seems to have forgotten that the April 12, 1995 Order granted plaintiff's request for an extension of time, and that the June 1, 1995 due date, which plaintiff now decries as "an unfair burden," was a date selected and requested by plaintiff. In plaintiff's own words:

Plaintiff Harold D. Johnson, M.D., hereby moves this Court for 90-day enlargement of time, to and including June 1 1995, in which to respond to Defendant's motions for summary judgment in this proceeding.

Plaintiff's Feb. 7, 1995 Mot. Enlarg. Time, at 1 (emphasis added). The court's April 12, 1995 Order provided the exact relief sought by plaintiff. It is simply preposterous that plaintiff now claims that this relief is an "unfair burden" imposed on him by [**31] this court.

Plaintiff has had more than ample time to prepare oppositions to defendants' dispositive motions, including the motion for summary judgment on civil rights claims. Plaintiff was served with defendants' motion for summary judgment on civil rights claims over two years ago. Since then, plaintiff has had a substantial opportunity to prepare an opposition. Moreover, even if plaintiff had not prepared an opposition before 1995, this court by its January 31, 1995 Order made plaintiff aware of the need to respond to defendants' motion. Furthermore, plaintiff's request for an additional extension until June 1, 1995 to file an opposition to defendants' motion was granted. The latter Order cannot be construed as placing "an unfair burden" on plaintiff now that plaintiff failed to meet his own filing deadline. The court made clear in the Order that no more extensions would be granted. Accordingly, the court shall deny both plaintiff's motion for a trifurcated briefing schedule and enlargement of time, and plaintiff's motion for leave to file out of time an opposition to defendants' motion for summary judgment on civil rights claims.⁹

[**32] The court shall grant Defendant's unopposed motion for summary judgment dismissing all civil rights claims as conceded pursuant to local Rule 108(b). Moreover, for the reasons set forth below, the court would be compelled to grant defendants' motion for summary judgment on the civil rights claims even if defendants' motion was not treated as conceded.

1. Claims Under the Civil Rights Acts of 1866 and 1871

Plaintiff alleged that the defendants refused to contract with him on racially neutral grounds, in violation of the Civil Rights Act of 1866, [42 U.S.C. § 1981](#), and the Civil Rights Act of 1871, [42 U.S.C. § 1985](#). Under the facts of this case, however, plaintiff fails to state a claim under either [§ 1981](#) or [§ 1985](#). The determinative issue with respect to plaintiff's [§ 1981](#) claim is whether the defendants' conduct violates federal [*152] rights secured by the Civil Rights Act of 1866, [42 U.S.C. § 1981](#). [HN8](#) [↑] [Section 1981](#) provides in pertinent part as follows:

Any persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . as is enjoyed by white citizens

Id. at [§ 1981\(a\)](#). [**33] The scope of this provision was recently addressed by the Supreme Court in [Patterson v. McLean Credit Union](#), [491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 \(1989\)](#). In *Patterson*, a black woman had been employed for 10 years as a teller and file coordinator at a credit union until she was laid off. She then filed a [§](#)

⁹ In light of the court's denial of plaintiff's motion to file out of time, defendants' motion to strike plaintiff's late submissions on the civil rights issue is denied as moot.

1981 lawsuit alleging that her employer harassed her, failed to promote her to the position of accounting clerk, and then discharged her, all due to her race. The Court affirmed the lower court's ruling that racial harassment was not actionable under § 1981 because the provision expressly prohibits discrimination *only* in the making and enforcement of contracts. The provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contractual obligations. See id. at 170. The Court stated:

HNg[↑] The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract, only on discriminatory terms. But the right does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract [**34] relation has been established, including breach of the terms of the contract or *imposition of discriminatory working conditions*. Such *postformation conduct does not involve the right to make a contract*.

Id. at 176 - 77. The D. C. Circuit expressly adopted the *Patterson* decision in Gersman v. Group Health Ass'n, Inc., 289 U.S. App. D.C. 332, 931 F.2d 1565 (D.C. Cir. 1991), vacated and remanded, 502 U.S. 1068, 117 L. Ed. 2d 127, 112 S. Ct. 960, aff'd on remand, 975 F.2d 886 (D.C. Cir. 1992).¹⁰ In *Gersman*, the D.C. Circuit addressed the issue whether allegations of "failure to renew" satisfy a plaintiff's need to demonstrate a "refusal to contract" under § 1981. Plaintiff argued that the parties were free to modify the price term under the existing contract, and defendants' alleged failure to consider a new price structure constituted a refusal to contract under § 1981. The court, however, observed that HN10[↑] § 1981 is only applicable when a *new* contractual relationship is contemplated. Contract modification, by contrast, is governed by the existing contract. Thus, defendant's actions, which resulted in the termination of the contractual relationship, were not actionable under § 1981. See 931 F.2d at 1573. In dismissing plaintiff's § 1981 claim, the *Gersman* court stated:

We agree with the majority of Circuits who have held that, under *Patterson*, HN11[↑] § 1981 does not apply to contract terminations. We find this conclusion appropriate in terms of the language of both § 1981 and the *Patterson* opinion. The Court was clear in stating that HN12[↑] § 1981 does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."

Id. at 1571 (citation omitted).

[**36] Dr. Johnson's § 1981 claim is analogous to plaintiff's claim in *Gersman*. The claim is styled as a refusal "to enter into a contract with plaintiff on racially neutral terms" and a refusal "to allow plaintiff to contract with Defendant Hospital on the same basis as white' physicians were permitted to contract." Complaint, PP 56 and 57. However, it is clear from plaintiff's recital of the facts that the conduct at issue occurred after the formation of plaintiff's appointment contract with Greater Southeast.

Plaintiff alleged that he had a continuing contractual relationship with Greater Southeast for nearly a decade. "From 1981 until 1988, he [plaintiff] applied for, and was [*153] granted, reappointment to the Active Medical Staff without limitation or incident." Complaint P 22. Defendants supposedly violated § 1981 when they modified plaintiff's hospital privileges by requiring him to comply with the monitoring and supervision program and when defendants allegedly failed to take action on plaintiff's 1989 application for reappointment. See Complaint PP 23, 30. However, Defendants' conduct in both instances is clearly *postformation*, and as such, is simply not actionable [**37] under § 1981. *Patterson* recognized the existence of a new contractual relationship only where there is a "new and distinct relation between employee and the employer." Gersman, 931 F.2d at 1565 (quoting Patterson, supra, 491 U.S. at 185). Plaintiff's relationship with Greater Southeast remained substantially the same as it always existed. His Staff membership and privileges continued, subject only to the two-year monitoring and supervision agreement.

¹⁰ The Supreme Court granted certiorari, but did not reach the merits of the decision. It simply vacated the judgment and remanded the case to the Court of Appeals for consideration of what impact the newly enacted Civil Rights Act of 1991 might have on the decision. In *Gersman II*, the court affirmed the district court's dismissal of plaintiff's § 1981 claims based on the *Patterson* decision. 975 F.2d 886, 887 (D.C. Cir. 1992).

Following the expiration of the agreement, plaintiff retained full Staff membership and privileges. At no point did either plaintiff or Greater Southeast consider the signing of the monitoring and supervision agreement to be the creation of a "new" contractual relationship. The court therefore rejects plaintiff's argument that the signing of the monitoring and supervision agreement constitutes a "making" of a new contract under [§ 1981](#).

The court also rejects plaintiff's argument that Greater Southeast's alleged refusal to act on plaintiff's application for reappointment is actionable under [§ 1981](#). The court in *Gersman* ruled that [HN13](#) renewals, like postformation modifications, were governed by the existing contract. Accordingly, [\[*38\]](#) the Court held that allegations of failure to renew a contract were not actionable under [§ 1981](#). See [id. at 1573](#). The *Gersman* court is not alone in holding that claims for failure to renew a contract fall outside the scope of [§ 1981](#). See, e.g., *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132 (7th Cir. 1992); *Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Ed.*, 926 F.2d 505 (6th Cir. 1991), cert denied, *Hull v. Schuck*, 501 U.S. 1261, 115 L. Ed. 2d 1080, 111 S. Ct. 2917 (1991); *Brereton v. Communications Satellite Corp.*, 735 F. Supp. 1085 (D.D.C. 1990), appeal dismissed without op., [925 F.2d 488](#) (D.C. Cir. 1990). Because the substance of the facts alleged in the complaint plainly implicates postformation conduct which is not actionable under [§ 1981](#), the court would be compelled to grant defendants' motion for summary judgment on plaintiff's [§ 1981](#) claims.

Plaintiff also claimed that defendants Conduct violated the Civil Rights Act of 1871, [42 U.S.C. § 1985](#). [HN14](#) [Section 1985](#) provides in pertinent part:

If two or more persons . . . conspire . . . for purpose of depriving, either directly or indirectly, any person or class of persons [\[*39\]](#) of equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. at § 1985(3).¹¹ In *Great Amer. Fed. Sav. & Loan Assoc. v. Novotny*, 442 U.S. 366, 60 L. Ed. 2d 957, 99 S. Ct. 2345 (1979), the Supreme Court observed that [HN15](#) [§ 1985\(3\)](#) was a purely remedial in nature, embodying no substantive rights of its own. See [id. at 372](#). Consequently, the claimant must demonstrate that the defendant's conduct violated the rights, privileges, and immunities under the *Fourteenth Amendment* that [§ 1985\(3\)](#) was intended to vindicate. In this case, plaintiff asserted that his rights under [§ 1981](#) were violated, and that such a violation gives rise to a [§ 1985](#) remedy. Plaintiff is correct that [HN16](#) [§ 1981](#) a violation of federal rights secured by [§ 1981](#) may serve as the basis of a [§ 1985](#) claim. See, e.g., *Alder v. Columbia Historical Society*, 690 F. Supp. 9 (D.D.C. 1988); *Thompson v. Int'l Assoc. of Machinists*, 580 F. Supp. 662 (D.D.C. 1984). [\[*154\]](#) However, as discussed above, plaintiff failed to state [\[*40\]](#) a claim under [§ 1981](#). Furthermore, violations of Title VII, discussed *infra*, may not be redressed through [§ 1985](#). See *Novotny, supra, at 378*. Plaintiff therefore has not set forth any allegations that would entitle him to the remedy provided by [§ 1985](#). Accordingly, the court would be compelled to grant defendants' motion for summary judgment on plaintiff's [§ 1985](#) claim.

2. Title VII Claim

Plaintiff also alleged that defendants unlawfully discriminated against him in the terms, conditions, and privileges of his employment in violation [\[*41\]](#) of Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e](#), by their refusal to grant him unrestricted Medical Staff membership and hospital privileges and their failure to act on his application for reappointment to the Medical Staff.¹² [\[*42\]](#) Defendants moved for summary judgment with respect to these

¹¹ [42 U.S.C. § 1985](#), also known as the "Ku Klux Klan Act," was designed to deter the Klan from committing vile transgressive acts against the rights of African-American citizens. See *Griffin v. Breckenridge*, 403 U.S. 88, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971). [HN17](#) Subsections (1) and (2) prohibit acts that may prevent a federal law enforcement official from performing his duty or otherwise obstruct justice. Neither of these subsections is applicable to this case.

¹² [HN18](#) [42 U.S.C. § 2000e-2\(a\)\(1\)](#) provides in pertinent part as follows:

(a) It shall be an unlawful employment practice for an employer --

claims on the grounds that Title VII applies only to employment relationships, and no employment relationship has been implicated in this case. Defendants first presented the undisputed fact that at no point was Dr. Johnson ever employed by Greater Southeast.¹³ Defendants went on to argue that the relationship between physician and patient is not one of employment, but more closely aligned to that of an independent contractor. Because no employment relationships were implicated in this case, the defendants urged the court to grant its motion for summary judgment on plaintiff's Title VII claim.

Plaintiff conceded that he had never been employed by Greater Southeast, and therefore was not entitled to employee protection in the traditional sense under Title VII. However, plaintiff argued that Title VII also applies to conduct that interferes with employment relationships like the physician-patient relationship, and that Greater Southeast's conduct interfered with his ability to service his patients. Under this latter theory, plaintiff claims he is entitled to Title VII coverage.

Plaintiff relies principally on the D.C. Circuit's opinion in *Sibley Memorial Hosp. v. Wilson*, 160 U.S. App. D.C. 14, 488 F.2d 1338 (D.C. Cir. 1973). In *Sibley*, plaintiff-appellee Wilson, a male private duty nurse, sued Sibley Memorial Hospital for allegedly discriminating against him in violation of Title VII. The plaintiff was not an employee of the hospital, but rather was listed with an independent nurses' registry. Patients at the defendant-hospital who required [**43] the services of a private duty nurse would submit a request to a hospital staff person, who would then notify the nurse's registry. The registry matched the request with the name of an available nurse. The nurse would be informed of the assignment and report directly to the patient's room. On two occasions, when the requesting patient was female and Wilson was "matched" by the registry, the hospital's supervisory nurses refused to let him report to the patient. The court, in holding that the relationship between Wilson and Sibley Memorial Hospital was sufficient to bring the case within the ambit of Title VII, stated:

We think it significant that the Act has addressed itself directly to the problems of interference with the direct employment by labor unions and employment agencies-institutions which have not a remote but a highly visible nexus with the creation and continuance of direct employment relationships between third parties.

448 F.2d at 1342. Dr. Johnson argued that the relationship between physician and patient could be similarly characterized as one of employment, and that Medical Staff membership [*155] and privileges at Greater Southeast provide clear employment [**44] opportunities for practicing physicians. Dr. Johnson therefore concluded that he was entitled to protection under Title VII because control over the access to such employment opportunities lies squarely in the hands of the Hospital.

Dr. Johnson's attempt to align his claim with the claim upheld in *Sibley* is not persuasive because, unlike the nurse in *Sibley*, Dr. Johnson's relationship with his patients is not one of employment. In *Spirides v. Reinhardt*, 198 U.S. App. D.C. 93, 613 F.2d 826 (D.C. Cir. 1979), the court addressed the question of how employee status is determined under Title VII. Writing for the panel, Judge McGowan reasoned that the determination should turn on an "analysis of the economic realities" of the work relationship." *613 F.2d at 831*. Judge McGowan elaborated on this analysis:

This test calls for application of general principles of agency to undisputed or established facts. Consideration of all the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review [**45] here If an employer has the right to control and direct the

(1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment

Id. HN19[] An "employer" is defined in *42 U.S.C. § 2000e(b)* as a "person engaged in an industry affecting commerce who has fifteen or more employees" *Id.* HN20[] An "employee" is simply "an individual employed by an employer. . . ." *Id.* at *§ 2000e(f)*.

¹³ Plaintiff acknowledged in his deposition that he has never been an employee of the Greater Southeast. See Dep. of Plaintiff, p. 481.

work of an individual, not only as to the result achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.

Id. at 831 - 32 (footnotes omitted). It is beyond dispute that a patient does not control the "manner and means" of a physician's medical services. The practice of medicine is a highly specialized and skilled occupation. A patient simply cannot exercise the sort of detailed control over the "manner" of a physician's work that is normally found in an employer-employee relationship. The same is true for the "means" by which a physician practices medicine. Patients do not provide the equipment that is used by physicians in treating them. Patients do not provide physicians with the office space and examining rooms in which to practice.

The absence of such control suggest that the relationship between physician and patient is more aptly characterized as an independent contractor relationship. The lack of control over a contracted worker is the distinguishing feature of an independent contractor. According to the Restatement (Second) of **[**46]** Agency (1958), a servant [more recently termed "employee"] is an agent employed by a master to perform service in his affairs *whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master.*" *Id.* at *§ 2* (emphasis added). In contrast, **HN21**¹⁴ an independent contractor is "a person who contracts to work with another to do something for him *but who is not controlled by the other nor subject to the other right of control with respect to his physical conduct in the performance of the undertaking.*" *Id.* (emphasis added).

An analysis of the physician-patient relationship in light of the other evaluative criteria set forth in *Spirides* also point decidedly toward an independent contractor relationship. The court indicated that reviewing courts should consider: (1) the kind of occupation, and whether the work is supervised or conducted by a specialist without supervision; (2) the skill required to perform the work; (3) whether the "employer" or individual in question furnishes the equipment used and the place of work; (4) the length of time the person has worked; (5) the method of payment (i.e. by time or by the job); (6) **[**47]** the method by which the work relationship is terminated (i.e. by one or both parties, with or without notification and explanation); (7) whether worker is eligible for annual leave; (8) whether work is an integral part of the "employer's" business; (9) whether the work accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties. See *Spirides, supra, at 832.*

HN22¹⁴ An evaluation of the physician-patient relationship under these criteria indicates a classic independent contractor relationship: (1) a physician's work is normally conducted without supervision by the patient; (2) the practice of medicine is a highly skilled and specialized profession; (3) neither the equipment nor the place of work is provided by the patient; (4) a physician's work with respect **[*156]** to individual patients is usually brief and/or episodic; (5) the method of payment varies with patient and the particular services rendered; (6) the work relationship can be terminated at will by either the patient or the physician; (7) no annual leave is provided by the patient; (8) the services provided by the physician are typically not an integral part of the **[**48]** work of the patient; (9) the patient provides no retirement benefits for the physician; (10) the patient pays no social security taxes; and (11) patients generally do not intend to become a physician's employer. Since plaintiff's status is that of an independent contractor and *not* an employee, he may not invoke Title VII as a basis for his claim against the Hospital.¹⁴

[49]** Moreover, even if the law of agency was such that a physician could be construed as an employee of his patients, it is unclear under the facts of this case whether Greater Southeast's exercise of authority over the allocation of staff membership and hospital privileges at Greater Southeast sufficiently interfered with Dr. Johnson's ability to take on "employers"/patients so as merit coverage of Dr. Johnson's claims under Title VII. In *Sibley*, the hospital prevented plaintiff from entering into employment relationships with patients by blocking plaintiff's physical

¹⁴ Courts in other jurisdictions that have confronted this issue have reached the same conclusion. See, e.g., *Mitchell v. Frank R. Howard Memorial Hospital, 853 F.2d 762 (9th Cir. 1988)*, cert. denied, **489 U.S. 1013, 103 L. Ed. 2d 186, 109 S. Ct. 1123 (1989)** (holding that "as a matter of law [plaintiff's] allegations that the hospital interfered with his relationships with his patients fail to state a claim for relief under Title VII."); *Beverley v. Douglas, 591 F. Supp. 1321, 1328 (S.D.N.Y. 1984)* ("[A physician's] relationship to her patients is not that of employer and employee -- and defendants accordingly are entitled to summary judgment on the Title VII claim.").

access to his potential employers. The hospital therefore had complete control over plaintiff's ability to secure potential employment. This is not true for Dr. Johnson. Unlike the nurse in *Sibley*, Dr. Johnson's access to potential patient-employers is not controlled by the Hospital. Greater Southeast may control the premises on which Dr. Johnson may wish to practice medicine, but the hospital has absolutely no control over Dr. Johnson's ability to secure patients and to enter into employment relationships with the patients. Although Medical Staff membership and hospital privileges at Greater Southeast certainly [**50] facilitate the doctor-patient relationship -- particular if patients prefer to be treated at Greater Southeast rather than some other hospital -- Greater Southeast, in its discretionary granting of membership and privileges, in no way robs Dr. Johnson of his ability to secure patient, or present them for treatment at other medical facilities.

It is also worth noting that [HN23](#)[¹] a Title VII claim is *not* always cognizable where the defendant "control[s] access to such employment." *Id. at 1342* (emphasis added). Although "control" is an important aspect to be considered, it is neither the sole nor determinative factor as to whether a particular claim falls under the purview of Title VII. For example, a licensing board has the power to deny an applicant the ability to earn a living at his chosen profession. A licensing board, by its very existence, has complete control over access the regulated professional job market. Despite this control, such boards have been routinely held *not* to be employers. See, e.g., [Haddock v Bd. of Dental Examiners](#), 777 F.2d 462 (9th Cir. 1985); [Woodard v. Virginia Bd. of Bar Examiners](#), 598 F.2d 1345 (4th Cir. 1979) (per curiam); [Tyler v. \[**51\] Vickery](#), 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 49 L. Ed. 2d 393, 96 S. Ct. 2660 (1976); [Nat'l Org. for Women v. Waterfront Comm'n of New York Harbor](#), 468 F. Supp. 317 (S.D.N.Y. 1979).

Plaintiff's theory of Title VII coverage requires that he allege and prove some link between the defendants' actions and some employment relationship involving himself. Plaintiff has failed to make this connection. Plaintiff admitted that he was never an employee of Greater Southeast. Furthermore, no employer-employee relationship is implicated in physician's medical practice at Greater Southeast. Thus, defendants would be entitled to summary judgment on plaintiff's Title VII claim.

3. D.C. Human Rights Act Claims

Plaintiff alleged violations of the District of Columbia Human Rights Act, [[*157](#)] D.C. Code § 1-2512 (1981), based on the same set of facts. Like the federal civil rights laws, [HN24](#)[¹] the District's statute outlaws employment discrimination and conspiracies to deprive persons of their rights. However, in light of the court's dismissal of plaintiff's federal claims, this court has no jurisdiction over plaintiff's municipal law claims. The only basis for this court's jurisdiction [**52] over plaintiff's D.C. Human Rights Act claims is the court's discretionary exercise of pendent jurisdiction. [HN25](#)[¹] A federal court may exercise pendent jurisdiction over municipal law claims when such claims are so inextricably intertwined with the facts and circumstances giving rise to the federal claims that they "form part of the same case or controversy under Article III." [28 U.S.C. § 1337](#). However, in light of the court's decision to grant defendants' motions for summary judgment on all of plaintiff's federal claims, the court has no basis to exercise pendent jurisdiction. See [United Mineworkers v. Gibbs](#), 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). [HN26](#)[¹] There must be a valid federal claim against each defendant for whom plaintiff seeks to present a claim of pendent jurisdiction under the D.C. Human Rights Act. See, e.g., [Brereton, supra](#); [Byrd v. Pyle](#), 728 F. Supp. 1 (D.D.C. 1989); [Clifton Terrace Assoc. v United Technologies](#), 728 F. Supp. 24 (D.D.C. 1990), aff'd in part and vacated in part, [289 U.S. App. D.C. 121, 929 F.2d 714 \(D.C. Cir. 1991\)](#). With no such federal claims remain in the litigation, this court is prevented from exercising pendent jurisdiction over plaintiff's local [**53] claims. Accordingly, the court shall dismiss plaintiff's claims under the D.C. Human Rights Act for lack of jurisdiction.

C. Tortious Inducement of Breach of Contract

Plaintiff alleged that defendant Hinman "intentionally, willfully, and tortiously induced a breach of contract between Plaintiff and Defendant Hospital in that he caused Defendant Hospital arbitrarily to terminate Plaintiff's Medical Staff membership and privileges." Complaint P 68. Plaintiff's claim is grounded in the common law of tort, and as such, is

a pendent claim in this federal litigation. In light of this court's decision to dismiss all of plaintiff's federal claims, this court has no basis to exercise subject matter jurisdiction over plaintiff's common law tort claim. See United Mineworkers, supra. Accordingly, plaintiff's tort claim against defendant Hinman shall be dismissed for lack of jurisdiction.¹⁵

[**54] III.

CONCLUSION

A separate Order summarizing all the above shall issue this date.

Royce C. Lamberth

United States District Judge

DATE: 10-19-95

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Plaintiff's antitrust claims involving Greater Southeast community Hospital ("Greater Southeast"), Johns Hopkins Health Plan ("Johns Hopkins"), and United Health Services contained in Counts I, II, and III of the Complaint are DISMISSED *sua sponte* for lack of ripeness.
2. All of defendants' pending motions for summary judgment on antitrust claims involving Greater Southeast, Johns Hopkins, and United Health Services are DISMISSED as moot.
- [*158] 3. Defendants' motion for summary judgment on plaintiff's antitrust claims involving Columbia Hospital for Women Medical Center ("Columbia Hospital") contained in Count I of the Complaint is GRANTED.
4. Plaintiff's antitrust claims involving Columbia Hospital are DISMISSED with prejudice.
5. Plaintiff's motion for issuance of a trifurcated briefing schedule and enlargement of time in which to respond to defendants' motions for summary judgment is DENIED.
6. Plaintiff's motion for [**55] leave to file an opposition to defendants' motion for summary judgment on civil rights claims out of time is DENIED.
7. Defendants' motion to strike plaintiff's opposition to defendants' motion for summary judgment on civil rights claims and all accompanying papers filed out of time is DENIED as moot.

¹⁵ Even if the court had jurisdiction to hear the matter, plaintiff's claim still fails as a matter of law because defendant Hinman engaged in his allegedly tortious conduct on behalf of Greater Southeast and therefore lacks the "third party" status required for this cause of action. See Press v. Howard University, 540 A.2d 733, 736 (D.C. 1988). In affirming the trial court's dismissal of plaintiff's tortious interference claim, the D.C. Court of Appeals stated:

The individual defendants, all of whom were officers of the University, were acting as agents of the other party to the contract, and . . . the University through their actions could not tortiously interfere with its own contract.

Id. at 763. The court's decision in *Press* is supported by ample authority. See Newman v. Legal Serv. Corp., 628 F. Supp. 535, 541 (D.D.C. 1986); Donohoe v. Watt, 546 F. Supp. 753, 757 (D.D.C. 1982), aff'd, 230 U.S. App. D.C. 70, 713 F.2d 864 (1983); Wilmington Trust Co. v. Clark, 289 Md. 313, 327-330, 424 A.2d 744, 754-755 (1981); W. Keeton, Prosser and Keeton on the Law of Torts § 129, at 990 (5th Ed. 1984).

903 F. Supp. 140, *158 1995 U.S. Dist. LEXIS 15475, **55

8. Defendants' unopposed motion for summary judgment on all civil rights claims (Counts IV and V of the Complaint) is GRANTED as conceded pursuant to local rule 108(b).

9. Plaintiff's civil rights claims (Counts IV and V of the Complaint) are DISMISSED with prejudice.

10. Plaintiff's tort claim against defendant Hinman (Count VI of the Complaint) is DISMISSED for lack of subject matter jurisdiction.

Accordingly, this entire case now stands DISMISSED.

SO ORDERED.

Royce C. Lamberth

United States District Judge

DATE: 10-19-95

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New York by Vacco v. Reebok Int'l

United States District Court for the Southern District of New York

October 20, 1995, Decided

Civil Action No. 95 Civ. 3143 (JGK)

Reporter

903 F. Supp. 532 *; 1995 U.S. Dist. LEXIS 15764 **; 1995-2 Trade Cas. (CCH) P71,155

STATE OF NEW YORK, by Attorney General DENNIS C. VACCO, et al., Plaintiffs, v. REEBOK INTERNATIONAL LTD., et al., JOHN DOE 1-500, Defendants.

Subsequent History: [\[**1\]](#) Reported at: 903 F. Supp. 532 at 547.

Core Terms

Products, Settlement, notice, prices, advertised, retail, state **antitrust law**, natural person, parties

Counsel: For STATE OF NEW YORK, by Attorney General Dennis C. Vacco, STATE OF ALABAMA, by Attorney General Jeff Sessions, STATE OF ALASKA, by Attorney General Bruce Botelho, STATE OF ARIZONA, by Attorney General Grant Woods, STATE OF ARKANSAS, by Attorney General Winston Bryant, STATE OF CALIFORNIA, by Attorney General Daniel E. Lungren, STATE OF COLORADO, by Attorney General Gale A. Norton, STATE OF CONNECTICUT, by Attorney General Richard Blumenthal, STATE OF DELAWARE, by Attorney General M. Jane Brady, DISTRICT OF COLUMBIA, by Attorney General Garland Pinkston, STATE OF FLORIDA, by Attorney General Robert A. Butterworth, STATE OF GEORGIA, STATE OF GEORGIA, by Attorney General Michael J. Bowers, STATE OF HAWAII, by Attorney General Margery S. Bronster, STATE OF IDAHO, by Attorney General Alan G. Lance, STATE OF ILLINOIS, by Attorney General Jim Ryan, STATE OF INDIANA, by Attorney General Pamela Carter, STATE OF IOWA, by Attorney General Thomas J. Miller, STATE OF KANSAS, by Attorney General Carla J. Stovall, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, by Attorney General Richard Ieyoub, STATE OF MAINE, by Attorney General Andrew Ketterer, STATE OF MARYLAND, by Attorney General J. Joseph Curran, Jr., COMMONWEALTH OF MASSACHUSETTS, by Attorney General Scott Harshbarger, STATE OF MICHIGAN, by Attorney General Frank J. Kelley, STATE OF MINNESOTA, by Attorney General Hubert H. Humphrey, III, STATE OF MISSISSIPPI, by Attorney General Mike Moore, STATE OF MISSOURI, by Attorney General Jeremiah Nixon, STATE OF MONTANA, by Attorney General Joseph M. Mazurek, STATE OF NEBRASKA, by Attorney General Don Stenberg, STATE OF NEW HAMPSHIRE, by Attorney General Jeffrey R. Howard, STATE OF NEW JERSEY, by Attorney General Deborah T. Portiz, STATE OF NEW MEXICO, by Attorney General Tom Udall, STATE OF NORTH CAROLINA, by Attorney General Michael F. Easley, STATE OF NORTH DAKOTA, by Attorney General Heida Heitkamp, STATE OF OHIO, by Attorney General Betty D. Montgomery, STATE OF OKLAHOMA, by Attorney General Drew Edmondson, STATE OF OREGON, by Attorney General Theodore R. Kulongski, COMMONWEALTH OF PENNSYLVANIA, by Attorney General Ernest D. Preate, Jr., COMMONWEALTH OF PUERTO RICO, by Attorney General Pedro D. Pierluisi, STATE OF RHODE ISLAND, by Attorney General Jeffrey B. Pine, STATE OF SOUTH CAROLINA, by Attorney General Charles Molony Condon, SOUTH OF SOUTH DAKOTA, by Attorney General Mark W. Barnett, STATE OF TENNESSEE, by Attorney General Patricia J. Cottrell, STATE OF TEXAS, by Attorney General Dan Morales, STATE OF UTAH, by Attorney General Jan Graham, STATE OF VERMONT, by Attorney General Jeffrey L. Amestov, COMMONWEALTH OF VIRGINIA, by Attorney General James S. Gilmore, III, STATE OF WASHINGTON, by Attorney General Christine O. Gregoire, STATE OF VIRGINIA, by Attorney General Darrell V. McGraw, Jr., STATE OF WISCONSIN, by Attorney

General James E. Doyle, Jr., STATE OF WYOMING, by Attorney General William U. Hill, plaintiffs: Joseph Opper, Antitrust Bureau, New York, NY.

Judges: John G. Koeltl, UNITED STATES DISTRICT COURT

Opinion by: John G. Koeltl

Opinion

[*547] FINAL JUDGMENT AND CONSENT DECREE

The States of New York, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, the District of Columbia, the Commonwealth of Puerto Rico and the United States Virgin Islands ("Plaintiff States" or "Plaintiffs" or "States") have filed a Complaint for damages and injunctive relief on their own behalf and as *parens patriae* on behalf of natural person citizens residing in the Plaintiff States who purchased Reebok Products, as defined in the Complaint herein, during the period of the alleged conspiracy, against the Defendant Reebok International Ltd. and The Rockport Company (collectively "Defendant") alleging violations of federal [*548] and state antitrust laws. Defendant denies the allegations stated therein.

Plaintiffs and Defendant desire to resolve any and all disputes arising from the Complaint. These parties have entered into a Settlement Agreement which has been filed with the Court and is incorporated by reference herein. In full and final settlement of the claims set forth in the Complaint, Defendant has agreed to pay compensatory damages and administration costs as set forth in the Settlement Agreement executed on April 25, 1995 (the "Settlement Agreement"). Defendant has also agreed to entry of this Final Judgment and Consent Decree. Plaintiffs have agreed to execute Releases of their [*548] claims against Defendant and to release the claims of natural persons residing in the States who have not excluded their claims, in accordance with the terms of the Settlement Agreement.

Notice of the Settlement was given pursuant to Court order in accordance with [15 U.S.C. § 15c](#) and the requirements of due process. The Notice was the best notice practicable under the circumstances.

An opportunity to be heard was given to all persons requesting to be heard in accordance with this Court's orders. The Court reviewed the [*548] terms of the Settlement, the submissions of the parties in support of it, and the comments received in response to the notice. After a hearing held on October 13, 1995, the Court approved the Settlement Agreement on 10/20/95, and determined it to be in all respects fair, reasonable and adequate. Said Order, which expressly excludes from the Settlement those natural person citizens who elected to opt-out of the Settlement, was entered on 10/20, 1995.

NOW, THEREFORE, without trial or adjudication of any issue of law or fact, before the taking of any testimony at trial, without the admission of liability or wrongdoing by Defendant and upon the consent of the parties hereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I

JURISDICTION

The Court has jurisdiction over the subject matter of this action and the parties hereto. The Complaint raises claims against Defendant under Section 1 of the Sherman Act (15 U.S.C. § 1), Section 4 of the Clayton Act (15 U.S.C. § 15), Section 4C of the Clayton Act (15 U.S.C. § 15c), and Section 16 of the Clayton Act (15 U.S.C. § 26). Jurisdiction lies in this Court pursuant to 28 U.S.C. § 15. The Complaint also raises pendent state claims [**4] for equitable and other relief.

II

DEFINITIONS

As used in this Final Judgment and Consent Decree:

- a. "Dealer" means any person, corporation or firm not owned by Reebok that in the course of its business sells Reebok Products in or into the United States of America;
- b. "Defendant" or "Reebok" means Reebok International Ltd. and its affiliates, parents, subsidiaries, divisions and other organizational units of any kind, including The Rockport Company, that sold Reebok and Rockport Products as defined herein, their successors and assigns and their present and former officers, directors, employees, agents, representatives and other persons acting on their behalf;
- c. "Reebok Products" means all Reebok and Rockport brand footwear products offered for sale to consumers located in the Plaintiff States or to Dealers.
- e. "Plaintiffs" or "Plaintiff States" means the State of New York and any other State, the District of Columbia, Puerto Rico and the United States Virgin Islands which opt to enter into the Settlement Agreement as provided in Section IX thereof, in their sovereign capacity and as *parens patriae* on behalf of all natural person citizens of such Plaintiff States who [**5] have purchased Reebok Products during the period of the alleged conspiracy (January 1, 1990 to and including December 31, 1994);
- f. "Resale Price" means any price, price floor, price ceiling, price range, or any mark-up formula, or margin of profit used by any Dealer for pricing any Reebok Products. Such term includes, but is not limited to, any suggested, established or customary resale price, as well as the retail price advertised, promoted or offered for sale by any Dealer.

III

APPLICABILITY

This Final Judgment and Consent Decree shall apply to the parties to this lawsuit.

IV

INJUNCTION

- A. For a period of five (5) years from the date this Final Judgment and Consent Decree [*549] is entered, Reebok will not enter into any contract, combination, conspiracy, agreement or arrangement with any Dealer to fix, lower, raise, peg, maintain or stabilize the Retail Prices at which Reebok Products are advertised and sold to end-user consumers.
- B. For a period of five (5) years from the date this Final Judgment and Consent Decree is entered, Reebok will not terminate, suspend or fail to fill orders of any Dealer of Reebok Products or reduce the supply of or discriminate in delivery, [**6] credit or other terms provided to any Dealer of Reebok Products in order to secure or attempt to

secure any commitment or assurance from any Dealer, or to coerce said Dealer, to adhere to any of Reebok's suggested retail pricing policies for Reebok Products. Notwithstanding the foregoing, Reebok retains the right to terminate unilaterally any Dealer for lawful business reasons that are not inconsistent with this or any other paragraph of this Final Judgment and Consent Decree.

C. Within thirty (30) days after the date the Final Judgment and Consent Decree is entered, Reebok will send the letter affixed as Attachment B to the Settlement Agreement to all of its then current Dealers of Reebok Products.

D. For a period of five (5) years from the date this Judgment is entered, Reebok shall notify its Dealers of Reebok Products that it is their right to determine independently the prices at which they will advertise and sell Reebok Products to end-user consumers. Reebok shall provide this notice by affixing a notice of disclosure (the "Disclosure") to every list of suggested retail prices and minimum advertised prices for any Reebok Products printed subsequent to the date of entry of this [**7] Judgment and provided to Dealers. The Disclosure shall clearly and conspicuously state the following on any list, advertising, book catalogue or promotional material for Reebok Products where Defendant has suggested any Resale Price to any Dealer:

ALTHOUGH [REEBOK INTERNATIONAL LTD.] or [THE ROCKPORT COMPANY] MAY SUGGEST RESALE PRICES FOR PRODUCTS, RETAILERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL ADVERTISE AND SELL [REEBOK] OR [ROCKPORT] PRODUCTS.

E. This Final Judgment and Consent Decree shall not be construed in any way to limit the right of Reebok to preannounce or suggest to its Dealers or distributors retail prices for Reebok Products and to unilaterally refuse to deal with those who fail to comply or to engage in any other behavior that is otherwise permitted by federal and state antitrust laws. Accordingly, if a cooperative advertising program established and maintained by Reebok does not violate federal or state antitrust laws, it will not constitute a violation of the injunctive provisions herein.

F. The Plaintiff States, and all natural person citizens residing in those States who purchased Reebok Products during the period January [**8] 1, 1990 - December 31, 1994 (except citizens who have timely and properly requested exclusion) are permanently barred and enjoined from prosecuting against Reebok, Rockport, their affiliates, parents, subsidiaries, divisions and other organizational units of any kind, and their present and former directors, officers, employees, agents, representatives and other persons acting on their behalf, successors and assigns, and against the John Doe defendants or any other Dealer not named as a defendant, any of the claims foreclosed or released in accordance with the Settlement Agreement, including any claim regarding the conduct alleged in the complaint.

V

COMPLIANCE

For purposes of determining and securing compliance with this Final Judgment and Consent Decree, duly authorized representatives of the Plaintiff States shall be permitted upon thirty (30) days prior written notice:

a. Reasonable access during normal office hours to any and all relevant and non-privileged records and documents in the possession, custody, or control of Defendant which relate to any of the matters contained herein or in the Settlement Agreement.

[*550] b. Subject to the reasonable convenience of Defendant to [**9] conduct interviews of any of the directors, officers, employees, agents, and any other persons acting on their behalf, each of whom may have counsel present, relating to any non-privileged matter contained herein or in the Settlement Agreement.

c. Defendant retains the right to object to any request under paragraphs (a) or (b) above within ten (10) days after its receipt on the grounds that the request is not reasonable, or not relevant to the matters contained herein or in the Settlement Agreement, or otherwise is not in accordance with law. Any such objection shall be directed to this Court for a ruling, with service by mail of the objection upon the State of New York.

d. The violation of any of the terms of Paragraph IV(A) of this Final Judgment and Consent Decree shall constitute a violation of federal and state antitrust laws for which civil remedies may be sought by the New York State Attorney General or the Attorney General of the State in which the violation occurred pursuant to [15 U.S.C. §§ 1, 15, 15c](#) and [26](#) and relevant state antitrust law upon application to this Court.

e. If the Attorney General of any Plaintiff State determines that Defendant has violated the terms [\[**10\]](#) of Section IV of this Final Judgment and Consent Decree, he shall give Defendant written notice of the violation and Defendant shall have fifteen (15) working days to respond in writing. If the State is not satisfied with Defendant's response, it shall notify Defendant in writing and Defendant shall have fifteen (15) working days to cure such non-compliance. If after such time Defendant has not cured the violation to the State's satisfaction, the State may seek penalties for contempt for violation of any paragraph of this Final Judgment and Consent Decree and with respect to alleged violations of Section IV (A) may seek the civil remedies referred to in Section V (d).

VI

JURISDICTION RETAINED

Without affecting the finality of this Final Judgment, jurisdiction shall be retained by this Court for the purpose of enabling any party hereto to apply for such further orders and directions as may be necessary or appropriate for the construction or enforcement of this Final Judgment and Consent Decree, the ruling upon any objection made pursuant to Section V, the modification of any of the provisions hereto to the extent such modification is permitted, and the remedy of a violation of [\[**11\]](#) any of the provisions contained herein. This Court shall have the authority to specifically enforce the provisions of this Final Judgment and Consent Decree.

VII

On the fifth anniversary date of this Final Judgment and Consent Decree, said Final Judgment and Consent Decree shall automatically terminate without any action by either party or the Court.

So ordered this *20th* day of *October*, 1995.

John G. Koeltl

UNITED STATES DISTRICT COURT

End of Document

Clark v. Esser

United States District Court for the Eastern District of Michigan, Southern Division

October 23, 1995, Decided ; October 23, 1995, filed

No. 92-CV-72341-DT

Reporter

907 F. Supp. 1069 *; 1995 U.S. Dist. LEXIS 17286 **; 151 L.R.R.M. 2087

GARY CLARK, LARRY DYER, GERALD GALLAGHER, ROBERT NASLANIC, DWIGHT WALKER and MARY KNOX, Plaintiffs, vs. JAMES F. ESSER, JIM CIANCIOLI, BETTY CARDINAL, LEON COOPER, GREG LOWRAN, RICK OLIVER, DAVID WITULSKI, BILL DUTTMAN and TEAMSTERS LOCAL 243, Defendants.

Prior History: [Clark v. Esser, 821 F. Supp. 1230, 1993 U.S. Dist. LEXIS 7124 \(E.D. Mich., 1993\)](#)

Core Terms

Defendants', lawsuit, Plaintiffs', state court, rights, individual defendant, discipline, sham, matter of law, defamation, new trial, Landrum-Griffin Act, infringement, complicity, motive, cases, union member, motion for judgment, retaliate, courts, directed verdict motion, state court action, jury instructions, retaliatory, parties, protections, renewal, required to exhaust, defamation claim, improper motive

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Weight & Sufficiency

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN1 [blue icon] Trials, Judgment as Matter of Law

The standards governing consideration of a motion for judgment as a matter of law, whether considered before or after submission of the case to the jury, are as follows: Viewing the evidence in the light most favorable to the party against whom the motion is made, a directed verdict is proper if reasonable minds could only come to a conclusion against the non-movant. In coming to this conclusion neither the credibility or weight of the evidence should be considered. Furthermore, a post-verdict motion for judgment as a matter of law will be considered only if a similar motion was made before the jury charge. [Fed. R. Civ. P. 50\(a\)\(2\)](#) and [50\(b\)](#). [Federal Rule of Civil Procedure 59](#) states that a new trial may be granted for any of the reasons for which new trials have been granted in actions at

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law in the courts of the United States. Specific grounds for new trial can include: that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and that the motion may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Jury Trials

HN2 Relief From Judgments, Altering & Amending Judgments

The grant of a new trial falls within the trial court's discretion to act to prevent a miscarriage of justice. This broad discretion vested in the trial court in deciding a [Fed. R. Civ. P. 59](#) motion for new trial extends to motions predicated upon the sufficiency of the evidence and errors in jury instructions. [Fed. R. Civ. P. 61](#) makes clear that the court must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. It provides, in pertinent part that no error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3 Judgment as Matter of Law, Directed Verdicts

[Fed. R. Civ. P. 50](#) controls the court's decision whether to grant a motion for judgment notwithstanding the verdict. [Fed. R. Civ. P. 50\(a\)\(2\)](#) specifies the requirements for a motion for directed verdict: Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment. [Fed. R. Civ. P. 50\(b\)](#) governs the renewal of this motion after trial: 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. The plain language of the [Fed. R. Civ. P. 50\(b\)](#) thus indicates that a motion for judgment notwithstanding the verdict is nothing more than the renewal of a previous motion for directed verdict; it follows that no new grounds can be asserted in the renewed motion.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

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Criminal Law & Procedure > Trials > Verdicts > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4 Judgment as Matter of Law, Directed Verdicts

Amended [Fed. R. Civ. P. 50\(a\)\(2\)](#) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment. The second sentence of [Fed. R. Civ. P. 50\(a\)\(2\)](#) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. [Fed. R. Civ. P. 50\(b\)](#) retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

HN5 Trials, Judgment as Matter of Law

Although erroneous jury instructions can provide the basis for ordering a new trial, [Fed. R. Civ. P. 51](#) flatly requires parties to call such alleged errors to the attention of the trial court: 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 > Trials > Judgment as Matter of Law > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Jury Instructions

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

HN6 Trials, Judgment as Matter of Law

An appellate court may enter judgment as a matter of law despite a failure to object to a jury instruction at trial if the instruction erroneously stated the law and the evidence presented at trial was insufficient as a matter of law to support a jury verdict under the correct statement of the law. A defendant would be entitled to judgment as a matter of law if it could show both: (1) that the court erroneously failed to instruct the jury that plaintiff could prevail only if they showed that a state lawsuit was a "sham," and (2) that the evidence at trial was insufficient as a matter of law to establish that the state lawsuit was a "sham."

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Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

HN7 **Labor Arbitration, Discipline, Layoffs & Terminations**

Title I of the Labor-Management Reporting and Disclosure Act, [29 U.S.C.S. §§ 411-415](#), provides a number of protections to union members, including the right to free speech and assembly, the right to sue, and the right not to be improperly disciplined. [29 U.S.C.S. § 411\(a\)\(2\)](#) provides that every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. [29 U.S.C.S. § 411\(a\)\(2\)](#).

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN8 **Labor Arbitration, Discipline, Layoffs & Terminations**

The Labor-Management Reporting and Disclosure Act [§ 411\(a\)\(5\), 29 U.S.C.S. § 411\(a\)\(5\)](#) states: No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing. [29 U.S.C.S. § 411\(a\)\(5\)](#). Disciplinary procedures, should a union choose to employ them, must conform to the dictates of [§ 411\(a\)\(5\)](#) regardless of the offensive nature of the union member's conduct.

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

HN9 **Labor Arbitration, Discipline, Layoffs & Terminations**

The Labor-Management Reporting and Disclosure Act [§ 411\(a\)\(4\), 29 U.S.C.S. § 411\(a\)\(4\)](#) states: No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, that no

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interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition. [29 U.S.C.S. § 411\(a\)\(4\)](#).

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

[**HN10**](#) [↴] **Enforcement of Bargaining Agreements, Exhaustion of Remedies**

The exhaustion requirement under Title I of the Landrum-Griffin Act plainly is permissive, not mandatory: any such labor organization member may be required to exhaust reasonable hearing procedures within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof. [29 U.S.C.S. § 411](#).

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[**HN11**](#) [↴] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A principle of law often referred to as the Noerr-Pennington doctrine holds that business interests may combine and lobby to influence the legislative, executive, or judicial branches of government or administrative agencies without violating the antitrust laws, because such activities are protected by the [first amendment](#) right of petition. Although the doctrine applies regardless of the motives of the petitioners, it is not without exception. The Supreme Court has carved out a narrow "sham" exception to this doctrine, which covers cases where the defendant intended to use the petitioning process merely to harass the plaintiff.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

[**HN12**](#) [↴] **Employer Violations, Interference With Protected Activities**

[29 U.S.C.S. § 158\(a\)](#). states that it shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in the National Labor Relations Act § 7 (Act), (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act. The National Labor Relations Act § 7 guarantees employees the right to self-organization, to form, join, or

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assist labor organizations, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection under [29 U.S.C.S. § 157](#).

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

[**HN13**](#) [blue icon] **Employer Violations, Interference With Protected Activities**

The right of access to the courts is an aspect of the [First Amendment](#) right to petition the government for redress of grievances. Accordingly, the antitrust laws do not prohibit the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. This same [First Amendment](#) right should inform its construction of the National Labor Relations Act (NLRA). The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the NLRA.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

[**HN14**](#) [blue icon] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

The [First Amendment](#) right should inform its construction of the National Labor Relations Act, that the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

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Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN15 [blue document icon] Trials, Judgment as Matter of Law

If there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot be concluded that the suit should be enjoined. When a suit presents genuine factual issues, the state plaintiff's *First Amendment* interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the state's interest in protecting the health and welfare of its citizens lead the courts to construe the National Labor Relations Act (NLRA), as not permitting the National Labor Relations Board (Board) to usurp the traditional factfinding function of the state-court jury or judge. Hence, if a state plaintiff is able to present the Board with evidence that shows his lawsuit raises genuine issues of material fact, the Board should proceed no further with the unfair labor practice proceedings under NLRA §§ 8(a)(1)-8(a)(4), but the Board should stay those proceedings until the state-court suit has been concluded.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN16 [blue document icon] Formal Adjudicatory Procedure, Hearings

The National Labor Relations Board must refrain from deciding genuinely disputed material factual issues with respect to a state suit, it likewise must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN17 [blue document icon] Formal Adjudicatory Procedure, Hearings

When presented with an unfair labor practice claim that also seeks to enjoin the employer's prosecution of a state court lawsuit against the union or its members, the National Labor Relations Board (NLRB), must stay its proceedings if the state suit has arguable merit, regardless of the employer's motivation for bringing the suit. Once the state court litigation has ended, however, the NLRB may proceed as follows: In instances where the NLRB must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the NLRB, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the NLRB may then proceed to adjudicate the National Labor Relations Act §§ 8(a)(1) and 8(a)(4) unfair labor practice case. The

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employer's suit having proved unmeritorious, the NLRB would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employee's National Labor Relations Act § 7 rights.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Arbitration Awards

Labor & Employment Law > ... > Labor Arbitration > Arbitrators > Authority

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN18 [blue icon] **Reviewability, Exhaustion of Remedies**

If a state court action utterly lacks merit, the National Labor Relations Board (NLRB), may properly enjoin it. Moreover, federal interests may be freely asserted once the state court litigation has ended and the threat of interference no longer exists. At that point, a federal authority may find that the state court lawsuit was filed in bad faith, even if it was not so lacking in merit as to warrant an earlier injunction. Indeed, termination of the state court suit diminishes the NLRB's obligation to examine that suit's allegations for any signs of possible merit. The NLRB instead may rely on the disposition of the state court action, even if it was not disposed of on the merits. A state lawsuit therefore could survive summary judgment and nevertheless be deemed meritless by the NLRB, so long as the suit did not ultimately terminate in the plaintiff's favor.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN19 [blue icon] **Defenses, Demurrers & Objections, Affirmative Defenses**

The question of whether the claims raised in a prior action, and raised again as counterclaims in another case, have a reasonable basis is beyond doubt a jury issue. Among the issues that must be considered in determining "reasonableness" is the subjective intent of the plaintiffs in initially bringing their claims. It is the question of reasonableness upon which the parties' rights will diverge.

Counsel: [**1] Attorney(s) for Plaintiff or Petitioner: Ellis Boal, Esq., Detroit, Michigan.

Attorney(s) for Defendant or Respondent: Curtis G. Rundell, II, Troy, Michigan.

Judges: Honorable Gerald E. Rosen, United States District Judge

Opinion by: Gerald E. Rosen

Opinion

[*1071] OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND THE INDIVIDUAL DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on OCT 23 1995

PRESENT: Honorable Gerald E. Rosen, United States District Judge

I. INTRODUCTION

Plaintiffs, members of a political caucus known as "rank and file teamsters" or **[*1072]** "RAFT" within Teamsters Local 243, instituted this action against Defendants, members of a political caucus known as "Esser-Cinci" within Local 243 and Local 243 itself, claiming that Defendants deprived Plaintiffs of their right to free expression, as protected by the Labor-Management Reporting and Disclosure Act ("LMRDA," or "Landrum-Griffin Act"), [29 U.S.C. 411\(a\)\(2\)](#). In particular, Plaintiffs claim that the individual Defendants filed a retaliatory defamation, libel, and slander action against them in state court. The **[**2]** individual Defendants, whose state court defamation case was dismissed, filed a defamation counterclaim against Plaintiffs in the instant matter.

The case was tried before a jury on June 21 through 25, 1993. At the close of Plaintiffs' case, Defendants made an oral motion for directed verdict, which was denied by the Court. On July 15, 1993, after a jury rejected Defendants' defamation counterclaim and returned a verdict in favor of Plaintiffs in the amount of \$ 30,000, Defendants filed the instant motion seeking judgment as a matter of law on Plaintiffs' Landrum-Griffin Act claim, or, in the alternative, a new trial.

While this motion was pending, this Court was informed that Mr. Francis J. Kortsch, counsel for Defendant Local 243, had been suspended from the practice of law by the State of Wisconsin prior to the trial. Because Mr. Kortsch's admission to practice in this Court was premised on his good standing in his home state of Wisconsin, this Court conducted a hearing to determine what action, if any, was necessitated by Mr. Kortsch's Wisconsin suspension. As a consequence, Mr. Kortsch was barred from continuing his representation of Defendant Local 243, and consideration of **[**3]** the instant motion was delayed until Local 243 could obtain new counsel.¹ On November 1, 1994, Defendant Local 243's new counsel filed a supplemental brief in support of Defendants' motion. Plaintiffs responded to the brief filed by Mr. Kortsch on August 11, 1993, and to the supplemental brief on December 5, 1994; Defendant Local 243 replied on December 9, 1994.

Next, on April 3, 1995, the individual Defendants filed a motion for relief from judgment, or in the alternative for a stay of execution of that judgment. The individual Defendants assert that it was "understood by all" throughout the trial that liability for Plaintiffs' LMRDA claims could rest only with Defendant Local 243. By order dated April 24, 1995, this Court granted the motion for a stay of execution pending resolution of Defendants' outstanding motions.

Having considered all of the documents filed by the **[**4]** parties, as well as the arguments made by their counsel at a hearing held on this matter on August 23, 1995, and for the reasons stated below, the Court hereby denies Defendants' request for judgment as a matter of law or for a new trial, and denies the individual Defendants' motion for relief from judgment.

II. STANDARD OF REVIEW

HN1 [↑] The standards governing consideration of a motion for judgment as a matter of law, whether considered before or after submission of the case to the jury, are as follows:

Viewing the evidence in the light most favorable to the party against whom the motion is made, a directed verdict is proper if reasonable minds could only come to a conclusion against the non-movant. In coming to this conclusion neither the credibility or weight of the evidence should be considered.

[Littlejohn v. Rose, 768 F.2d 765, 770 \(6th Cir. 1985\)](#), cert. denied, 475 U.S. 1045, 106 S. Ct. 1260, 89 L. Ed. 2d 570 (1986). Furthermore, a post-verdict motion for judgment as a matter of law will be considered only if a similar motion was made before the jury charge. See [Fed. R. Civ. P. 50\(a\)\(2\)](#) and [50\(b\)](#).

¹ After the hearing, this Court also found Mr. Kortsch in contempt of Court for violation of his obligation under Local Rule 111.1(b).

Turning to the motion for new trial, [Federal Rule of Civil Procedure 59](#) states that "[a] new trial may be granted . . . for any of the reasons for which new trials have been granted in actions at law in the courts [[*1073](#)] of the United States . . ." Specific grounds for new trial can include:

that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and that the motion may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.

11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2805, at 37-38 (1973).

[HN2](#) [↑] "The grant of a new trial . . . falls within the trial court's discretion to act to prevent a miscarriage of justice." [Fryman v. Federal Crop Ins. Corp., 936 F.2d 244, 248 \(6th Cir. 1991\)](#). This broad discretion vested in the trial court in deciding a [Rule 59](#) motion for new trial extends to motions predicated upon the sufficiency of the evidence and errors in jury instructions. See [City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749 \(6th Cir. 1980\)](#). See generally C. Wright and A. Miller, 11 *Federal Practice* [[**6](#)] and *Procedure* § 2818 and cases cited therein.

[Federal Rule of Civil Procedure 61](#) makes clear that the court must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. It provides, in pertinent part:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

The Court will apply the above principles in deciding Defendants' motion for judgment notwithstanding the verdict or for a new trial.

III. ARGUMENTS OF THE PARTIES

Defendants make several arguments in support of their motion for judgment notwithstanding the verdict or for a new trial. In their initial brief (filed by Francis Kortsch on July 15, 1993), they argue:

- I. Lack of subject matter jurisdiction because the state court litigation, [[**7](#)] however construed, does not constitute "discipline" under [§ 411](#) of the Landrum-Griffin Act.
- II. Insufficient evidence of union complicity in preparing or advancing the state court action.
- III. Insufficient evidence that the state court action was filed for an improper purpose.
- IV. Failure to exhaust internal union remedies.

In a supplemental brief (filed by Defendant Local 243's new counsel on November 1, 1994), Defendants also argue:

- V. Because the [First Amendment](#) protects the right of citizens to petition the courts for redress of grievances, the commencement of a public proceeding against a union member can never constitute an actionable infringement of his rights, or at most can constitute an infringement only if it is a "sham" proceeding.

As a result of this alleged failure of the Court to properly construe the law, Defendant Local 243 argues that improper jury instructions were given.

In addition to attacking the merits of these contentions, Plaintiffs also contend that arguments I, IV and V should not be addressed by this Court due to Defendants' failure to raise these points of law in their initial motion for directed verdict,² and [[**8](#)] their failure to object to the jury instructions.

² Although the parties refer to the motion raised by Defendants at the close of Plaintiffs' case-in-chief as a "motion for directed verdict," the 1991 amendments to [Federal Rule of Civil Procedure 50](#) abandoned the term "directed verdict" in favor of the more precise term "judgment as a matter of law." See [Fed. R. Civ. P. 50\(a\)](#) Advisory Committee's Note (1991 Amendment). However, because the parties have employed the "directed verdict" terminology, the Court, rather than standing on linguistic formalities, adopts the parties' terminology when discussing this motion.

[*1074] Regarding the individual Defendants' motion for relief from judgment, Defendants contend that the trial was conducted with the implicit understanding, by all parties, that only Defendant Local 243 could be held liable for any infringement of Plaintiffs' rights under Title I of the Landrum-Griffin Act. Accordingly, the individual Defendants conclude that the judgment of this Court holding *all* [*9] of the Defendants liable reflects a "clerical mistake" that should be corrected by issuing an amended judgment naming only Defendant Local 243. Plaintiffs respond that their complaint properly named both the individual Defendants and Local 243, and that their trial brief explicitly asserted the joint and several liability of the Local and the members of "Esser-Cinci."

IV. ANALYSIS

A. THIS COURT WILL ADDRESS DEFENDANTS' ARGUMENTS DESPITE THEIR FAILURE TO RAISE THEM IN THEIR MOTION FOR DIRECTED VERDICT OR TO OBJECT TO THE JURY INSTRUCTIONS.

Defendants' motion for directed verdict after the completion of Plaintiffs' case-in-chief rested exclusively on the alleged insufficiency of the evidence to establish either union complicity or improper motive in filing the state lawsuit. Furthermore, Defendants did not object to the jury instructions given by the Court. Plaintiffs contend that because arguments I, IV, and V above were not raised in Defendants' motion for directed verdict, they may not be raised in a subsequent motion for judgment notwithstanding the verdict. Moreover, to the extent that argument V above asserts that the jury was improperly instructed, Plaintiffs [*10] argue that Defendants' failure to object to the jury instructions at trial bars them from objecting to those instructions in a post-trial motion.

HN3 [↑] [Federal Rule of Civil Procedure 50](#) controls this Court's decision whether to grant a motion for judgment notwithstanding the verdict. [Rule 50\(a\)\(2\)](#) specifies the requirements for a motion for directed verdict:

Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment.

[Rule 50\(b\)](#) governs the renewal of this motion after trial:

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.

The plain language of the Rule thus indicates that a motion for judgment notwithstanding the verdict is nothing more than the renewal of a previous motion for directed verdict; it follows that no new grounds can be asserted in the renewed motion. The Advisory [*11] Committee adopted this straight forward interpretation in its discussion of the 1991 amendments to the Rule, and also explained the purpose behind the Rule's requirements:

HN4 [↑] Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment

The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict . [*12] . . .

* * * *

[*1075] [[Rule 50\(b\)](#)] retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A *post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.*

Fed. R. Civ. P. 50 Advisory Committee's Note (1991 Amendment) (citations omitted) (emphasis added). Therefore, the Advisory Committee Notes -- not to mention the language of the Rule itself -- clearly support Plaintiffs' contention that this Court should not consider any arguments Defendants raised only in their "renewed" motion.

In response, Defendants argue that "technicalities" should not foreclose their presentation of new arguments, and that these new arguments in any event are only "minor variances" from the points raised in their motion for directed verdict. However, most of the cases cited by Defendant in support of this position involve only the failure of a party to *renew* its motion for judgment as a matter of law at the close of all the evidence. See, e.g., Miller v. American President Lines, Inc., [\[*131\] 989 F.2d 1450, 1465 \(6th Cir. 1993\)](#); Riverview Invs., Inc. v. Ottawa Community Improvement Corp., [899 F.2d 474, 477-78 \(6th Cir. 1990\)](#); Boynton v. TRW, Inc., [858 F.2d 1178, 1185 \(6th Cir. 1988\)](#). Those cases thus did not need to address the possibility of prejudice to the party opposing the motion, because that party was properly advised of the basis for the motion in the earlier motion for directed verdict.

Two cases, however, do offer some support for Defendants' argument. First, in National Indus., Inc. v. Sharon Steel Corp., [781 F.2d 1545, 1549 \(11th Cir. 1986\)](#), the court found that a renewed motion for judgment as a matter of law presented arguments that were "closely related" to those raised in the initial motion. The court further stated that "even if the subject matters of the two motions were much farther apart, we would not read Rule 50(b) so narrowly as [the opposing party] urges us to do." [781 F.2d at 1549](#). Reasoning that Rule 50 is designed to ensure that the party opposing a motion is adequately informed of the basis for the motion, the court found that "there is nothing in the record to suggest an ambush or sandbagging." [781 F.2d at 1549](#). Similarly, [\[**14\]](#) the court in Parkway Garage, Inc. v. City of Philadelphia, [5 F.3d 685, 691 \(3d Cir. 1993\)](#), found Rule 50 satisfied where the moving party's "implicit" and "oblique" references to an issue were sufficient to put the opposing party on notice that the issue was contested.

Because Defendants' first "new" argument -- i.e., that state court litigation does not constitute "discipline" under the Landrum-Griffin Act -- presents a purely legal issue, and because Defendants' counsel referred at trial to a case that considers this argument, Defendants assert that Plaintiffs were given sufficient notice of this argument to satisfy Rule 50. This Court notes as an initial matter that Defendants' new theory can in no way be construed as a "minor variance" from the grounds asserted in their motion for directed verdict. However, because it appears unlikely that Plaintiffs' presentation of their case would have been any different had Defendants asserted this argument earlier, the Court will address the merits of the argument.

Defendants' most recent argument -- i.e., that Plaintiffs could not establish actionable infringement of their rights under the Landrum-Griffin Act without at least showing [\[**15\]](#) that Defendants' state lawsuit was a "sham" -- presents a closer question. In its broadest form, the argument rests on the purely legal question whether bringing a lawsuit can ever constitute infringement of Landrum-Griffin rights. If this Court were to answer this question in the negative, Plaintiffs' claims under the LMRDA would be foreclosed, regardless of any additional evidence Plaintiff could have presented at trial. In that event, Plaintiffs would not have been deprived of any meaningful opportunity to cure defects in their case.

Defendants' argument can also be construed as turning on the more fact-based question whether Plaintiffs could show that the state lawsuit was a "sham" proceeding. Had Plaintiffs been aware of this argument during the trial, they might have tailored [\[*1076\]](#) their presentation of evidence bearing on Defendants' motives for bringing the state action to more squarely assert that the state suit was indeed a "sham." This Court is reluctant to speculate that earlier articulation of this theory would have had no effect on Plaintiffs' case. Cf. Francis v. Clark Equip. Co., [993 F.2d 545, 555 \(6th Cir. 1993\)](#) (construing Rule 50 as dictating that "the nonmoving [\[**16\]](#) party must be apprised of the dispositive issues and afforded an opportunity to present *any* available evidence").

If Defendants' argument is viewed as a failure to properly instruct the jury, however, a different analysis pertains. HN5 Although erroneous jury instructions can provide the basis for ordering a new trial, Federal Rule of Civil Procedure 51 flatly requires parties to call such alleged errors to the attention of the trial court:

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.

Because Defendants failed to object to the jury instructions in time to give the Court an opportunity to cure any defects, [Rule 51](#) appears to preclude this Court's consideration of Defendants' most recent theory.

A Supreme Court case, however, offers Defendants the possibility of avoiding the [Rule 51](#) bar by combining two contentions. In [Boyle v. United Technologies Corp., 487 U.S. 500, 513-14, 108 S. Ct. 2510, 2519, 101 L. Ed. 2d 442 \(1988\)](#), the Court found that [HN6](#)¹ an appellate court may enter [\[*17\]](#) judgment as a matter of law despite a failure to object to a jury instruction at trial if the instruction erroneously stated the law and the evidence presented at trial was insufficient as a matter of law to support a jury verdict under the correct statement of the law. *Boyle* thus suggests that Defendants would be entitled to judgment as a matter of law if they could show both: (1) that the Court erroneously failed to instruct the jury that Plaintiffs could prevail only if they showed that the state lawsuit was a "sham," and (2) that the evidence at trial was insufficient as a matter of law to establish that the state lawsuit was a "sham." In considering the second point, though, this Court again runs afoul of the difficulty discussed above in its [Rule 50](#) analysis: Plaintiffs' evidence might have been different had they been properly apprised of Defendants' contention during the trial.³

[\[*18\]](#) In short, this Court's survey of the relevant Rules and case law has failed to uncover any clear support for the proposition that a trial court may address an argument presented for the first time in a post-trial motion, particularly when that argument turns partly on factual determinations. Accordingly, this Court appears to be precluded from considering Defendants' most recent argument. However, because this is a close question, and because the argument can be construed as turning on purely legal issues, this Court believes that the most appropriate course of action is to address the merits of Defendants' theory.⁴

B. THE STATE COURT LAWSUIT NEED NOT HAVE BEEN "DISCIPLINE" WITHIN THE MEANING OF § 411(a)(5) TO CONSTITUTE A VIOLATION OF § 411(a)(2).

[HN7](#)¹ Title [\[*19\]](#) I of the Labor-Management Reporting and Disclosure Act, [29 U.S.C. \[*1077\] §§ 411-415](#), provides a number of protections to union members, including the right to free speech and assembly, the right to sue, and the right not to be improperly disciplined. [Section 411\(a\)\(2\)](#) -- the subsection upon which Plaintiffs rely -- provides:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

³ Although *Boyle* does not address this concern, the case upon which *Boyle* relies, [City of St. Louis v. Praprotnik, 485 U.S. 112, 119-20, 108 S. Ct. 915, 921-22, 99 L. Ed. 2d 107 \(1988\)](#), specifically notes that the party claiming error in a jury instruction had raised and preserved the relevant legal issues by filing a pretrial motion for summary judgment, a motion for directed verdict, and a motion for judgment notwithstanding the law. The opposing party thus was put on notice, both before and during the trial, of the issues involved in the dispute over the jury instruction. Defendants here cannot show that Plaintiffs were similarly apprised of Defendants' most recent argument. Cf. [Graham v. Davis, 279 U.S. App. D.C. 341, 880 F.2d 1414, 1420 \(D.C. Cir. 1989\)](#) (distinguishing *Praprotnik* on the ground that the party objecting to jury instructions had at best raised the underlying legal issues by submitting proposed instructions during the trial that stated the law differently).

⁴ Plaintiffs also contend that argument IV above -- i.e., that Plaintiffs failed to exhaust internal union remedies -- should not be addressed by this Court. The Court agrees, but for a different reason discussed later in this opinion.

Defendants, in their initial post-trial brief, argue that [§ 411\(a\)\(2\)](#) protects a member's rights to [\[**20\]](#) free speech only as defined by the Act, and that the Act does not create a right to commit an intentional tort such as defamation against union officials. Because defamatory statements are not protected by the Act, Defendants surmise that Local 243's state court defamation suit could not have constituted "discipline" of Plaintiffs within the meaning of [§ 411\(a\)\(5\)](#).⁵ In addition, although Defendants strenuously deny that there was any union complicity in the decision to bring the state court defamation action, they argue that the Union nonetheless would have been justified in taking action to protect its image with its rank-and-file members, because lack of trust among members "would interfere with its performance of its legal or contractual obligations" within the meaning of [§ 411\(a\)\(2\)](#).

[\[**21\]](#) These arguments are flawed for several reasons, not the least of which is the fact that the jury found Defendants' defamation claim to be without merit. Furthermore, it is unclear how the allegedly defamatory nature of Plaintiffs' statements bears on the propriety of the Union's disciplinary procedures.⁶ Surely disciplinary procedures, should a union choose to employ them, must conform to the dictates of [§ 411\(a\)\(5\)](#) regardless of the offensive nature of the union member's conduct. Finally, even if Local 243 were correct in its contention that [§ 411\(a\)\(2\)](#) authorizes a response to Plaintiffs' statements because of their potential to interfere with the Local's ability to function as an institution, [§ 411\(a\)\(2\)](#) also makes clear that establishment of appropriate rules and initiation of disciplinary proceedings pursuant to those rules would have been the appropriate course of action.

[\[**22\]](#) In their supplemental brief, Defendants attempt to establish the relevance of [§ 411\(a\)\(5\)](#) to the instant matter by directing the Court's attention -- for the first time -- to two cases involving the filing of civil or criminal complaints against union members. In [Morrissey v. National Maritime Union of America, 544 F.2d 19, 22 \(2d Cir. 1976\)](#), a union member who opposed the established union leadership attempted to distribute pamphlets expressing his point of view at the union hall in violation of a posted sign indicating that only union publications could be distributed inside the hall. After Morrissey was asked to stop and refused to do so, he was arrested and charged with disorderly conduct and criminal trespass. [544 F.2d at 22](#). Both charges were eventually dismissed, and Morrissey then brought a civil suit pursuant to [§§ 411\(a\)\(2\) and \(5\)](#) against the union and several of its officials. [544 F.2d at 22](#). He argued that actions taken by union officials "in prohibiting and preventing him from distributing the pamphlets in the Union Hall deprived him" of his free speech rights [\[*1078\]](#) under [§ 411\(a\)\(2\)](#), and that "their causing his arrest constituted improper disciplinary action in [\[**23\]](#) violation of [29 U.S.C. § 411\(a\)\(5\)](#)." [544 F.2d at 22](#) (quoting [Morrissey v. National Maritime Union, 397 F. Supp. 659, 663 \(S.D.N.Y. 1975\)](#)). The jury returned a general verdict finding that the defendants had violated [§ 411\(a\)](#) of the Landrum-Griffith Act, without specifying whether the violation had been of [§ 411\(a\)\(2\)](#) or [§ 411\(a\)\(5\)](#) or both. [544 F.2d at 23](#).

The Court of Appeals for the Second Circuit first found that the evidence adduced at trial was sufficient to support a verdict against the defendants under [§ 411\(a\)\(2\)](#). [544 F.2d at 23-24](#). The defendants had argued that their conduct fell within the [§ 411\(a\)\(2\)](#) proviso that permits unions to "adopt and enforce reasonable rules." [544 F.2d at 23](#). The court, however, agreed with the trial court that it was unnecessary to inquire into the reasonableness of the rule posted in the union hall, because that rule was posted by an individual union officer without first having been "adopted" by the union within the meaning of the [§ 411\(a\)\(2\)](#) proviso. [544 F.2d at 24](#).

Nevertheless, the *Morrissey* court reversed the general verdict for the plaintiff, based on its conclusion that the defendants had not violated [§ 411\(a\)\(5\)](#) of the [\[**24\]](#) Landrum-Griffith Act. [544 F.2d at 25-26](#). The court reasoned that because the focus of [§ 411\(a\)\(5\)](#) is to provide due process protections before a union may discipline its members, that subsection does not extend to proceedings such as criminal prosecutions where the judicial system will provide the necessary procedural protections:

⁵ [HN8](#)  [Section 411\(a\)\(5\)](#) of the Act states:

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

⁶ This assumes that [§ 411\(a\)\(5\)](#) has some relevance to this case, a proposition that will be explored later in this opinion.

The scope of the prohibition is best illuminated by Congress' statement of the conditions that will overcome it. Congress desired to provide "safeguards against improper disciplinary action," not to outlaw union discipline. A union may "otherwise discipline" a member, just as it may fine, suspend or expel him, if it has served him with written specific charges, has given him a reasonable time to prepare his defenses, and has afforded him a full and fair hearing. At least in this context, the phrase "otherwise disciplined" must be limited to types of punishment where compliance with these conditions is feasible. The compulsory steps would take weeks, even months. The "otherwise disciplined" phrase could thus not have been meant to cover a decision to call a policemen to remove a member from a union's premises.

We do not say, of course, that "discipline" [**25] may not be involved in union sanctions arising from incidents that would otherwise be violations of law, cf. *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 91 S. Ct. 609, 28 L. Ed. 2d 10 (1971) (expulsion following assault on union official). We do say that Congress could not have been thinking of a case like this where the union chooses to invoke the processes of law and the arrested union member will have his full range of procedural protections in the courts. If the decision to have him arrested and prosecuted is itself unjustified, he will have other legal remedies, as this case demonstrates [i.e., a malicious prosecution claim]; Title I has no preemptive effect on such remedies, [29 U.S.C. § 413]. We thus conclude it was error for the judge to have allowed the jury to find the defendants liable for violating [§ 411(a)(5)].

544 F.2d at 26 (emphasis added) (footnote omitted). Thus, contrary to Defendants' contention, *Morrissey* did not hold that pursuit of a state court action cannot be considered an act in violation of § 411(a)(2); rather, that court held that a state prosecution could not be considered discipline for purposes of determining [**26] violations of § 411(a)(5).

Similarly, in the second case cited by Defendants, *Phillips v. International Assoc. of Bridge, Structural and Ornamental Iron Workers*, 556 F.2d 939, 941 (9th Cir. 1977), the issue was "whether malicious prosecution of a civil suit by a labor organization or its officers acting in their official capacity against a member constitutes 'discipline' within the meaning of § 411(a)(5)." Relying on *Morrissey, supra*, the court concluded that malicious prosecution is not "discipline" within the meaning of the Act. *556 F.2d at 941-42*. The court reasoned:

Judicial process will assure [a union member] that before judgment is rendered he [*1079] will have notice of the specific charges on which the suit is based, time to prepare a defense and a full and fair hearing, and, if the judicial process was invoked improperly against the union member, he will have the full range of remedies provided by law.

556 F.2d at 941. *Morrissey* and *Phillips*, therefore, both stand for the proposition that when a union decides to bring charges against a member through the judicial system, as opposed to through union disciplinary procedures, there is no need for [**27] the procedural protections afforded to union members by § 411(a)(5).

This Court finds it unnecessary to address the *Morrissey - Phillips* construction of § 411(a)(5), because the principle announced in those cases concerning § 411(a)(5) simply is not applicable to the instant matter. Plaintiffs did not allege, nor did they argue before the jury, that the state court action filed against them by the individual Defendants constituted "discipline" within the meaning of § 411(a)(5). They do not claim that they were denied procedural protections. Rather, they claim that their substantive free speech rights, as protected by § 411(a)(2), were infringed by a retaliatory lawsuit designed to stop them from speaking out in the future. Nothing in *Morrissey* or *Phillips* defeats this claim. See *Murphy v. International Union of Operating Eng'rs*, 774 F.2d 114, 121-22 (6th Cir. 1985) (citing *Morrissey* but still finding that "a suit may be brought to redress an infringement of section 411 rights even if no improper 'discipline' is shown").

Indeed, after addressing and rejecting a § 411(a)(5) claim, *Phillips* recognized that a retaliatory lawsuit may form the basis of [**28] a Title I infringement claim. *556 F.2d at 942*. The plaintiffs in *Phillips* alleged that the union had filed suit against them in order to prevent them from prosecuting actions they previously had filed against the union in a state court and before the National Labor Relations Board ("NLRB"). *556 F.2d at 940*. As union members, their

right to file such actions is protected by [§ 411\(a\)\(4\)](#).⁷ The *Phillips* court thus considered "whether the bringing of the malicious civil actions [by the union] . . . can be said to have limited the right of [the union member plaintiffs] to institute or to continue" NLRB and court actions protected by [§ 411\(a\)\(4\)](#). [556 F.2d at 942](#). After noting that in a previous case, [Operating Eng'rs Local Union No. 3 v. Burroughs](#), 417 F.2d 370 (9th Cir. 1969), the Ninth Circuit had found that disciplining a member through imposition of a fine for bringing a suit against the union constituted a violation of [§ 411\(a\)\(4\)](#), the court stated:

It is thus established that the taking of retaliatory action against the member for having brought suit can operate to limit the right of that member to institute suit under this subsection. The fact that in *Burroughs* [**29] the union retaliation was by union discipline for violation of a formal union rule, while here it was by way of malicious court actions, does not affect the result. If a union member's right to sue is to have any meaning, courts must be ever vigilant in protecting that right against indirect and subtle devices as well as against direct and obvious limitations.

[556 F.2d at 942](#) (footnote omitted). Accordingly, the court reversed a lower court ruling dismissing the plaintiff's complaint for failure to state a claim under [§ 411\(a\)\(4\)](#). [556 F.2d at 942](#).

[**30] As in *Phillips*, the Plaintiff union members in the instant matter seek protection of Title I rights that have allegedly been infringed [[*1080](#)] through a retaliatory lawsuit. Here, the rights that they seek to protect are those free speech rights protected under [§ 411\(a\)\(2\)](#). Clearly, the threat of a lawsuit and its attendant financial burdens could suppress those protected rights. Consequently, this Court concludes that Plaintiffs' claim of a violation of their [§ 411\(a\)\(2\)](#) rights was properly presented to the jury.

C. SUFFICIENT EVIDENCE OF UNION COMPLICITY WAS AVAILABLE FOR SUBMISSION OF THE CASE TO A JURY.

Defendants, in both their original and supplemental briefs, attack the evidence concerning union complicity, arguing that it was insufficient for the jury to conclude that Local 243 participated in the state court action filed against Plaintiffs. Their attack seeks to discredit the available circumstantial evidence by examining it in a piecemeal fashion. Although any one of these pieces of evidence by itself might be insufficient for a finding of complicity, the evidence as a whole certainly was sufficient for the jury to conclude that the lawsuit was advanced and [**31] supported by the Union. Because this Court cannot say that no reasonable jury could find in Plaintiffs' favor, granting judgment as a matter of law would be inappropriate. Furthermore, because this Court, upon reviewing the record, does not have a firm conviction that the jury reached the wrong conclusion, granting a new trial would be inappropriate. Indeed, the Court is convinced that the jury properly weighed the evidence.

In its May 27, 1993, Opinion and Order denying Defendants' motion for summary judgment, this Court relied principally upon four pieces of evidence of union complicity to preclude summary judgment: (1) a newspaper article in the Detroit Free Press in which a "Teamster spokesman" is quoted as saying that the purpose of the lawsuit was to "temper" Plaintiffs in the upcoming union election; (2) the fact that all of the members of the executive board of Local 243 participated in the state court litigation; (3) Defendant Union's admission in paragraph fourteen of its answer to the complaint that some work associated with the lawsuit was performed on Union time, and (4) the fact

⁷  [Section 411\(a\)\(4\)](#) states:

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

that some of this work was performed at Union offices. Further, it was alleged and then proven [**32] that a union organizer, Thomas Ziembovic, effected service of process on Plaintiffs. At trial, the jury was presented with evidence concerning all of these items, with the exception of the Detroit Free Press article, which was excluded from the case.⁸ Consequently, this Court concludes that the jury's finding of union complicity was supported by the evidence.

[33] D. SUFFICIENT EVIDENCE OF IMPROPER MOTIVE WAS AVAILABLE FOR SUBMISSION OF THE CASE TO A JURY.**

As with complicity, Defendants attack the evidence concerning improper motive in a piecemeal fashion, and fail to mention some of its more damaging aspects. The Court is confident that the jury reasonably found that the state lawsuit was filed with an improper motive. The timing of the lawsuit and Defendants' failure to prosecute it were telling indicia of that motive. Defendants brought the state court defamation action in the midst of a union election campaign in which Plaintiffs were opposing them. After the election was over and Defendants had won, they then largely failed to pursue their suit or participate in discovery. Indeed, several of the Defendants were involuntarily dismissed from the state court litigation due to their failure to appear for depositions. The remaining litigants eventually abandoned the action despite the fact that they had survived a motion for summary [*1081] disposition. Their failure to pursue the defamation action to its conclusion strongly suggests that their motive was improper. The jury so found, and this Court does not believe such a finding to [**34] be against the weight of the evidence.

Relying on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) Defendant Union also argues that the jury should have been instructed that Plaintiffs must prove retaliatory motive by clear and convincing, as opposed to preponderant, evidence. *Gertz* held that *public figures*, who often intentionally seek public attention, may not recover for alleged defamation by a news organization absent a showing, by clear and convincing evidence, that the organization had at least a reckless disregard for the truth. *418 U.S. at 342, 94 S. Ct. at 3008*. Defendant Union asserts that the decision of the individual Defendants to file a lawsuit, like the decision of a publisher to print information about public figures, is protected by the *First Amendment*. It follows, according to Defendant, that proof of improper motive must be by clear and convincing evidence.

Among the reasons cited by the *Gertz* Court as justification for imposing a heightened standard of proof on public figures who elect to bring defamation suits against news organizations, the Court pointed to significant differences between public and private figures [**35]⁹ and the need for protection of the press. *418 U.S. at 342-44, 94 S. Ct. at 3008-09*. Neither of these concerns is present here. Moreover, *Gertz* held that the high standard of proof and degree of malice required in public figure defamation cases need not be extended to cases involving private figures. *418 U.S. at 345-46, 94 S. Ct. at 3010*. Rather, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *418 U.S. at 347, 94 S. Ct. at 3010*. Because Plaintiffs are not public figures, Defendant Union's reliance on *Gertz* is without merit.

The [**36] *Gertz* Court's *First Amendment* analysis is also inapplicable here because of the sources of the competing rights at issue. Although the *First Amendment* defines the right of the individual Defendants to bring a defamation suit, Title I of the LMRDA grants Plaintiffs the free speech rights they seek to vindicate in the instant

⁸ In an effort to determine whether the "Teamster spokesman" quoted in the Detroit Free Press article truly was a spokesperson for the Union, the reporter who wrote the article was subpoenaed to testify concerning the source of the comment attributed to that spokesperson. After a hearing, the Court found that the reporter could not be compelled to divulge his source, and the reporter refused to do so voluntarily. Because the comment in the article was offered both for its truth -- i.e., that the purpose of the state lawsuit was to "temper" Plaintiffs -- and to show union complicity in the lawsuit, and because, pursuant to the Court's ruling, neither basis for admission could be established, the Court excluded the article on both foundation and hearsay grounds.

⁹ In particular, the Court reasoned that "public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements [than] private individuals normally enjoy." *418 U.S. at 344, 94 S. Ct. at 3009*.

suit. Nothing in [§ 411\(a\)\(2\)](#) requires an elevated standard of proof, nor is there any case law which even implies that such a standard should apply.¹⁰ In this situation, the Court sees no basis, either in law or policy, to insist upon such a standard.

E. EXHAUSTION OF INTERNAL UNION REMEDIES IS NOT REQUIRED.

Next, the Court rejects Defendants' argument that Plaintiffs' [\[**37\]](#) failure to exhaust internal union remedies should bar their action.¹¹ As an initial matter, [HN10](#)[] the exhaustion requirement under Title I of the Landrum-Griffin Act plainly is permissive, not mandatory: "any such [labor organization] member *may* be required to exhaust reasonable hearing procedures . . . within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . ." [29 U.S.C. § 411](#) (emphasis added); see also [NLRB v. Industrial Union of Marine & Shipbuilding Workers](#), [391 U.S. 418, 88 S. Ct. 1717, 1723, 20 L. Ed. 2d 706 \(1968\)](#) ("We conclude that 'may be required' is not a grant of authority to unions more firmly to police their members but a statement of policy that the public [\[*1082\]](#) tribunals whose aid is invoked may in their discretion stay their hands . . . while the aggrieved person seeks relief within the union."); [Bise v. International Bhd. of Elec. Workers](#), [618 F.2d 1299, 1303 \(9th Cir. 1979\)](#) ("The requirement of exhaustion of union remedies is a matter within the sound discretion of the courts." (footnote omitted)), cert. denied, [449 U.S. 904, 101 S. Ct. 279, 66 L. Ed. 2d 136 \(1980\)](#).

[\[**38\]](#) This Court thus invokes its discretion to waive the exhaustion requirement in this case. In support of this decision, the Court notes that a number of courts have singled out free speech actions as warranting waiver of the exhaustion requirement. See, e.g., [Bradford v. Textile Workers](#), [563 F.2d 1138, 1140-41 \(4th Cir. 1977\)](#) (recognizing exception to exhaustion requirement when free speech rights are implicated); [Koenig v. Clark](#), [536 F. Supp. 753, 762 \(D.N.J. 1982\)](#) (excusing exhaustion requirement in part because "plaintiff's allegations against the union and its officers include interference with protected speech rights"). The reason for such special concern for free speech claims is obvious. Congress passed the Landrum-Griffin Act to police internal union affairs. Although a union and its officers may be well-equipped to review discipline imposed for other forms of alleged misconduct, claims involving speech -- especially when that speech is critical of current union leadership -- often will demand independent review to ensure a just outcome.

In addition, this Court believes that by not raising the exhaustion issue prior to this motion, Defendants have waived it. See [\[**39\] International Bhd. of Boilermakers Local 1603 v. Transue & Williams Corp.](#), [879 F.2d 1388, 1396 n.3 \(6th Cir. 1989\)](#) (failure to plead limitations defense until post-trial motion constituted waiver of that defense).

F. COMMENCEMENT OF A LAWSUIT MAY CONSTITUTE INFRINGEMENT OF LANDRUM-GRIFFIN RIGHTS.

Relying on [Eastern Railroad Presidents Conference v. Noerr Motor Freight](#), [365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#), [United Mine Workers v. Pennington](#), [381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#), [California Motor Transp. Co. v. Trucking Unlimited](#), [404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 \(1972\)](#), and other cases, Defendant Local 243 argues in its supplemental brief that, by virtue of [First Amendment](#) protection, the bringing of a civil lawsuit can never be considered a violation of the Landrum-Griffin Act, or, alternatively, that it can be considered a violation of the Act only if it was a "sham" proceeding. The Local argues that, at the very least, the jury should have been told that they could find in favor of Plaintiffs only if they first determined that the state court lawsuit was a complete sham.¹² Defendant Local 243 further contends [\[**40\]](#) that the Court exacerbated its failure to properly instruct the jury by submitting Defendants' defamation counterclaim to the jury at the same time, thereby

¹⁰ Indeed, if a heightened standard of proof were to apply at all, it would seem that it would have applied to Defendants' defamation claims against Plaintiffs, because the individual Defendants, as union officers, arguably are "limited purpose" public figures. See [Gertz](#), [418 U.S. at 351, 94 S. Ct. at 3013](#).

¹¹ Counsel for Defendant Local 243 appeared to abandon this argument at the hearing on this matter.

¹² It should be noted that at trial Defendants neither requested a jury instruction to this effect nor objected to the instruction actually given.

implicitly instructing the jury that it was possible to find in favor of Plaintiffs while also determining that Defendants' defamation claim was meritorious.

Noerr and *Pennington, supra*, taken together, establish HN11[¹²] a principle of law often referred to as the Noerr-Pennington doctrine. "That doctrine holds that business interests may combine and lobby to influence the legislative, executive, or judicial branches of government or administrative agencies without violating the antitrust laws, because such activities are protected by the *first amendment* right of petition." *Eaton v. Newport Bd. of Educ.*, *975 F.2d 292, 298 (6th Cir. 1992)*, cert. denied, *508 U.S. 957, 124 L. Ed. 2d 674, 113 S. Ct. 2459 (1993)*. Although [**41] the doctrine applies "regardless of the motives of the petitioners," *975 F.2d at 298*, it is not without exception. "The Supreme Court has carved out a narrow 'sham' exception to this doctrine, which covers cases where the defendant intended to use the petitioning process merely to harass the plaintiff." *975 F.2d at 298*.

[*1083] In *Bill Johnson's Restaurants, Inc. v. NLRB*, *461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)*, the Supreme Court discussed the parameters of the "sham" exception within the context of the National Labor Relations Act ("NLRA"). The question before the Court in that case was "whether the National Labor Relations Board may issue a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally-protected labor rights, *without also finding that the suit lacks a reasonable basis in fact or law*." *461 U.S. at 733, 103 S. Ct. at 2165* (emphasis added). The case arose when an employee of Bill Johnson's Restaurants was fired after engaging in union organizing activities. *461 U.S. at 733, 103 S. Ct. at 2165*. The discharged employee filed unfair labor practice charges with the [**42] NLRB, and, with the aid of fellow employees, began a picketing campaign at the restaurant that included distribution of a leaflet alleging wrongdoing by restaurant management. *461 U.S. at 733-34, 103 S. Ct. at 2165*. The restaurant and three of its co-owners filed a complaint in state court seeking injunctive relief from the picketing activity and damages for, among other things, allegedly libelous statements made in the leaflet. *461 U.S. at 734, 103 S. Ct. at 2165*. In response to this state court litigation, the former employee filed additional charges with the NLRB, claiming that the restaurant had filed the state suit in retaliation for her protected activities, including her initial decision to file charges with the *NLRB*. *461 U.S. at 734-35, 103 S. Ct. at 2165*. The General Counsel for the NLRB issued a complaint against the restaurant alleging unfair labor practices.¹³ *461 U.S. at 735, 103 S. Ct. at 2165*.

[**43] After noting that the broad scope of the NLRA provided some support for the Board's position that a civil lawsuit can be an unfair labor practice, and thus can be enjoined, if it is pursued with a retaliatory motive, the Court cited "weighty countervailing considerations." *461 U.S. at 740-41, 103 S. Ct. at 2168-69*. In particular, the Court discussed its development of the "sham" exception in an earlier case arising under *antitrust law*:

In *California Motor Transport Co. v. Trucking Unlimited*, *404 U.S. 508, 510, 92 S. Ct. 609, 611, 30 L. Ed. 2d 642 (1972)*, we recognized that HN13[¹⁴] the right of access to the courts is an aspect of the *First Amendment* right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes.

¹³ Those allegations were based on a provision in the NLRA defining unfair labor practices by an employer. See HN12[¹⁵] *29 U.S.C. § 158(a)*. That provision states, in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section [7 of the Act];

* * * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *29 U.S.C. § 157*.

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[461 U.S. at 741, 103 S. Ct. at 2169](#) (citation omitted). [HN14](#)[] The Court reasoned that this same [*First Amendment*](#) right should inform its construction of the NLRA, and concluded:

The filing and prosecution of a *well-founded* lawsuit may [**44] not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.

[461 U.S. at 741-43, 103 S. Ct. at 2169-70](#) (emphasis added).

Apart from its desire to protect the [*First Amendment*](#) right of employers to seek redress in state court, the Court in *Bill Johnson's* [*1084] cited two additional factors that entered into its decision. First, the Court was concerned with limiting the power of the federal government to interfere with state court litigation. The Court recognized a "substantial state interest 'in protecting the health and well-being of its citizens.'" [461 U.S. at 742, 103 S. Ct. at 2169](#) (quoting [*Farmer v. United Bhd. of Carpenters & Joiners, Local 25, 430 U.S. 290, 303, 97 S. Ct. 1056, 1065, 51 L. Ed. 2d 338 \(1977\)*](#)). Second, the Court recognized that because the NLRB is powerless to grant relief to employers, "if the Board is allowed to enjoin the prosecution of a well-grounded state lawsuit, it necessarily follows that any state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury." [461 U.S. at 742, 103 S. Ct. at 2169](#) (citing [*Linn v. Plant Guard Workers, 383 U.S. 53, 63, 86 S. Ct. 657, 663, 15 L. Ed. 2d 582 \(1966\)*](#)).

After announcing a general rule and discussing its underlying bases, the Court described the steps the NLRB should take "in evaluating whether a state-court suit lacks the requisite basis." [461 U.S. at 744, 103 S. Ct. at 2170](#). The Court held:

[HN15](#)[] If there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined. When a suit presents genuine factual issues, the state plaintiff's [*First Amendment*](#) interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, lead us to construe the Act as not permitting the Board to usurp the traditional factfinding function of the state-court jury or judge. Hence, we conclude that if a state plaintiff is able to present the Board with evidence that shows his lawsuit raises genuine issues of material fact, the Board should proceed [**46] no further with the § 8(a)(1)-§ 8(a)(4) unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded.

[461 U.S. at 745-746, 103 S. Ct. at 2171](#) (footnotes omitted). In a footnote, the Court suggested that the NLRB consult the standards used by courts to decide motions for directed verdict and summary judgment. [461 U.S. at 745 n.11, 103 S. Ct. at 2171 n.11](#). Furthermore, "[HN16](#)[] just as the Board must refrain from deciding genuinely disputed material factual issues with respect to a state suit, it likewise must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary." [461 U.S. at 746, 103 S. Ct. at 2172](#) (footnote omitted).

Accordingly, [HN17](#)[] when presented with an unfair labor practice claim that also seeks to enjoin the employer's prosecution of a state court lawsuit against the union or its members, the NLRB must stay its proceedings if the state suit has arguable merit, regardless of the employer's motivation for bringing the suit. Once the state court litigation has ended, however, the NLRB may proceed as follows:

In instances where the Board must allow the lawsuit to proceed, [**47] if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in the state court, however, *or if his suit is withdrawn* or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and §

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8(a)(4) unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employee's § 7 rights.

Bill Johnson's, 461 U.S. at 747, 103 S. Ct. at 2172 (emphasis added); see also *Johnson & Hardin Co. v. NLRB, 49 F.3d 237, 242-243 (6th Cir. 1995)*; *Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085, 1089 (9th Cir. 1995)* ("Although . . . the mere lack of a [*1085] lawsuit's success does not by itself establish retaliation, it [**48] may be taken into account along with other factors in determining retaliatory motive."); *NLRB v. International Union of Operating Eng'r's, Local 520, 15 F.3d 677, 679 (7th Cir. 1994)* ("If a union's lawsuit has been finally adjudicated and the union has not prevailed, its lawsuit is deemed meritless." (footnote omitted)).

In sum, although *Bill Johnson's* proscribes federal interference with arguably meritorious state court actions, the Court did not completely forbid federal involvement. *HN18*[¹⁸] If a state court action utterly lacks merit, the Board may properly enjoin it. Moreover, and more to the point in the instant matter, federal interests may be freely asserted once the state court litigation has ended and the threat of interference no longer exists. At that point, a federal authority may find that the state court lawsuit was filed in bad faith, even if it was not so lacking in merit as to warrant an earlier injunction. Indeed, the Court in *Bill Johnson's* found that termination of the state court suit diminishes the Board's obligation to examine that suit's allegations for any signs of possible merit. The Board instead may rely on the disposition of the state court action, [**49] even if it was not disposed of on the merits. A state lawsuit therefore could survive summary judgment and nevertheless be deemed merit less by the Board, so long as the suit did not ultimately terminate in the plaintiff's favor.

The principles announced in *Bill Johnson's* readily extend to cases like the instant one that involve alleged retaliation for exercise of Landrum-Griffin Act rights. In particular, none of the concerns that prompted the Supreme Court's limitation of NLRB power to enjoin state lawsuits is present here. Plaintiffs do not seek an injunction to halt prosecution of a state action; rather, they seek compensation for the injury they suffered as a result of previously concluded litigation. Accordingly, "the interest of the State in providing a forum for its citizens has been vindicated." *Bill Johnson's, 461 U.S. at 747, 103 S. Ct. at 2172*.

Moreover, Defendants' *First Amendment* right of access to the courts has not been diminished in any way. Defendants had their day in state court; they chose to withdraw their lawsuit well before the instant action was filed. Beyond that, by pursuing their defamation claims anew in this Court, Defendants further vindicated [**50] their *First Amendment* rights. Unlike the NLRB, this Court has the power to compensate the individual Defendants for Plaintiffs' allegedly tortious conduct toward them. The jury simply chose not to.

Furthermore, although *Bill Johnson's* does not require an express finding that a previously concluded lawsuit was a "sham" proceeding, this Court has already determined that the record amply supports a determination that the state court action initiated by Defendants was a "sham" brought only for the purpose of harassment. As discussed above, not only did the individual Defendants withdraw from the suit after the election was over, but they also refused to participate in discovery or submit to depositions, despite the fact that they were the parties who had initiated the suit.

These indications of an improper motive thus distinguish the instant case from *Eaton v. Newport Bd. of Educ., 975 F.2d 292 (6th Cir. 1992)*, in which the court invoked the Noerr-Pennington doctrine to shield the defendants from liability. The plaintiff in *Eaton* had been discharged from his position as a school principal, and he alleged that this discharge resulted in part from actions taken by two defendants, [**51] the Kentucky Education Association ("KEA") and its managing agent, in support of their belief that Eaton should be dismissed for having made a racist remark. *975 F.2d at 296-97*. Eaton claimed that the defendants had organized a demonstration against him at a school board meeting, and that the KEA had threatened to file a lawsuit against the school board if they did not fire him. *975 F.2d at 295*. The court held that the defendants were entitled to judgment as a matter of law:

All of the actions taken by the defendants, even if everything Eaton says is true, are simply not actionable because they are all protected by the *first amendment*. In short, what Eaton attempts to characterize as a conspiracy is more accurately [*1086] and commonly known as free expression and political organizing.

975 F.2d at 297.

Defendant Local 243 argues that *Eaton* controls the instant case because the filing of the state lawsuit by the individual Defendants was protected by the *First Amendment*. However, the tort of malicious prosecution belies Defendant's broad reading of *Eaton*; litigants are subject to tort liability for bringing groundless suits notwithstanding their *First Amendment* rights. [\[**52\]](#)¹⁴ Defendant's contention also overlooks the "sham" exception to the *Noerr-Pennington* doctrine. The *Eaton* court expressly found that the "sham" exception did not apply in that case, because the defendants had intended to achieve a permissible goal, the plaintiff's discharge, rather than intending "to use the petitioning process merely to harass the plaintiff." [975 F.2d at 298](#). In contrast, the jury here found that Defendants filed their state lawsuit to retaliate for Plaintiffs' exercise of their [§ 411\(a\)\(2\)](#) rights, rather than to achieve the permissible object of recovering for injuries resulting from Plaintiffs' alleged defamation.

[\[**53\]](#) Finally, this Court finds no irreconcilable conflict between Plaintiffs' claims under the Landrum-Griffin Act and Defendants' defamation claims. Defendants' state court litigation having terminated, the jury needed only to determine whether that litigation was commenced with an improper motive. As *Bill Johnson's* demonstrates in its description of the NLRB's course of action once a state lawsuit has ended, the jury here was not required to examine the underlying merits of Defendants' state lawsuit in order to resolve Plaintiffs' claims. *Bill Johnson's* suggests that the jury would have been precluded as a matter of law from finding that the state lawsuit was improperly brought *only if* Defendants had prevailed in that earlier suit. Because they did not, the question of Defendants' motives in bringing the earlier suit was left to the jury. The possible merit of that earlier suit was at most a factor the jury was free to consider in determining whether Defendants' motives were improper. Thus, although there may be some common issues, the *merit* of Defendants' defamation claims is a distinct question from Defendants' *motives* in bringing the state lawsuit.

Another district [\[**54\]](#) court recently reached a similar conclusion under a nearly identical set of facts. In [Morris v. Scardelletti, 1995 U.S. Dist. LEXIS 12559, No. 94-3557, 1995 WL 508210](#) (E.D. Pa. Aug. 21, 1995), the court considered the defendants' argument that their *First Amendment* right to bring a lawsuit shielded them from liability in the plaintiffs' LMRDA claims. The defendants had asserted pendent state law defamation claims in a previous federal action, but those claims had been dismissed for want of jurisdiction after the federal claims were settled. [1995 WL 508210](#) at *1. The defendants then reasserted their state law claims as counterclaims in the instant suit, in which the plaintiffs charged that the defendants' prior suit was filed to retaliate against the plaintiffs' rival union activities, and thus infringed their Title I rights. [1995 WL 508210](#) at *1. The court rejected the defendants' argument that summary judgment should be granted because the prior action "had a reasonable basis in law and fact," and thus was protected activity under the *First Amendment*.

[HN19](#) The question of whether the claims raised in [the prior action], and reraised as counterclaims here, have a reasonable basis is beyond doubt a jury issue. [\[**55\]](#) Among the issues that must be considered in determining "reasonableness" is the subjective intent of the [defendants] in initially bringing their claims. As we made clear [in an earlier opinion], the *First Amendment* rights of the defendants are in conflict with the Title I rights of the plaintiffs. It is the question of reasonableness upon which the parties' rights will diverge. *If* [\[*1087\]](#) *the plaintiffs successfully prove that the intent of the defendants was to retaliate against them for their rival union activities, the jury would be within its bounds to conclude the plaintiffs suffered an abridgement [of] their Title I rights.*

¹⁴ Moreover, the availability of a malicious prosecution cause of action under state law does not render unnecessary a claim under Title I of the LMRDA. As noted by the Court in *Bill Johnson's*:

Dual remedies are appropriate because a State has a substantial interest in deterring the filing of baseless litigation in its courts, and the Federal Government has an equally strong interest in enforcing the federal labor laws. The Federal Government need not rely on state remedies to ensure that its interests are served.

[1995 WL 508210](#) at *1 (emphasis added). The court also found that factual disputes precluded summary judgment for the plaintiffs on their LMRDA claims and the defendants' counterclaims. [1995 WL 508210](#) at *3. Morris thus supports this Court's determination that Plaintiffs' LMRDA claims were not precluded by Defendants' [First Amendment](#) protections, but instead were properly submitted to the jury along with Defendants' defamation claims.

In conclusion, because the individual Defendants' state court defamation claims were dismissed without a finding [**56] in their favor, the jury's determination that the state lawsuit infringed Plaintiffs' [§ 411\(a\)\(2\)](#) rights was consistent with the law. This is so, contrary to Defendant Local 243's argument, even absent an express finding that the state lawsuit was a "sham." Accordingly, this Court finds no error in its jury instructions.

G. THIS COURT PROPERLY ASSESSED LIABILITY AGAINST THE INDIVIDUAL DEFENDANTS AS WELL AS DEFENDANT LOCAL 243.

The individual Defendants' motion for relief from judgment is easily disposed of. Defendants correctly note that the Rule upon which they rely permits correction of judgments only on the basis of "clerical mistakes." [Fed. R. Civ. P. 60\(a\)](#). Citing various passages from the trial transcript, Defendants contend that the assessment of liability against the individual Defendants for violation of the Landrum-Griffin Act represents such a "clerical mistake," or at least an error that is utterly mechanical and apparent from the record. According to Defendants, the trial transcript shows that the parties and this Court all understood that only Defendant Local 243 could be held liable under Plaintiffs' LMRDA claims.

The trial transcript reflects no such [**57] common understanding. Instead, the passages cited by Defendants reflect the Court's understanding that the individual Defendants could be held liable for infringement of Plaintiffs' Title I rights only if, as the Court explicitly instructed the jury, the individual Defendants "were acting under the color of union authority" or were otherwise aided by the Local in filing their state lawsuit. (Trial Tr., June 25, 1993, at 136). The passages quoted by Defendants thus show that union complicity was an *element* of Plaintiffs' LMRDA claims, and that the individual Defendants consequently would have been free of liability if Plaintiffs had failed to establish that element. Those passages, however, neither state nor even imply that the individual Defendants would be free of liability *regardless* of Plaintiffs' showing of complicity.

Indeed, this Court has previously found *in this same litigation* that actions under Title I of the Landrum-Griffin Act can be pursued against individuals as well as unions. [Clark v. Esser, 821 F. Supp. 1230, 1235 \(E.D. Mich. 1993\)](#). The individual Defendants' belief that they were exempt from liability thus is especially unavailing here. Regardless [**58] of whether the individual Defendants were generally aware that they were subject to liability for Title I violations, they were expressly advised by this Court that they could be held liable under Plaintiffs' particular claims. Moreover, Plaintiffs specifically asserted in their trial brief that Defendant Local 243 and the individual Defendants would be jointly and severally liable for damages should Plaintiffs prevail. Finally, Plaintiffs' understanding that both the Local and the individual Defendants were subject to liability can certainly be implied from Plaintiffs' naming of all of the Defendants in their initial complaint.

The individual Defendants cannot hope to overcome these plain declarations of joint liability among *all* of the Defendants by claiming an unstated "common understanding" to the contrary. If the individual Defendants believed that they were legally exempt from liability, they would have been well advised to seek dismissal from the case on that basis. If, on the other hand, they believed that the facts could not establish their liability as individuals, the jury finding of union complicity shows that this belief was [*1088] not shared by the trier of fact. Accordingly, [**59] this Court rejects as utterly without merit the individual Defendants' contention that they were erroneously named in the Court's judgment.

V. CONCLUSION

For the foregoing reasons,

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NOW, THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial be DENIED, and that the individual Defendants' Motion for Relief from Judgment also be DENIED.

Gerald E. Rosen

U.S. District Court Judge

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Total TV v. Palmer Communications

United States Court of Appeals for the Ninth Circuit

June 8, 1995, Argued and Submitted, Pasadena, California ; October 24, 1995, Filed

No. 94-55112

Reporter

69 F.3d 298 *; 1995 U.S. App. LEXIS 29835 **; 1995-2 Trade Cas. (CCH) P71,156; 95 Cal. Daily Op. Service 8265; 95 Daily Journal DAR 14263; 1 Comm. Reg. (P & F) 191

TOTAL TV, a Wisconsin Corporation, dba Total TV, Plaintiff-Appellee, v. PALMER COMMUNICATIONS, INC. and COLONY COMMUNICATIONS, INC., Defendants-Appellants.

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Central District of California. D.C. No. CV-93-276-AHS. Alicemarie H. Stotler, District Judge, Presiding.

Core Terms

Cable, preemption, preempt, regulation, rates, anti trust law, cable television, rate regulation, state law, appellants', preemptive

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[**HN1**](#)  **Actual Monopolization, Anticompetitive & Predatory Practices**

See [Cal. Bus. & Prof. Code § 17043.](#)

Civil Procedure > Appeals > Standards of Review > De Novo Review

Pensions & Benefits Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Pensions & Benefits Law > ERISA > Federal Preemption > General Overview

Pensions & Benefits Law > ... > Handling of Claims > Judicial Review > General Overview

[**HN2**](#)  **Standards of Review, De Novo Review**

The court of appeals reviews de novo a dismissal for failure to state a claim pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.

Environmental Law > Federal Versus State Law > Federal Preemption

[HN3](#) **Federal Versus State Law, Federal Preemption**

See [47 U.S.C.S. § 543\(a\)\(1\) \(1992\)](#).

Environmental Law > Federal Versus State Law > Federal Preemption

[HN4](#) **Federal Versus State Law, Federal Preemption**

See [47 U.S.C.S. § 543\(a\)\(1\) \(1992\)](#).

Constitutional Law > Supremacy Clause > Federal Preemption

Environmental Law > Federal Versus State Law > Federal Preemption

Constitutional Law > Supremacy Clause > General Overview

[HN5](#) **Supremacy Clause, Federal Preemption**

The [Supremacy Clause](#) invalidates state laws that interfere with, or are contrary to federal law. [U.S. Const. art. VI, cl. 2](#). There are three types of federal preemption of state statutes: (1) express preemption; (2) implied preemption; and (3) preemption that arises because the federal and state statutes conflict, making compliance with both impossible.

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Barbara M. Motz, Deputy Attorney General, Los Angeles, California, as amicus curiae in support of the plaintiff-appellee.

Spencer R. Kaitz, Jeffrey Sinsheimer, California Cable Television Association, Oakland, California, as amicus curiae in support of the defendants-appellants.

Judges: Before: Harry Pregerson, Cecil F. Poole, and Dorothy W. Nelson, Circuit Judges. Opinion by Judge Poole.

Opinion by: CECIL F. POOLE

Opinion

[*300] OPINION

POOLE, Circuit Judge:

Appellants, cable television operators Colony Communications, Inc. ("Colony") and Palmer Communications, Inc. ("Palmer"), [\[**2\]](#) interlocutorily appeal the district court's denial of their motion to dismiss on federal preemption grounds competitor Total TV's diversity action. We granted permission to appeal pursuant to [28 U.S.C. § 1292\(b\)](#), and we affirm.¹

I. Background

Colony is a franchised cable operator that provides cable television services in California and other parts of the United States. Before it was purchased by Colony, Palmer was also a franchised cable operator in California. They are subject to federal regulation as franchised cable operators, under both the Cable Communications Policy Act of 1984, [47 U.S.C. §§ 521 et seq. \(1988\)](#)(amended 1992), and the Cable Television Consumer Protection and Competition Act of 1992, [47 U.S.C. §§ 521 et seq. \(Supp. IV 1992\)](#)(collectively "the Cable Acts"). Total TV operates as a "cable television dealer" and [\[**3\]](#) competes with Colony and Palmer for certain private customers² in the Coachella Valley of Riverside County, California, but is not subject to federal regulation of its subscriber rates because it is a non-franchised dealer.

This action was originally filed in California state court by Total TV, which maintains that appellants are attempting to drive it out of the Coachella Valley by engaging in below-cost predatory pricing with the intent to destroy competition in violation of the California Unfair Practices Act ("UPA"), [Cal. Bus. & Prof. Code § 17043](#).³ Total TV seeks monetary damages and an injunction prohibiting appellants from continuing [\[**4\]](#) their predatory pricing. Colony and Palmer claim that such relief would prohibit them from charging their current rates, effectively regulating them in contravention of the Cable Acts.

The action was removed by the appellants to the Central District of California on the basis of diversity of citizenship. Colony and Palmer then filed a motion to dismiss Total TV's complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#), based on the express preemption provisions of the Cable Acts. On May 28, 1993, the district court issued a tentative motion granting the motion to dismiss. However, after ordering additional briefing, [\[*301\]](#) the district court issued an order on September 20, 1993, denying the appellants' motion to dismiss on preemption grounds. [\[**5\]](#) On December 20, 1993, the district court certified that order for interlocutory appeal, and on January 21, 1994, we granted appellants' petition to review the order.

II. Rate Regulation

[HN2](#)⁴ We review de novo a dismissal for failure to state a claim pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). [Everest and Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 \(9th Cir. 1994\)](#). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* We also review de novo the district court's decision regarding preemption. See [Aloha Airlines, Inc. v. Ahue, 12 F.3d 1498, 1500 \(9th Cir. 1993\)](#) (reviewing the district court's determination that ERISA preempted a state law claim); [Holman v. Laulo-Rowe Agency, 994 F.2d 666, 668 \(9th Cir. 1993\)](#) (reviewing the district court's determination that FCIA preempted all state law claims).

¹ The motion of the California Cable Television Association to file an amicus curiae brief on behalf of appellants is granted. The brief submitted on May 2, 1994 is deemed filed.

² These so called "private customers" live in private or gated communities represented by homeowner associations. The associations enter into contracts with cable television operators to provide service throughout the communities. The associations are billed directly for cable service and typically pass the costs onto the individual residents as part of the monthly dues.

³ [HN1](#)⁵ [California Business and Professions Code § 17043](#) provides in relevant part: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof . . . for the purpose of injuring competitors or destroying competition."

The issue of whether the Cable Acts preempt state laws is one of first impression in this Circuit. The 1992 Act provides in relevant part: "[HN3](#)[⁴] no federal agency or state may regulate the rates for the provision of cable services." [47 U.S.C. § 543\(a\)\(1\)](#) (Supp. IV 1992).⁴ We hold that the Cable Acts do [\[**6\]](#) not preempt the provisions of the UPA that Total TV invokes because these provisions do not regulate appellants' rates. The UPA is "not a price fixing statute at all. It merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor." [People v. Gordon, 105 Cal. App. 2d 711, 234 P.2d 287, 292 \(Cal. 1951\)](#) (quoting [Wholesale Tobacco Dealers Bureau Inc. v. National Candy & Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3, 15 \(Cal. 1938\)](#)).

Even assuming that Total [\[**7\]](#) TV receives the relief it requests, Colony's and Palmer's prices will not be regulated directly and, as long as they do not act with discriminatory purpose, they will be free to "sell [their] merchandise at any price [they] please in the ordinary course of business." [Food & Grocery Bureau of So. Cal. v. United States, 139 F.2d 973, 974 \(9th Cir. 1943\)](#). Therefore, the UPA provisions in question do not operate to regulate rates within the meaning of the Cable Acts' preemption clause. Nowhere in the legislative history of either Act is there a suggestion that "rate regulation" includes predatory pricing or price discrimination measures.

Our conclusion is bolstered by the D.C. Circuit's recent decision affirming the F.C.C.'s interpretation that the prohibition of negative option billing is "a consumer protection provision rather than rate regulation." [Time Warner Entertainment Co. v. FCC, 56 F.3d 151, 194 \(D.C. Cir. 1995\)](#). The D.C. Circuit concluded that the statutory prohibition of negative option billing did not preempt, but rather coexisted with, state consumer protection laws. [Id. at 192-93](#). Like the UPA, the negative option laws are directed at the seller's conduct [\[**8\]](#) rather than the seller's actual rates. Because they do not directly affect rates, they are not rate regulations.

Appellants' reliance on *Storer Cable Communications v. City of Montgomery, Ala.* is misplaced. [806 F. Supp. 1518, 1542-44 \(M.D. Ala. 1992\)](#) (holding that an ordinance regulating rates charged to subscribers was preempted by the 1984 Cable Act). The statute at issue in *Storer* not only set particular cable television rates, but was directed specifically at the cable industry in clear violation of the Cable Acts.⁵ *Id.*

[\[**9\]](#) [\[*302\]](#) III. Preemption

[HN5](#)[⁴] The [Supremacy Clause](#) invalidates state laws that "interfere with, or are contrary to" federal law. See [U.S. Const., Art. VI, cl. 2](#); [Hillsborough County, Fla. v. Automated Medical Labs., 471 U.S. 707, 712-13, 85 L. Ed. 2d 714, 105 S. Ct. 2371 \(1985\)](#) (quoting [Gibbons v. Ogden, 22 U.S. \(9 Wheat.\) 1, 211, 6 L. Ed. 23 \(1824\)](#)). There are three types of federal preemption of state statutes: (1) express preemption; (2) implied preemption; and (3) preemption that arises because the federal and state statutes conflict, making compliance with both impossible. [Hillsborough County, 471 U.S. at 713](#). We consider only the theory of express preemption in this appeal.⁶

⁴ [Section 543\(a\)](#) of the 1984 Cable Act provides that "any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section." [47 U.S.C. § 543\(a\) \(1988\)](#). In the 1992 Act, the wording of the clause was changed slightly and recodified as [§ 543\(a\)\(1\)](#). That section reads in part: [HN4](#)[⁵] "no Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title." [47 U.S.C. § 543\(a\)\(1\) \(Supp. IV 1992\)](#).

⁵ Other cases relied upon by appellants are also distinguishable, as noted by the district court, because they do not concern statutes of general applicability. See, e.g., [Westmarc Communications, Inc. v. Conn. Dep't. of Pub. Util. Control, 807 F. Supp. 876 \(D. Conn. 1990\)](#) (involving an order affecting rates directly aimed at a cable company); [Housatonic Cable Vision v. Dep't of Publ. Util. Control, 622 F. Supp. 798 \(D. Conn. 1985\)](#), and [Comcast Cablevision, Inc. v. City of Sterling Heights, 178 Mich. App. 117, 443 N.W.2d 440 \(Mich. 1989\)](#) (involving fees unrelated to rates for the provision of cable services).

⁶ The theory of implied preemption, not argued by the appellants, is nevertheless unavailable here because "implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." [United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 719-20, 45 L. Ed. 2d 486, 95 S. Ct. 2427 \(1975\)](#). Appellants have failed to make that showing.

[**10] In determining the preemptive scope of the Cable Acts, we must discern and effectuate Congressional intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992) ("the purpose of Congress is the ultimate touchstone' of preemption analysis") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 55 L. Ed. 2d 443, 98 S. Ct. 1185 (1978)). The Cable Acts were passed to foster competition in the cable industry. See *Time Warner*, 56 F.3d at 184 ("The government's interest in regulating cable rates is evident - protecting consumers from monopoly prices charged by cable operators who do not face effective competition.").

The UPA complements, not undermines, the Cable Acts. Like the Cable Acts, the UPA was designed to "encourage competition, by prohibiting unfair . . . and discriminatory practices by which fair and honest competition is destroyed or prevented." *Cal. Bus. & Prof. Code § 17001*. Thus, the Cable Acts do not preempt the UPA because the federal laws and the state law share the same purpose. See *Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014, 1050 n.62 (9th Cir. 1981), cert. denied, 459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982).

Although under certain circumstances federal regulations have been held [**11] to explicitly preempt generally applicable state statutes, see, e.g., *Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 858 F.2d 567, 569-70 (9th Cir. 1988) (claims brought under California state antitrust statutes preempted by Staggers Railway Act), Congress clearly did not intend the Cable Acts to preempt generally applicable state antitrust laws such as the UPA. By stipulating in § 543(a) of the 1984 Cable Act that a federal agency may not "regulate the rates" for cable services, Congress revealed its intent to limit preemption of state law under the Cable Acts. See *47 U.S.C. § 543(a) (1988)* (amended 1992). The Supreme Court has differentiated between the phrases "regulate" and "related to regulation." See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 377, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987). The former is associated with a more limited preemptive intent. The latter phrase, which is not used in § 543(a), signifies a broad preemptive purpose sufficient to preempt state laws of general application such as the UPA. Other courts have held similarly regarding the preemptive scope of § 543. See *Cable Television Ass'n v. Finneran*, I**121 954 F.2d 91, 101 (2d Cir. 1992) ("the language of the preemption clause at issue [e.g. § 543(a)] fails to evince an intention to carve out a wide area free of state regulation").

Most importantly, the legislative history of the Cable Acts cements our belief that they were not meant to preempt laws of general applicability. In its amendment to the 1992 Act, Congress quite explicitly stated that it did not intend the Cable Acts to dilute enforcement of statutes like the UPA. Congress noted that "nothing in the Cable [*303] Television Consumer Protection Act of 1991 shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law." *47 U.S.C. § 521* note, 106 Stat. 1503 ("§ 27").⁷ Senator Metzenbaum's comment that the amendment makes "clear that cable companies will still be fully subject to the antitrust laws," also supports our conclusion that the intent of *47 U.S.C. § 543(a)(1)* was not to preempt statutes such as the UPA. 138 Cong. Rec. S654-01, S661 (daily ed. Jan 30, 1992).⁸ When the intent of Congress is as clear and well-defined as it

⁷ Appellants note that § 27 appears only as a note in the codification of the laws. However, it is undeniably part of the Statutes at Large, since it was approved by the Committee and the full Senate, and is part of the "Congressional Findings and Policy for Pub. L. 102-385." The district court properly decided that § 27 "cannot be relegated to the status of legislative history simply because it is not codified in the United States Code." See, e.g., *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 808 F. Supp. 646 (N.D. Ill. 1992) (citing section 27 as support for the proposition that state antitrust acts are not preempted).

⁸ The context of the remarks in the Congressional Record is as follows:

MR. METZENBAUM: The third matter that has been of concern to me has to do with the question of whether or not this act would in any way provide an exemption from the antitrust laws. The amendment [§ 27] makes it clear that cable companies will still be fully subject to the antitrust laws.

The amendment is actually needed because S. 12 [the 1992 Cable Act] contains provisions which are designed to prevent anticompetitive conduct by cable companies and some cable companies might very well argue that Congress intended to have the procompetitive regulatory provisions of S. 12 serve as a substitute for the antitrust laws. This amendment will prevent needless litigation over this issue by clarifying that the antitrust laws still apply in full to the cable industry.

is here, we "must give effect to [that] unambiguously expressed intent. . . ." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

[**14] Giving effect to § 27 will not effectively nullify § 543(a)(1). There is a wide range of competitive rates that a cable company could establish that are neither excessive nor below cost. As the district court noted, § 27 and § 543(a)(1) can be reconciled by giving effect to both sections through a reasonable interpretation based on the history and purpose of the Cable Acts. We adopt the district court's suggestion that "in light of the clear mandate of Section 27 that state antitrust laws not be preempted, § 543(a)(1) applies only to those situations involving a statute (or local ordinance) directly aimed at the cable industry and affecting or regulating rates."

Appellants' argument that § 27 has no application outside the scope of the 1992 Act because § 543(a)'s express preemption of state rate regulation predicated the 1992 Cable Act is without merit. Section 27 was not added to the 1992 Act to change the preemptive scope of § 543. Exempting rate regulation under the 1984 Act from antitrust laws but then removing that immunity in the 1992 Act would leave an intervening window of eight years. That eight year period not only runs directly counter to the legislative history, [**15] but is also plainly impractical.

Lastly, § 556(c) of both Cable Acts, which provides that "any provision of law of any State . . . which is inconsistent with this chapter shall be deemed to be preempted and superseded," is not relevant in this instance because the UPA is consistent with the Cable Acts. Section 556(c) is simply a recognition that Congress did not intend to fully occupy the field of cable television regulation. Because the purposes of the Cable Acts and the state antitrust laws are consistent, [*304] and a hypothetical conflict is not a sufficient basis for preemption, the UPA is not preempted by § 556(c). See *Inglis*, 668 F.2d at 1049.

AFFIRMED.

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. . . It is my understanding that this amendment is in accord with the intention of the managers of the bill, and if that is the case, I am prepared to move forward with this amendment.

MR. INOUYE: Madam President, the amendment before us is the result of over 10 hours of discussions and consultations involving the distinguished Senator from Ohio, several members of the committee, and countless numbers of staff people.

We have studied the amendment very carefully, and we find that it is acceptable.

MR. DANFORTH: Madam President, after discussing this matter with Senator Metzenbaum earlier in the day, we have discussed it with the staff of the Judiciary Committee . . . The amendment is not objectionable . . .

THE PRESIDING OFFICER: The amendment (No. 1518) was agreed to.

138 Cong. Rec. S654-01, S661 (daily ed. Jan. 30, 1992).



City of Cleveland v. United States Nuclear Regulatory Comm'n

United States Court of Appeals for the District of Columbia Circuit

September 5, 1995, Argued ; October 27, 1995, Decided

No. 92-1532, Consolidated with Nos. 93-1665, 93-1672, 93-1673

Reporter

68 F.3d 1361 *; 1995 U.S. App. LEXIS 30809 **; 314 U.S. App. D.C. 310; 1995-2 Trade Cas. (CCH) P71,166

CITY OF CLEVELAND, OHIO, ET AL., PETITIONERS v. UNITED STATES NUCLEAR REGULATORY COMMISSION, AND THE UNITED STATES OF AMERICA, RESPONDENTS CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL., INTERVENORS

Prior History: [**1] On Petitions for Review of Orders of the Nuclear Regulatory Commission.

Core Terms

Licensees, conditions, antitrust, plants, license, nuclear, competitors, electricity, generation, proceedings, anticompetitive, alternative source, coordinated, suspend, transmission facilities, anti trust law, transmission, suspension, threshold, low-cost, nuclear plant, nuclear power, bedrock, costs, legislative history, aggrieved, circumstances, arbitration, reliability, territory

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Energy & Utilities Law > Nuclear Power Industry > Atomic Energy Act

Energy & Utilities Law > Nuclear Power Industry > Licenses & Permits

Energy & Utilities Law > Nuclear Power Industry > General Overview

Business & Corporate Compliance > ... > Energy & Utilities Law > Regulators > US Nuclear Regulatory Commission

HN1[Nuclear Power Industry, Atomic Energy Act

The Atomic Energy Act of 1954, as amended, authorizes the Nuclear Regulatory Commission to impose remedial conditions on a nuclear power plant if activities under the plant's operating license would create or maintain a situation inconsistent with the antitrust laws. [42 U.S.C.S. § 2135\(c\)\(5\) \(1988\)](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Energy & Utilities Law > Nuclear Power Industry > Atomic Energy Act

Energy & Utilities Law > Nuclear Power Industry > Licenses & Permits

Business & Corporate Compliance > ... > Energy & Utilities Law > Regulators > US Nuclear Regulatory Commission

HN2 Public Enforcement, State Civil Actions

To ensure that conditions are imposed as necessary, the Atomic Energy Act directs the Nuclear Regulatory Commission to seek a recommendation from the Attorney General and make a finding as to whether the plant's activities will have an adverse antitrust impact, before issuing a license. [42 U.S.C.S. § 2135\(c\)\(5\) \(1988\)](#).

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Legislation > Interpretation

HN3 Judicial Review, Standards of Review

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Governments > Legislation > Interpretation

HN4 Legislation, Interpretation

In determining whether clear intent exists, the appellate court looks to the language of the statute, as well as the language and design of the statute as a whole.

Governments > Legislation > Interpretation

HN5 Legislation, Interpretation

The appellate court may consider a provision's legislative history in the first step of analysis under Chevron to determine whether Congress' intent is clear from the plain language of a statute.

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

HN6 Judicial Review, Standards of Review

If an agency's interpretation represents a reasonable accommodation, the appellate court should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Administrative Law > Judicial Review > Reviewability > Standing

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

Business & Corporate Compliance > ... > Energy & Utilities Law > Regulators > US Nuclear Regulatory Commission

HN7 **Reviewability, Standing**

The Hobbs Act permits any party aggrieved by a final order of the Nuclear Regulatory Commission to file a petition for review in the appropriate court of appeals. [28 U.S.C.S. § 2344](#). In determining when a party is aggrieved, this circuit has recognized only a few exceptions to the general rule that a party may not appeal from a disposition in its favor.

Counsel: Reuben Goldberg argued the cause for petitioners City of Cleveland, Ohio, et al. With him on the briefs were Channing D. Strother, Jr., David R. Straus and Gregg Ottinger.

James P. Murphy argued the cause for petitioners Cleveland Electric Illuminating Company, Ohio Edison Company and Toledo Edison Company. With him on the briefs were Gerald Charnoff and Mitchell S. Ross.

Grace H. Kim, Attorney, United States Nuclear Regulatory Commission, argued the cause for respondent. With her on the brief were Anne K. Bingaman, Assistant Attorney General, John J. Powers, III, Attorney, Marion L. Jetton, Attorney, United States Department of Justice, Karen D. Cyr, General Counsel, John F. Cordes, Jr., Solicitor, and E. Leo Slaggie, Deputy Solicitor, United States Nuclear Regulatory Commission. Marjorie S. Nordlinger, Attorney, United States Nuclear Regulatory Commission, entered an appearance for respondent.

James P. Murphy argued the cause for intervenors Cleveland Electric Illuminating Company, Toledo Edison Company and Ohio Edison Company. With him on the briefs were Gerald Charnoff and Mitchell S. Ross.

Reuben **[**2]** Goldberg argued the cause for intervenors City of Cleveland, Ohio, et al. With him on the briefs were Channing D. Strother, Jr., David R. Straus, Scott H. Strauss, Gregg D. Ottinger and D. Baird MacGuineas. John P. Coyle entered an appearance for intervenor City of Brook Park, Ohio.

Judges: Before: WALD, SILBERMAN and ROGERS, Circuit Judges. Opinion for the Court filed by Circuit Judge WALD.

Opinion by: WALD

Opinion

[*1363] WALD, *Circuit Judge*: Petitioners Cleveland Electric Illuminating Company, Ohio Edison Company, and Toledo Edison Company ("Licensees") seek review of an order by the United States Nuclear Regulatory Commission ("NRC" or "Commission") denying their applications to suspend antitrust conditions imposed on two nuclear power plants owned by Licensees. The City of Cleveland, American Municipal Power-Ohio, and the City of Brook Park ("Cleveland") also appeal a separate order by the Commission denying their challenge to its statutory authority to suspend antitrust conditions. We affirm the Commission's order denying Licensees' suspension applications. We also hold that Cleveland has not demonstrated it was aggrieved by the ruling it challenges, and therefore dismiss Cleveland's petition **[**3]** without reaching the merits.

I. BACKGROUND

HN1  The Atomic Energy Act of 1954, as amended, ("AEA" or "Act") authorizes the NRC to impose remedial conditions on a nuclear power plant if "activities under the [plant's operating] license would create or maintain a

situation inconsistent with the antitrust laws." AEA, [42 U.S.C. § 2135\(c\)\(5\) \(1988\)](#) ("§ 105(c)"). [HN2](#)[ To ensure that conditions are imposed as necessary, the Act directs the NRC to seek a recommendation from the Attorney General and make a finding as to whether the plant's activities will have an adverse antitrust impact, before issuing a license. *Id.*

A. Initial License Proceedings

As required by the Act, the NRC considered potential antitrust problems during the initial license proceedings for the two plants owned by [Licensees, the Perry Nuclear Power Plant and the Davis-Besse Nuclear Power Station, Toledo Edison Co., 10 N.R.C. 265 \(1979\), aff'g as modified 5 N.R.C. 133 \(1977\)](#). Because the Commission's findings are relevant to the question of whether the license conditions can be retained even though the power produced by these stations turned out to be higher in cost than power from alternative sources, [\[**4\]](#) we discuss those proceedings in some detail.

In its order imposing antitrust conditions on the plants, the Commission first made extensive findings of fact about ongoing anticompetitive acts by the Licensees that were directed against smaller electric utilities in the region competing with Licensees for sale of wholesale and retail power. The three Licensees who are petitioners in this proceeding, along with two other neighboring electric utilities who did not join petitioners' suspension request, formed a regional power pool called the Central Area Power Coordination group ("CAPCO"). The purpose of CAPCO was to "coordinate installation of generation and transmission in order to further reliability and to take advantage of scale economies." 5 N.R.C. at 152. Each CAPCO member dominated generation, transmission, and sale of electric energy within its particular service area, controlling between 94% and 100% of all generating capacity and transmission facilities, and accounting for between 94% and 100% of retail and wholesale sales. 5 N.R.C. at 153-54. This dominance was maintained, in part, by the companies' decision to operate as a unified system. CAPCO members coordinated their operation [\[**5\]](#) through connections among all of the utilities ("interconnection"); sharing of power reserves during times of shortage, maintenance outages, and construction; and exchange and sale of various types of power at low rates. 5 N.R.C. at 154-55. CAPCO companies also engaged in coordinated development, constructing shared generating units and transmission facilities according to a joint plan. 5 N.R.C. at 153.

Not only did CAPCO members realize the legitimate benefits of economies of scale and coordinated operation, but more importantly, they used this arrangement to forestall competition from other smaller utilities in the region. CAPCO members avoided competition among themselves, through either explicit agreements or failure to solicit customers of fellow CAPCO utilities. 5 N.R.C. at 143, 190-95, 214-17. They denied competing utilities membership in the power pool and refused to make available to competitors any of the benefits of interconnection, including sharing of reserves and exchanges of emergency or economy rate power. 5 N.R.C. at 144 n.9, 224-25, 227-31. [\[*1364\]](#) CAPCO utilities also refused to "wheel" power, or transport it from outside utilities across their transmission lines, to competing [\[**6\]](#) utilities inside CAPCO territory. 5 N.R.C. at 144 n.9. Due to economic and regulatory constraints, competitors could not construct their own duplicative transmission lines and, without CAPCO's cooperation, could not obtain access to outside power sources. 5 N.R.C. at 156-58. These competitors were often left with only one option--buying power from CAPCO utilities for resale--but CAPCO companies would sell their power only if competitors agreed to rate-fixing and other unfair and anticompetitive terms. 5 N.R.C. at 167-68, 177-78, 180-82, 200-03.

After examining these facts, the Commission concluded that the market structure created by CAPCO members through their formation of an exclusive power pool gave them the ability to prevent competing utilities from gaining access to the benefits of coordinated operation and economy of scale which they themselves enjoyed, and that this ability had, in fact, been used to create and maintain a situation inconsistent with the antitrust laws. 5 N.R.C. at 238-41, 255; 10 N.R.C. at 281. The cooperative arrangement made this situation possible even though the power offered by CAPCO companies was higher in price than the power of competing smaller utilities. [\[**7\]](#) 5 N.R.C. at 166 ("Rates and quality of service were and are the principal elements of competition between these utilities, with Cleveland traditionally offering lower rates and CEI greater reliability." (citations omitted)).

Pursuant to § 105(c), the Commission also determined that a substantial nexus existed between this anticompetitive situation and the construction of the nuclear plants at issue: the significant increase in generating capacity provided by the plants¹ would strengthen CAPCO's dominance of the regional electric power industry. 5 N.R.C. at 238-39 ("Within the [CAPCO territory], the generation of the nuclear units ineluctably will have a substantial effect on the supply and cost of power for each of the five Applicant companies."). Specifically, the new units would enhance Licensees' competitive position by "producing economies of scale and ... providing for long term generation costs well under average system costs which could be obtained either compared to the cost of operating their present generating equipment or in comparison to new generation relying upon fossil fueled units." 5 N.R.C. at 143. Additionally, the Commission found a strong link between plans **[**8]** to construct new nuclear plants and plans to expand transmission facilities. The new plants would be cost-effective only if the CAPCO companies agreed to build additional shared high voltage transmission lines, and these extra transmission facilities, in turn, would make it even more difficult for smaller utilities to build alternative transmission systems. 5 N.R.C. at 156, 240. In sum, the Commission found, construction of the plants was "calculated to further increase [Licensees'] dominance" and thus maintained a situation inconsistent with the antitrust laws. 5 N.R.C. at 144. Although the Commission expected that nuclear power would be low-cost and thus particularly advantageous to Licensees, its conclusions also rested on the degree to which the existing market structure allowed Licensees to control competitors' power supply options. 5 N.R.C. at 238-41.

[9]** As a remedy, the NRC imposed antitrust conditions on the plants' licenses that were designed to ameliorate the competitive advantages conferred on licensees by ownership of the plants. 10 N.R.C. at 278. These conditions prohibited Licensees from making the sale of wholesale power or the coordination of services contingent upon agreements to allocate customers, forgo alternative power supplies, or refrain from participating in Commission antitrust proceedings. The conditions also required Licensees to connect their transmission lines with those of their competitors; wheel power for competitors; open up membership in CAPCO to competitors in the CAPCO territory; sell various types of power to competitors on the same terms offered to CAPCO members; share power reserves with interconnected facilities **[*1365]** that generate their own power; and give competitors access to power generated by Licensees' nuclear plants. 10 N.R.C. at 296-99.

B. Current Proceedings on Licensees' Request to Suspend Antitrust Conditions

Almost a decade later, Licensees filed applications with the NRC to suspend these § 105 license conditions. The Licensees claimed that, contrary to the expectations which had **[**10]** motivated passage of § 105 antitrust protections, the cost of nuclear power far exceeded the cost of power from alternative sources. Thus, the Licensees argued, ownership of a nuclear plant could not confer any of the competitive advantages that Congress had feared and, given this turn of events, § 105(c) prohibited the NRC from retaining antitrust conditions on a nuclear plant that generated high cost power. After NRC staff rejected these applications for suspension, see *Notice of Denial*, 56 Fed. Reg. 20,057 (May 1, 1991), Licensees petitioned for a hearing on the denial.

At this juncture, Cleveland entered the proceedings to oppose Licensees' hearing request, arguing that the NRC had no statutory authority to consider applications for *suspension* of antitrust license conditions. Alternatively, Cleveland sought to intervene in any hearing held on the applications so that it could oppose the requested suspensions. The Atomic Safety and Licensing Board ("Licensing Board") dismissed Cleveland's petition on the grounds that the NRC did have authority to grant Licensees a hearing and to modify antitrust conditions subsequent to issuance of a license, and granted Cleveland's request **[**11]** to intervene. *Ohio Edison Co., 34 N.R.C. 229, 238, 239-45 (1991)* (Prehearing Conference Order). Cleveland appealed the Licensing Board's rejection of its challenge to the Commission's authority to suspend, and the Commission affirmed that authority under several sections of the *AEA. Ohio Edison Co., 36 N.R.C. 47, 59 (1992)*. Cleveland now petitions for review of that decision by this court.

¹The combined generating capacity of CAPCO members prior to construction of the plants was approximately 13,000 megawatts, and CAPCO anticipated that the new plants would add an extra 4,500 megawatts. 5 N.R.C. at 143.

In a subsequent stage of the proceedings, the Licensing Board considered the "bedrock" legal issue presented by the parties:

Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain the antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared? ²

The Board ruled that neither the plain meaning of § 105(c), the provision's legislative history, general principles of **antitrust law**, nor prior NRC cases required a threshold showing of low-cost power production in order to maintain antitrust conditions challenged by a licensee. 36 **[**12]** N.R.C. at 289-306. The Commission declined to accept Licensees' petition for review of the Board's decision, thereby converting the ruling into final agency action. See 10 C.F.R. § 2.786(c) (1995).

Licensees now appeal the NRC's ruling on the "bedrock" legal issue. They argue that the Commission ignored the plain meaning of § 105(c) by asserting the authority to maintain antitrust conditions on the operation of **[**13]** a plant even when the cost of the nuclear power generated is higher than that of alternative sources of power. Cleveland also appeals the Commission's rejection of its challenge to the NRC's statutory authority to consider requests to suspend conditions under any circumstances. In response to Cleveland, the NRC contends that since Cleveland basically prevailed in the underlying proceeding which refused to suspend the conditions, it is not a "party aggrieved" as required by the Hobbs Act. 28 U.S.C. §§ 2342(4), 2344 (1988). We consider each challenge in turn.

[*1366] II. "BEDROCK" LEGAL ISSUE

The parties involved in the proceedings below formulated one issue for the NRC to address in considering Licensees' suspension application: Does § 105(c) permit the NRC to retain antitrust conditions on the operation of a nuclear plant when the cost of power generated by the plant is higher than the cost of power from available alternative sources? ³ In reviewing the NRC's answer to this question, we begin with the familiar principles of *Chevron*, which instruct that:

HN3 [↑] If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect **[**14]** to the unambiguously expressed intent of Congress.... [But if] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

² Ohio Edison Co., 36 N.R.C. 269, 280 (1992). At the request of the Licensing Board, this question was formulated in a joint statement filed by the parties. They agreed that if Licensees prevailed on this issue, the Board would then hold a second, evidentiary proceeding to assess whether the power produced by Licensees' facilities was, in fact, higher in cost than available alternative sources. If Licensees did not prevail at the first stage on the legal question, the proceedings would terminate prior to a determination of the comparative costs of available power sources. *Id.* at 280-81.

³ Although the NRC did not parse any further the meaning of the parties' joint articulation of the "bedrock" issue, we assume the cost of power from "alternative" sources means sources that are available to Licensees' purchasers. See, e.g., 34 N.R.C. at 254 n.80 (Prehearing Conference Order) ("bedrock" issue involves comparison of "actual facility costs for Davis-Besse and Perry" plants with "non-nuclear power costs"); 36 N.R.C. at 279 (comparison of "cost of electricity generated at a nuclear facility" with "that from other competing sources"); 36 N.R.C. at 291 (comparison of cost of electricity produced by nuclear facility with that of "rival producers").

It should be noted that at oral argument, counsel for the Licensees contended that the NRC should have examined another variable in considering the "bedrock" issue: the cost of alternative sources of power, coupled with other factors such as their reliability and accessibility. Licensees did not explore this issue in their briefs, and were in fact able to point to only one oblique reference in their reply brief to this expanded definition of "alternative." It might be the case that if other utilities have not only cheaper sources of power, but also equivalent reliability and access to transmission facilities, more expensive power from a nuclear plant could not pose a competitive threat and § 105(c) conditions would not be needed. That question, however, was not considered by the NRC, and it is not before this court now.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). As explained in greater detail below, we certainly cannot find in § 105(c) any clear signal that a threshold showing of low-cost power production is or is not required in order to retain antitrust conditions on a license under § 105(c), and so we proceed to the second step of *Chevron* to examine whether the NRC's construction of that provision was reasonable and consistent with the purpose and structure of the Act and relevant legislative history. Ultimately, we find the NRC's interpretation of § 105(c) permissible.

[**15] A. Chevron Step One

Paradoxically, both Licensees and the NRC contend that Congress has clearly spoken to the question of whether § 105(c) requires a preliminary finding of low-cost power production as a prerequisite to antitrust conditions. HN4↑ In determining whether clear intent exists, we look to the language of the statute, as well as "the language and design of the statute as a whole." ⁴ Fort Stewart Schools v. FLRA, 495 U.S. 641, 645, 109 L. Ed. 2d 659, 110 S. Ct. 2043 (1990) (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988)); Tataranowicz v. Sullivan, 294 U.S. App. D.C. 322, 959 F.2d 268, 276 (D.C. Cir. 1992) (citing McCarthy v. Bronson, 500 U.S. 136, 139, 114 L. Ed. 2d 194, 111 S. Ct. 1737 (1991); Crandon v. United States, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 (1990)), cert. denied, 113 S. Ct. 963 (1993).

[**16] [*1367] Focusing their argument on the phrase in § 105(c)(5) that grants authority to impose conditions if "activities under the license" have an adverse antitrust impact, Licensees argue that these four words restrict the NRC's antitrust authority to situations where it can demonstrate that the actual operation of the plant creates or maintains an anticompetitive situation. Licensees claim that since electricity is a fungible commodity, the only difference between electricity generated by their nuclear plants and that from alternative sources is cost. Thus, ownership of a nuclear plant which generates more costly power than that of competitors necessarily imposes a competitive disadvantage, rather than enhancing the owner's competitive position on that basis. Licensees urge us to conclude that as a matter of law, any invocation of § 105(c) requires a preliminary showing that the power generated by the licensed plant is lower in cost than power from available alternative sources. There is a ready response to that argument.

Had Congress intended to require a threshold showing of low-cost power production before allowing the NRC to regulate under § 105(c), or had it determined that high-cost [**17] plants could not pose a competitive threat, we believe it would have phrased that intent much more precisely. As it is, no reference at all is made to the cost of power in § 105(c). In fact, the plain language of § 105(c) undercuts Licensees' argument. As the initial license proceedings surrounding these plants well demonstrate, various plant "activities," such as generation of power that increases a utility's total capacity and reliability, or the construction of transmission facilities that make a new plant economically feasible, may further strengthen a utility's position in the regional electricity market, regardless of the cost of power generated by the plant. The words chosen by Congress allow a linkage of the NRC's antitrust authority to these kinds of "activities," rather than making it contingent only upon power costs.

Conversely, the NRC asserts that § 105(c)(5) clearly instructs the NRC to engage in a traditional antitrust analysis, as opposed to considering the higher cost of power as a threshold barrier beyond which no further analysis is necessary. It pins this claim on three other subsections of § 105 that discuss the Commission's regulatory authority. The NRC contends [**18] that these provisions refer to utility behavior, not just cost, and argues that we must

⁴ HN5↑ In addition, we may consider a provision's legislative history in the first step of *Chevron* analysis to determine whether Congress' intent is clear from the plain language of a statute. See, e.g., American Scholastic TV Programming Found. v. FCC, 310 U.S. App. D.C. 256, 46 F.3d 1173, 1180 (D.C. Cir. 1995) (citing Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)); Ohio v. United States Dep't of the Interior, 279 U.S. App. D.C. 109, 880 F.2d 432, 450 (D.C. Cir. 1989) ("We next examine the legislative history ... to ascertain if there are any countervailing indications to our conclusion and also to check on [whether] certain parts of the history are inconsistent with our conclusion and so render the statute ambiguous within the meaning of *Chevron*."). Because the legislative history of § 105(c) is not dispositive even for purposes of determining whether the NRC's interpretation was reasonable, see *infra* part II.B., we do not discuss it further here.

construe § 105(c)(5) in a similar manner. The NRC first directs our attention to § 105(c)(2), which directs the Commission to consider a "licensee's activities or proposed activities" in determining whether a second antitrust review is necessary before issuance of an operating permit. [42 U.S.C. § 2135\(c\)\(2\)](#). Because that provision refers to "proposed activities," the Commission argues, it must encompass more than changes in cost of power, which can never be wholly within the licensee's control. While this provision does make clear that the statute does not limit the NRC to considerations of cost in assessing the need for a second antitrust review, neither does it clearly prohibit the NRC from imposing a threshold requirement of low-cost power production should it determine that low cost was an indispensable ingredient to any finding of anticompetitive impact. The NRC also points to §§ 105(a) and (b), which warn that the NRC's antitrust authority does not relieve licensees from compliance with other antitrust laws and require the NRC to report violations of those laws, as bolstering its argument [**19] that Congress did not intend to limit interpretation of "activities" to considerations of cost alone. [42 U.S.C. §§ 2135\(a\), \(b\)](#). We do not see how these provisions compel or even advance the reading of § 105(c)(5) that the NRC advocates. The NRC's efforts to construe § 105(c) as an unambiguous directive not to impose a low-cost threshold for antitrust conditions fails as well.

B. Chevron Step Two

If, then, § 105(c) does not clearly require a threshold showing of low-cost power production in order to retain antitrust conditions, we must defer to the NRC's interpretation if it is reasonable and consistent with the statutory scheme and legislative history. [Chevron, 467 U.S. at 845](#) (if [HN6](#)[↑] agency's interpretation "represents a reasonable accommodation ... , we should not disturb [*1368] it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned" (quoting [United States v. Shimer, 367 U.S. 374, 383, 6 L. Ed. 2d 908, 81 S. Ct. 1554 \(1961\)](#))). We find the NRC's construction reasonable, and thus we affirm its denial of Licensees' suspension applications.⁵

[**20] This question comes to us in a somewhat awkward posture. Licensees explicitly elected not to argue that the circumstances justifying the original imposition of § 105 conditions no longer existed, choosing instead to present only the "bedrock" legal question of whether the NRC is ever permitted to retain conditions when a nuclear plant's power costs more than power from alternative sources.⁶ Thus, Licensees have not attempted to show that under this particular scenario, the high-cost power generated by their plants does not have any anticompetitive impact, despite the other advantages of reliability and coordination that they enjoy. Nor has the NRC sought to prove that in this specific context, operation of Licensees' plants still confers a competitive advantage, regardless of cost. As a result, we are left to consider the near-hypothetical question posed by the "bedrock" issue without the benefit of extensive factual development in a concrete situation.

[**21] For Licensees to persuade us that the NRC's interpretation of § 105(c) is unreasonable, they must show that there is no set of circumstances where a plant producing high-cost power could contribute to a situation inconsistent with the antitrust laws. Licensees contend that the power generated by a nuclear plant is a fungible commodity which must compete with electricity from other sources; if power from a licensee's nuclear plant costs more than power from alternative sources, then licensees are necessarily disadvantaged vis-a-vis their competitors

⁵ Although the Commission's decision spoke of § 105(c) as "requiring" a traditional antitrust analysis under a "plain meaning" reading, its lengthy opinion treated fulsomely why such a multifaceted economic analysis was necessary to give meaning to the provision. 36 N.R.C. at 287-306. We note that the NRC also argued in its brief to this court that it should prevail under both the first and second steps of *Chevron*. In those circumstances, we are authorized to affirm the Commission under a *Chevron* step two analysis, despite our rejection of the Commission's *Chevron* step one argument. See [GMC v. National Highway Traffic Safety Admin., 283 U.S. App. D.C. 151, 898 F.2d 165, 171-72 \(D.C. Cir. 1990\)](#) (reviewing court may resolve statutory interpretation question under *Chevron* step two analysis without remand where agency has woven "policy and administrative concerns" into its textual and historical arguments).

⁶ Licensees initially appeared to make a "changed circumstances" claim before the NRC. Later, though, they clarified their intent to abandon that line of argument and focus solely on the "bedrock" legal issue. Although of course we do not consider the viability of a changed circumstances argument here, Licensees remain free to raise such a claim in a subsequent application proceeding.

and cannot pose an anticompetitive threat. This analysis, however, with its exclusive focus on the cost of power, totally ignores other factors that may affect the competitive position of any producer. See LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 74-93 (1977) (factors indicating market power include market concentration, entry barriers, firm conduct, excessive profits, rigid pricing policies, price discrimination, and firm size). More to the point, it ignores several factors that the NRC considered dispositive in finding anticompetitive behavior on the part of these very Licensees when it first imposed antitrust conditions.

[**22] In the initial proceedings, the NRC identified a number of competitive advantages accruing to Licensees from their participation in the CAPCO power pool, all of which predated construction of the nuclear plants at issue here and existed despite the pivotal fact that even then, CAPCO's power was more costly than that of competing utilities. As previously discussed, the Commission at the time of the initial licensing found that Licensees had almost complete dominance over the generation, transmission, and sale of electric power in the CAPCO territory. It also found that Licensees had exercised this power in an anticompetitive fashion: they had refused to wheel competitors' power or allow them access to transmission facilities for carrying alternative sources of power; prevented competitors from joining the CAPCO pool, sharing power reserves, or selling or exchanging [*1369] various types of power at low rates; and denied them the economies of scale and other benefits of coordinated planning and construction.

The Commission ruled that these circumstances constituted a situation inconsistent with the antitrust laws, and that the resulting increase in CAPCO's generating capacity and transmission [**23] facilities would enhance Licensees' market position and its ability to maintain entry barriers which precluded full participation by competing utilities. Licensees offer no compelling reason why these same factors that led the NRC to find a situation inconsistent with antitrust laws should not now be sufficient to maintain antitrust authority under § 105(c). Licensees still exercise market control in the CAPCO territory, and the power generated by the nuclear plants contributes to that dominance by providing increased total capacity and greater reliability. Nuclear power may be higher in cost than available non-nuclear power, but just as higher-cost power generated by Licensees before construction of the nuclear plants did not prevent them from controlling competitors' power supply options, higher-cost power from a nuclear plant could have the same anticompetitive effect. Expanded transmission facilities built as part of the nuclear construction program further strengthen Licensees' ability to deprive competitors of access to alternative power sources. Absent the license conditions, there is no intrinsic reason why Licensees could not again use their market dominance to weaken and [**24] eliminate competitors, despite the higher cost of their power. Thus, we determine that the NRC reasonably answered the "bedrock" question in deciding that a threshold showing of lower cost nuclear power was not required as an indispensable prerequisite of retaining antitrust conditions.⁷

Licensees also [**25] contend that the NRC's interpretation is inconsistent with § 105's legislative history, pointing to several instances where witnesses appearing before Congress during hearings on § 105(c)⁸ stated their belief that nuclear power would prove to be a cheap source of power. The NRC does not contest this point, acknowledging that "at one time the Commission and ... Congress ... anticipated that the electricity produced at nuclear facilities would be lower cost as compared to alternative sources." 36 N.R.C. at 296 (NRC denial of Licensees' suspension applications). Congress' mistaken assumptions about the relative costs of nuclear power, however, do not resolve the "bedrock" question. Even if Congress did believe that nuclear plants would generate a wealth of cheap power, it gave no indication in text or committee reports that the success of that prediction was in any way the touchstone of § 105(c) authority. The Joint Committee Report, for example, makes no mention of cost

⁷ Our determination that § 105(c) does not require the NRC to focus solely on the cost of nuclear power accords with the position of the one other circuit that has considered the scope of the NRC's antitrust authority under § 105(c). In *Alabama Power Co. v. NRC*, owners of a nuclear plant argued that the NRC could examine only the direct activities of a licensed plant in assessing whether antitrust conditions were appropriate, rather than evaluating prior anticompetitive activities by the licensee as well. [692 F.2d 1362, 1367-68 \(11th Cir. 1982\)](#), cert. denied, 464 U.S. 816 (1983). The court held that a § 105(c) analysis necessitates a "broad inquiry using all available information." [*Id. at 1368*](#).

⁸ In 1970, Congress amended the Atomic Energy Act, enacting the current version of § 105(c)(5). Act of Dec. 19, 1970, Pub. L. No. 91-5160, § 6, 84 Stat. 1472, 1473.

at all, either as a background presumption informing the boundaries of the NRC's antitrust authority, or as a necessary prerequisite for exercise of that authority. *Report By the Joint Committee on Atomic Energy*, [**26] H.R. REP. NO. 1470, 91st Cong., 2d. Sess. 15 (1970). See *Power Reactor Development Co. v. International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 409, 6 L. Ed. 2d 924, 81 S. Ct. 1529 (1961) (noting "peculiar responsibility and place of the Joint Committee" in developing statutory scheme); accord *Alabama Power Co. v. NRC*, 692 F.2d 1362, 1368 (11th Cir. 1982), cert. denied, 464 U.S. 816, 78 L. Ed. 2d 85, 104 S. Ct. 72 (1983). Thus, the legislative history of § 105(c) does not alter [**1370] our conclusion that the NRC reasonably interpreted that provision in the proceeding below.⁹

[**27] III. NRC'S STATUTORY AUTHORITY TO SUSPEND ANTITRUST CONDITIONS

Cleveland asks us to reverse the Commission's ruling that it has authority to modify antitrust license conditions imposed pursuant to § 105(c). Because we decide that Cleveland did not satisfy the statutory requirements for appealing the final order of an administrative agency, we do not pass on the question.

HN7 The Hobbs Act permits "any party aggrieved by [a] final order"¹⁰ of the Nuclear Regulatory Commission to file a petition for review in the appropriate court of appeals. *28 U.S.C. § 2344*. In determining when a party is aggrieved, this circuit has recognized only a few exceptions to the general rule that "a party may not appeal from a disposition in its favor." *Showtime Networks, Inc. v. FCC*, 289 U.S. App. D.C. 348, 932 F.2d 1, 4 (D.C. Cir. 1991) (citing cases). Cleveland claims that it falls within the exception set forth in *International Brotherhood of Electrical Workers v. ICC*, 274 U.S. App. D.C. 103, 862 F.2d 330 (D.C. Cir. 1988) ("IBEW"). In IBEW, the court permitted petitioner union IBEW to challenge the ICC's jurisdiction to review arbitration awards, even though it had prevailed on the merits of the specific arbitration award before [**28] the *ICC*. 862 F.2d at 334. The court found IBEW's plight extraordinary because arbitration proceedings were a central component of the union's operation, IBEW would be forced to litigate numerous future arbitration awards before the ICC, without any opportunity for resolution of its jurisdictional claim until it lost an arbitration proceeding on the merits and could appeal. This threat of repeatedly having to pursue disputes with employers was sufficient to render IBEW aggrieved, despite its victory on the merits of the individual case. Cf. *Shell Oil Co. v. FERC*, 310 U.S. App. D.C. 312, 47 F.3d 1186, 1202 (D.C. Cir. 1995) (IBEW exception inapplicable where petitioner would not incur "virtually inevitable and repeating costs" in future litigation before reviewing agency).

[**29] The risk of future litigation by Licensees over the antitrust conditions at issue in this case seems neither so inevitable nor of such a magnitude as to bring Cleveland within the IBEW exception. Cleveland does claim that repeat litigation over the conditions is virtually guaranteed because of the past adversarial relationship between the parties. But while it is of course possible that Licensees will renew their efforts to suspend the antitrust conditions through a claim of "changed circumstances" and in such an event, Cleveland may find it necessary to return to court to defend the restrictions, see Respondents' Br. at 19 (discussing Cleveland's remedies if Licensees should seek a future modification of antitrust conditions), IBEW requires more. It demands a showing of an "inevitable and repeating" course of litigation, between the same parties, all based on a single jurisdictional issue. We find the inchoate threat of another round of litigation about these conditions based on a new theory not to rise to the level of potential harm incurred by the labor union petitioners in IBEW. Accordingly, Cleveland is not a "party aggrieved," and we dismiss its petition for [**30] review.

⁹ Licensees also argue that the NRC's ruling was at odds with prior agency decisions construing § 105(c). We do not find these decisions squarely on point here; while discussing the scope of the NRC's authority under § 105(c)(5), they do not consider whether that authority is limited to nuclear plants that produce low-cost power.

¹⁰ The government contended that the Commission's ruling on Cleveland's challenge was an interlocutory order entered as part of the proceedings on Licensees' suspension requests, and thus not appealable under the Hobbs Act. Respondents' Br. at 15-17. This characterization is erroneous. Although proceedings on the "bedrock" legal issue were still pending, Cleveland exhausted all administrative remedies as to its claim regarding the NRC's authority to consider suspension requests, and the Commission issued a final ruling on this specific issue when it denied Cleveland's appeal from the Licensing Board's decision. Thus, the Commission's decision was a "final order" for purposes of the Hobbs Act.

68 F.3d 1361, *1370 1995 U.S. App. LEXIS 30809, **30

So ordered.

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United States v. Mercy Health Servs.

United States District Court for the Northern District of Iowa, Eastern - Dubuque Division

October 27, 1995, Decided ; October 27, 1995, Filed

C94-1023

Reporter

902 F. Supp. 968 *; 1995 U.S. Dist. LEXIS 16565 **; 1995-2 Trade Cas. (CCH) P71,162

UNITED STATES OF AMERICA, Plaintiff, vs. MERCY HEALTH SERVICES and FINLEY TRI-STATES HEALTH GROUP, INC. Defendants.

Core Terms

patients, drive, managed care, service area, clinics, inpatient, merger, hospitalization, census, beds, discounts, outreach, rural, average daily, residents, entities, enrollees, travel, acute care, regional, discharges, staffed, prices, geographic, anticompetitive, induce, healthcare, plans, edge, zip code

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN1[] Antitrust & Trade Law, Clayton Act

The Clayton Act § 7, [15 U.S.C.S. § 18](#), provides, in part, that no person shall acquire the whole or any part of the assets of another person where the effect of such acquisition may be substantially to lessen competition.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Regulated Industries, Higher Education & Professional Associations

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To meet the requirement of the Clayton Act § 7, [15 U.S.C.S. § 18](#), the plaintiff must show a reasonable probability that the proposed transaction would substantially lessen competition in the future. The Sherman Act [§1](#), [15 U.S.C.S. § 1](#), requires the same analysis.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

[HN3](#) **Financial Institutions, Bank Mergers**

To determine whether there is a reasonable probability of a substantial lessening of competition, the courts focus on whether the merger will cause the merged entity to have enough market power such that it could profitably increase prices. Whether the merger will cause an anticompetitive effect is not the kind of question which is susceptible of a ready and precise answer in most cases.

Evidence > Burdens of Proof > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

[HN4](#) **Evidence, Burdens of Proof**

The antitrust plaintiff may make a *prima facie* showing that the merger will result in anticompetitive effects by showing that the merged entity will have an undue share of the relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

[HN5](#) **Market Definition, Relevant Market**

Before a court can determine the effect of a merger on competition, it must first define the relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[HN6](#) **Regulated Practices, Market Definition**

The relevant market is defined by identifying those producers that provide customers of defendants' firms with alternative sources for the defendants' product or service.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[HN7](#) **Regulated Practices, Market Definition**

A properly defined market excludes other potential suppliers (1) whose product is too different, product dimension of the market, or too far away, relevant geographic market, and (2) who are not likely to shift promptly to offer defendants' customers a suitably proximate alternative. Those who can readily shift into offering such a product are in the market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[HN8](#) **Regulated Practices, Market Definition**

Although a great deal of emphasis is placed on market share statistics, they are not conclusive indicators of anticompetitive effects.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Evidence > Burdens of Proof > General Overview

Evidence > Inferences & Presumptions > General Overview

[HN9](#) **Regulated Practices, Market Definition**

If plaintiff is able to make a *prima facie* case, the defendants can overcome the presumption of illegality by showing that the market-share analysis gives an inaccurate reflection of the acquisition's probable effect on competition within the relevant market. To rebut plaintiff's case, the defendants may produce nonstatistical evidence, which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences. Factors, which courts have previously considered to be relevant, include ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition.

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

[HN10](#) [blue document icon] Mergers & Acquisitions Law, Antitrust

When determining whether a merger will have an anticompetitive effect, the court must view the merger functionally within the context of its industry's "structure, history, and probable future."

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Evidence > Burdens of Proof > General Overview

Mergers & Acquisitions Law > General Overview

[HN11](#) [blue document icon] Burdens of Proof, Ultimate Burden of Persuasion

If defendants are successful in rebutting plaintiff's statistical evidence, plaintiff then has the burden of presenting additional evidence that the merger will lessen competition and this burden merges with the ultimate burden of persuasion, which remains with plaintiff at all times.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > Inferences & Presumptions > General Overview

[HN12](#) [blue document icon] Regulated Practices, Market Definition

The burden is on plaintiff to prove the relevant geographic market.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

[HN13](#) [blue document icon] Relevant Market, Geographic Market Definition

In determining the relevant geographic market, the court must determine the market in which the seller operates and to which the purchaser can practicably turn for supplies. The analysis must focus not merely on where patients have gone for acute inpatient services, but where they could practicably go should the merged entity become anticompetitive. This requires a fluid analysis. It is not sufficient to take a snapshot of the current situation and define the relevant geographic market to be synonymous with the current service areas of the defendants.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Mergers & Acquisitions Law > Merger Guidelines

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Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN14**](#) [L] Relevant Market, Geographic Market Definition

In order to determine the actual geographic market, current market behavior must be put into a dynamic analysis which looks at possible competitive responses from other hospitals, third party payers and consumers.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN15**](#) [L] Regulated Practices, Market Definition

The Elzinger-Hogarty test is merely a starting point. It is a snapshot of the market as it exists under current conditions and does not pretend to answer the question of what would happen if there was an attempt to exercise market power by one of the market participants.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN16**](#) [L] Regulated Practices, Market Definition

Geographic market can be shown by showing resulting market power over any group of buyers.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN17**](#) [L] Regulated Practices, Market Definition

To be the relevant market (in the context of hospitals), there must not be any other supplier of inpatient services who could constrain the price raising capability of the merged entity to purchasers of inpatient services who reside within the specified geographic region.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

[**HN18**](#) [L] Antitrust, Horizontal Mergers

The validity of a horizontal merger must be determined based on the merger's effect on competition generally in an economically significant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

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[**HN19**](#) [blue icon] Regulated Practices, Market Definition

Under some circumstances the relevant geographic area may be as small as a single metropolitan area.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Market Definition

[**HN20**](#) [blue icon] Antitrust Statutes, Clayton Act

The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place their merger outside the scope of the Sherman Act § 7, [15 U.S.C.S. § 18](#). That section speaks of "any section of the country," and if anticompetitive effects of a merger are probable in "any" significant market, the merger, at least to that extent, is proscribed. The issue is where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.

Governments > Legislation > Interpretation

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Mergers & Acquisitions Law > Antitrust > General Overview

[**HN21**](#) [blue icon] Legislation, Interpretation

The antitrust laws protect competition, not competitors.

Evidence > Burdens of Proof > General Overview

[**HN22**](#) [blue icon] Evidence, Burdens of Proof

Where plaintiff fails to carry its burden, the defendants are not required to prove their affirmative defenses.

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > Antitrust > General Overview

HN23 [L] Antitrust, Market Definition

In an appropriate case, a defendant may rebut plaintiff's *prima facie* case with evidence showing that the intended merger would create significant efficiencies in the relevant market.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Burdens of Proof > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN24 [L] Burdens of Proof, Prosecution

Defendants have to meet the lower burden of showing an efficiencies defense by a preponderance of the evidence. It is generally accepted that if the efficiencies may be obtained through a method which would not limit competition, then they may not be used as a valid defense.

Counsel: **[**1]** For United States of America, Plaintiff: Mary Beth McGee, Esq., Eugene Cohen, Esq., Jessica N. Cohen, Esq., U.S. Department of Justice, AntiTrust Division, Washington, DC. Lawrence D. Kudej, Esq., Assistant United States Attorney, Cedar Rapids, Iowa.

For Mercy Health Services and Finley Tri-States Health Group, Inc., Defendant: David A. Ettinger, Esq., Howard B. Iwrey, Esq., Honingman Miller Schwartz & Cohn, Detroit, MI. James D. Hodges, Jr., Esq., Steven J. Pace, Esq., Shuttleworth & Ingersoll, Cedar Rapids, Iowa.

Judges: Michael J. Melloy, Chief Judge, UNITED STATES DISTRICT COURT

Opinion by: Michael J. Melloy

Opinion

[*971] OPINION and ORDER

The United States has brought this action under the antitrust laws. The defendants, Mercy Health Services and Finley Tri-States Health Group, Inc. own Mercy Health Center (Mercy) and Finley Hospital (Finley), respectively. Mercy and Finley are the only two general acute care hospitals in Dubuque, Iowa. The two hospitals have agreed to form a partnership, Dubuque Regional Health Services (DRHS), which all parties acknowledge constitutes a merger for purposes of antitrust analysis. On June 10, 1994, the government filed a complaint seeking injunctive **[**2]** relief against the merger as a violation of § 7 of the Clayton Act, [15 U.S.C. § 18](#), and of [§ 1](#) of the Sherman Act, [15 U.S.C. § 1](#). The parties agreed to waive a preliminary injunction hearing in order to proceed to trial on the matter. After expedited discovery, the matter was tried to the bench. Two weeks of testimony was heard and several hundred items were moved into evidence.

I. Findings of Fact

A. Hospital Background

Dubuque is situated within Dubuque County, Iowa, which in 1993 had a population of 86,403. Dubuque lies on the Mississippi River, at a point where Iowa adjoins the southwestern portion of Wisconsin and the northwestern portion of Illinois.

Mercy is an acute care hospital which, in 1994, had approximately 320 staffed beds, 9980 acute care patient discharges and an average daily census of 127. Mercy's acute care commercial discharges for 1994 were estimated to be 3622 and the average daily acute care commercial census was 44. Finley is also an acute care hospital and, in 1994, was estimated to have 124 staffed beds, 5247 acute care patient discharges and an average daily census of 63. Finley's acute care commercial discharges for 1994 [**3] were estimated to be 2175 and the average daily acute care commercial census was 21.

There are seven rural hospitals in the area: Galena-Stauss Hospital in Galena, Illinois, 15 minutes from Dubuque, has 25 licensed beds and an average daily census of 3. Southwest Health Center in Platteville, Wisconsin, 30 minutes from Dubuque, has 35 licensed beds and an average daily census of 11. Lancaster Memorial Hospital in Lancaster, Wisconsin, 30 minutes from Dubuque, has 35 licensed beds and an average daily census of 10. Delaware County Memorial Hospital in Manchester, Iowa, 40 minutes from Dubuque, has 58 licensed beds and an average daily census of 12. Jackson County Public Hospital in Maquoketa, Iowa, 30 minutes from Dubuque, has 99 licensed beds and an average daily census of 12.4. Guttenberg Memorial Hospital in Guttenberg, Iowa, 40 minutes from Dubuque, has 37 licensed beds and an average daily census of 7. Finally, Central Community Hospital in Elkader, Iowa, 60 minutes from Dubuque, has 29 licensed beds and an average daily census of 3-4.

These hospitals primarily serve patients who are closer to the rural hospital than to any other hospital. The rural hospitals mainly provide [**4] primary care services and do not provide the breadth of services Mercy and Finley offer. Guttenberg provides the largest array of services in that it offers 68% of the same Diagnosis Related Groups (DRGs)¹ Mercy and Finley provide. Galena-Stauss has the smallest array of services, providing care for only 11.5% of the same DRGs Mercy and Finley provide.

[*972] There are several regional hospitals within 70 to 100 miles of Dubuque which generally offer the same or greater range of services as provided by Mercy and Finley. Allen Memorial Hospital in Waterloo, Iowa has 194 staffed beds and an average daily census of 145. Covenant Medical Center in Waterloo, Iowa has approximately 322 staffed acute care beds with an average daily census of 173. St. Luke's Methodist Hospital in Cedar Rapids, Iowa has 441 staffed beds with an average daily census of 284. Mercy Medical Center in Cedar Rapids, Iowa has [**5] 353 staffed beds and an average daily census of 193. St. Mary's Medical Center in Madison, Wisconsin has 345 staffed beds and an average daily census of 265. Freeport Memorial Hospital in Freeport, Illinois has 143 staffed beds and an average daily census of 70. University of Wisconsin Hospital and Clinics in Madison, Wisconsin has 496 staffed beds and an average daily census of 386. Meriter Hospital in Madison, Wisconsin has 429 staffed beds and an average daily census of 258. The University of Iowa Hospitals and Clinics in Iowa City, Iowa (UIHC) has 868 staffed beds and an average daily census of 677.

Mercy and Finley's patient bases are composed of individuals covered by government insurance programs, traditional indemnity insurance and managed care payers. Managed care payers include health maintenance organizations (HMO's), and preferred provider organizations (PPO's). HMO's generally charge a set fee which covers all of an enrollee's health care needs, including hospitalizations. HMO's generally restrict the doctors and hospitals from which an enrollee can receive care to those physicians and hospitals providing a discounted rate to the HMO. HMO's often work with the hospitals [**6] when an enrollee is hospitalized to insure that the costs of the hospitalization remain as low as possible. HMO's may have their own clinics to which enrollees are obligated to go for office visits and most outpatient needs. HMO's generally stress preventative care and require preapproval prior to being hospitalized in order to keep the rate of hospitalizations low.

PPO's generally negotiate discounted rates with physicians and hospitals and then require their enrollees to receive their care from the discounted care providers or risk being denied reimbursement. PPO's generally do not have their own clinics and do not stress preventative care. In contrast to the managed care payers, the indemnity health insurers have not traditionally attempted to gain discounted rates from physicians or hospitals.² Instead, these

¹A DRG is a numerical code indicating the treatment provided to a patient or his diagnosis and severity of his illness.

²The traditional indemnity insurers are now beginning to demand and receive discounts. In addition, traditional insurers, such as Blue Cross/Blue Shield, have formed their own PPO or HMO.

traditional insurers cover a percentage of the health care costs with the remainder being paid by the insured. HMO's and PPO's have only recently established themselves in Iowa, but already 25% of Mercy and Finley's patients are covered by managed care payers. Of the remaining 75% of Mercy and Finley's inpatients, 50% are covered by Medicare and Medicaid and the other [**7] 25% are covered by traditional indemnity insurance.

A hospital will discount its stated charges to managed care payers in order to entice the managed care entity to send more enrollees to their hospital for inpatient care. Mercy currently gives discounts to the following managed care entities: Medical Associates, Heritage National Health Plan, Self-Insured Systems Corporation (SISCO), Alliance Select PPO (a Blue Cross plan), HMO of Wisconsin, Wisconsin Education Association Insurance and the Affordable Health Plan. Finley contracts with Blue Cross/Blue Shield of Iowa, Alliance Select PPO Program (a Blue Cross plan), Heritage National Health Plan, Inc., Heritage Preferred, Medical Associates HMO, HMO of Wisconsin, Blue Cross of Illinois PPO, BeefAmerica Operating Co., ProAmerica Network, Inc., American Health Care Advisory [**8] Association, Hospice of Dubuque County, and Collaborative Medical for Religions (a charitable contribution).

Medical Associates is a physician-owned medical practice which operates the Medical Associates HMO in the Dubuque area. The HMO has approximately 30,000 enrollees. The Medical Associates HMO accounts for 11-12% of Mercy's net revenues. Physicians [*973] employed by Medical Associates refer patients to Mercy for inpatient and outpatient care constituting approximately 80% of Mercy's yearly revenue. Heritage National Health Plan operates a PPO which covers 5,000 lives in the Dubuque area. Nationally it covers 280,000 persons. It accounts for 2-3% of Mercy's net revenues. SISCO is a third-party payer which administers self-insured employee health plans and also contracts for reduced rates for some of its employer-customers. Blue Cross has a state-run managed care plan in which it offers the hospital a contract on a "take it or leave it" basis. The hospital can either agree to the stated rates or not be on the plan's preferred provider list. It accounts for 8-9% of Mercy's net revenues. Affordable accounts for less than 1% of Mercy's revenues. HMO Wisconsin accounts for less than 0.5% [**9] of Mercy's revenues. Medicare and Medicaid account for 46-47% of Mercy's net revenues. Traditional indemnity insurance accounts for 26% of Mercy's net revenues.

Medical Associates has a clinic in Dubuque in which it sees patients for regular office visits. It also operates an outpatient clinic in Dubuque which directly competes with Mercy and Finley for outpatient procedures. In addition to its Dubuque Clinic, Medical Associates has permanent facilities in Bellevue, Iowa; East Dubuque, Illinois; and Galena, Illinois. It operates outreach clinics in Bellevue, Iowa; Dyersville, Iowa; Lancaster, Wisconsin; Maquoketa, Iowa; Platteville, Wisconsin; Boscobel, Wisconsin; Elkader, Iowa; Guttenberg, Iowa; Manchester, Iowa; Oelwein, Iowa; Darlington, Wisconsin; Clinton, Iowa; and Monticello, Iowa. These outreach clinics are primarily conducted in order to obtain secondary referrals for Medical Associates' specialists.

B. Health Care Market Trends

Traditionally, hospitals competed on the basis of amenities and perceptions of quality. Only in the last ten to fifteen years have hospitals begun to compete on the basis of price. To a large degree, this competition has occurred because [**10] of the arrival of managed care. These large purchasers shop on the basis of price and are able to induce hospitals to discount stated charges in return for the managed care payer's promise to direct a larger volume of patients to the hospital. Hospitals must employ cost containment measures in order to become more cost efficient so that they can afford to give discounts to the managed care payers. Competition for Medicare, Medicaid and traditional indemnity patients still occurs on the basis of amenities and perceptions of quality.

Managed care entities are capable of inducing their enrollees to receive inpatient care at a specific hospital. The entity does this in one of the following ways: (1) by only paying the hospitalization costs if the enrollee is treated at a specified hospital, or (2) by requiring the enrollee to pay a higher percentage of the enrollee's hospitalization costs (a co-pay) if the enrollee chooses to be hospitalized at a non-preferred hospital. Managed care entities are gaining sophistication in their ability to induce patients to be hospitalized at a preferred hospital. However, the managed care entities do not always show price sensitivity when they establish [**11] requirements. For example, Medical Associates may be charged a lower rate by one hospital for a certain DRG, however, the physicians who admit the

patients may not be aware of the rate differential and consequently do not encourage patients to go to the cheaper hospital.

Traditionally, when people decided where to receive inpatient care, they considered the following factors: where their physician had hospital privileges and could therefore take care of them during the hospitalization; what hospital was convenient; the reputation of the hospital; and the amenities the hospital offered. Patients have only recently added out-of-pocket expenses to this list. (Traditional indemnity insurance covered a specific portion of the fees no matter which hospital was utilized and patients generally had little knowledge of whether hospital prices varied for their specific hospitalization needs.)

The advent of managed care has resulted in individuals also considering what their out-of-pocket expenses will be. Under traditional indemnity insurance a certain percentage of a hospitalization is covered without regard to the hospital used. Managed care enrollees [***974**] are much more aware of their out-of-pocket [****12**] expenses resulting from a hospitalization because the policies generally state that expenses incurred at certain hospitals will either not be covered or will require a higher co-pay.

People who continue to be covered by either traditional insurance or by Medicare and Medicaid remain largely insensitive to price differentials. The government dictates hospital fees for the care of Medicare and Medicaid patients, and such fees are often below the cost of providing the services. This causes "cost shifting" of the costs of these services to non-Medicare and non-Medicaid patients. Patients covered by traditional indemnity insurance have been charged full charges which take into account the need to cost shift. Even though managed care groups negotiate with the hospitals for rates below full charges, the rates are greater than those charged Medicare and Medicaid patients and include some cost shifting.

Price competition is important among the managed care groups. Generally, the managed care payer will negotiate the best rates and the greatest discounts possible with area hospitals and physician groups. Based on the rates obtained, the managed care payer determines the premium it must charge [****13**] enrollees for services. The managed care group next approaches businesses to try to convince them to offer their managed care plan to their employees. Thirty-five to 40% of the managed care premium is due to inpatient hospital charges, so the rates negotiated with the hospitals significantly impact the premium charged by the managed care payer and affects the cost competitiveness of the managed care entity receiving the discount.

Hospitals contract at discounted rates with the managed care entity when it feels the managed care payer can induce its enrollees, through financial incentives or otherwise, to use the contracting hospital. A hospital will generally only contract with the managed care entity if it feels that (1) by giving a discount, the managed care entity will shift a higher volume of patients to the hospital, or (2) by refusing to give a discount, the managed care entity will shift a significant volume of patients away from the hospital.

Managed care plans influence which physicians and hospitals an enrollee chooses by offering incentives to use certain care providers (i.e., a reduction in co-pay or a total waiver of co-pay), by requiring a co-pay if the enrollee uses [****14**] a different care provider or hospital, or by simply requiring the enrollee to use designated hospitals and care providers to receive reimbursement.

Along with the rise of managed care has come the increased use of outpatient services for procedures which traditionally required overnight hospitalization. The length of hospital stays are also becoming significantly shorter because of the increased use of home care and because managed care payers closely monitor the length of time an enrollee is hospitalized. This results in less hospital utilization and a decrease in the average daily census. Because hospitals have high fixed costs, the loss of patient volume requires hospitals to broaden their service area in order to maintain patient census and resulting cash flow.

Prior to the trend in shorter and fewer hospitalizations and to the advent of cost competition, hospitals had their own "catchment area" from which they drew their patients and from which other hospitals generally did not try to encroach upon the residing population. The main competition between regional hospitals was in the "fringe area,"

the area half-way between two regional hospitals. However, the competitive market [**15] has changed and is continuing to change at a rapid pace.

Hospitals, needing to maintain their patient volume, have begun to establish outreach efforts in the fringe areas as well as deep in the heart of what used to be considered another hospital's catchment area. The efforts include the establishment of hospital owned clinics and the purchase of physician practices in towns up to 50-60 miles from the hospital. These clinics have succeeded in capturing patients and referring them to their associated hospital for inpatient care.

Outreach efforts also include clinics established by private physicians' groups. The physician clinics are used to broaden the referral base for the clinic's various specialties. [*975] The clinics refer patients back to the hospital where the physicians have admitting privileges for inpatient and outpatient services. Consequently, when a physicians' group extends its market area by opening an outreach clinic, it also extends the market area of the hospital with which the group is associated. Once an outreach clinic is established, the hospital and specialty referral patterns from the community where it is located change significantly within a short period of time [**16] (often within two months). Clinics can generally be established in a matter of weeks as they are often opened in existing hospitals or clinics. Both hospital and physician-owned clinics have proven they induce outreach patients to receive hospital care at the associated hospital, even if another regional hospital is closer.

There is a great deal of evidence showing that these national trends exist in the Dubuque area. Mercy's inpatient volume decreased by approximately 15% from 1990 to 1994. In order to maintain its present patient volume and revenues, Mercy must gain market share in what it considers its "secondary market," the area outside of Dubuque County. This can only be done on a significant level by establishing outreach clinics. Mercy has not established any of its own outreach clinics, but depends on the managed care payers which use Mercy to do so -- primarily Medical Associates.

C. Other Findings of Fact

Additional findings of fact are made under the Conclusions of Law section and throughout the legal analysis. In addition, attached as Appendix A, are the facts to which the parties have stipulated.

II. Conclusions of Law

A. Anti-trust [**17] Analysis

Section 7 of the Clayton Act [HN1](#)[] provides, in part, that "no person . . . shall acquire the whole or any part of the assets of another person . . . where . . . the effect of such acquisition may be substantially to lessen competition." [15 U.S.C. § 18 \(1973 & Supp. 1995\)](#); [United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589, 77 S. Ct. 872, 875, 1 L. Ed. 2d 1057 \(1957\)](#) (Section 7 is "designed to arrest in its incipiency . . . the substantial lessening of competition . . ."). [HN2](#)[] To meet the requirement of Section 7, the government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future. [FTC v. University Health Inc., 938 F.2d 1206, 1218 \(11th Cir. 1991\)](#); [FTC v. Warner Communications, Inc., 742 F.2d 1156, 1160 \(9th Cir. 1984\)](#). [Section 1](#) of the Sherman Act requires the same analysis. 2 Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#) P 304c., at 9 (1995); [United States v. Rockford Mem. Corp., 898 F.2d 1278, 1281-86](#) (7th Cir.), cert. denied, 498 U.S. 920, 112 L. Ed. 2d 249, 111 S. Ct. 295 (1990).

[HN3](#)[] To determine whether there is a reasonable probability of a substantial lessening of competition, the courts have focused [**18] on whether the merger will cause the merged entity to have enough market power such that it could profitably increase prices. Whether the merger will cause an anticompetitive effect is not "the kind of question which is susceptible of a ready and precise answer in most cases." [United States v. Philadelphia National Bank, 374 U.S. 321, 362, 83 S. Ct. 1715, 1740, 10 L. Ed. 2d 915 \(1962\)](#). Generally, the plaintiff attempts to prove its case by showing that the merged entity will have a large percentage of the relevant market such that, either individually or through collusion, its hold over the market will enable it to profitably raise prices above competitive levels. [HN4](#)[] The government may make a *prima facie* showing that the merger will result in anticompetitive effects by showing that the merged entity will have an undue share of the relevant market. [Id., at 363](#); [University Health, Inc.,](#)

938 F.2d at 1218. Thus HN5 before a court can determine the effect of a merger on competition, it must first define the relevant market.

HN6 The relevant market is defined by identifying those "producers that provide customers of defendants' . . . firms with alternative sources for the defendants' [**19] product or service." 2A Phillip E. Areeda, Herbert Hovenkamp & John L. Sowle, Antitrust Law P 530a, at 150 (1995). HN7 A properly defined market excludes other potential suppliers [*976] (1) whose product is too different (product dimension of the market) or too far away (relevant geographic market) and (2) who are not likely to shift promptly to offer defendants' customers a suitably proximate alternative. *Id.* "Those who can readily shift into offering such a product are in the market." *Id.*

HN8 Although a great deal of emphasis is placed on market share statistics, they are not conclusive indicators of anticompetitive effects. United States v. General Dynamics, 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974). HN9 If the government is able to make a *prima facie* case, the defendants can overcome the presumption of illegality by showing that the market-share analysis gives an inaccurate reflection of the acquisition's probable effect on competition within the relevant market. United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120-21, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975). To rebut the government's case, the defendants may produce "nonstatistical evidence which casts doubt on the [**20] persuasive quality of the statistics to predict future anticompetitive consequences." University Health Inc., 938 F.2d at 1218 (quoting Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1341 (7th Cir. 1981)). Factors which courts have previously considered to be relevant include "ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition." *Id.* HN10 When determining whether a merger will have an anticompetitive effect, the court must view the merger functionally within the context of its industry's "structure, history, and probable future." General Dynamics, 415 U.S. at 498 (quoting Brown Shoe v. United States, 370 U.S. 294, 322 n. 38, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)).

HN11 If the defendant is successful in rebutting the government's statistical evidence, the government then has the burden of presenting additional evidence that the merger will lessen competition and this burden "merges with the ultimate burden of persuasion, which remains with the government at all times." University Health Inc., 938 F.2d at 1219 (quoting United States v. Baker Hughes Inc., 285 U.S. App. D.C. 222, 908 F.2d 981, 983 (D.C. Cir. 1990)).

[**21] B. Relevant Product Market

The parties have agreed that the relevant product market is acute care inpatient services offered by both Mercy and Finley. This definition excludes inpatient psychiatric care, substance abuse treatment, rehabilitation services, and open-heart surgery. This limits the product market to those services for which Mercy and Finley currently compete for inpatients.

C. Relevant Geographic Market

HN12 The burden is on the government to prove the relevant geographic market. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 113 S. Ct. 884, 890, 122 L. Ed. 2d 247 (1993). The relevant market is hotly disputed by the parties. The government asserts that the geographic market includes Dubuque County, Iowa and a half-circle with a 15 mile radius extending from Dubuque County's eastern edge into Illinois and Wisconsin. This geographical area would include Mercy, Finley and Galena-Strauss Hospital. Currently, 88% of the patients within the market use the three hospitals within the market. Only about 2% of the 88% use Galena- Stauss; the remainder uses Mercy and Finley. Approximately 76% of the patients at the three hospitals come from within the market.

[**22] The defendants asserts that the proper geographic market includes Mercy, Finley, the seven closest rural hospitals and the regional hospitals situated in Cedar Rapids, Waterloo, Iowa City, Davenport, and Madison. Mercy and Finley's market share of the patients within this geographical area is approximately 10%. The government does not contest that if this is the relevant market, the merger is not illegal.

The parties dispute whether the government has properly defined the relevant geographic market by trying to show whether DRHS could (1) profitably raise prices by 5% to managed care entities, or (2) profitably raise prices by completely eliminating present [*977] discounts to managed care entities. In the event the court finds the government has not met its burden as to the proposed geographic market, the government has proposed an alternative market encompassing only the City of Dubuque.

The government defined its market based on (1) the views of the major purchasers of health care services in the Dubuque area, (2) where physicians have privileges, (3) the views of physicians, and (4) patient flow data. Looking at the views of the major managed care providers in the Dubuque area, [**23] the government finds it significant that Medical Associates HMO and the Heritage Plan both feel their health care plans must include one of the Dubuque hospitals in order for the plan to be marketable to Dubuque employers. The government argues this is evidence that there is no market substitute for the Dubuque hospitals.

The government then looked at the overlap of physicians who were currently on staff at the area hospitals. The government showed that there is a great deal of physician staff overlap between the staffs of Mercy and Finley, but very little between the rural hospitals and Mercy or Finley. Seventy-six percent of Mercy's physicians were shown to be on staff at Finley and over 90% of Finley's physicians were on staff at Mercy. The government concludes from these statistics that (1) those patients who currently use a physician with privileges at Mercy and Finley cannot switch to a rural hospital due to their loyalty to their physician and their physician's inability to admit them at a rural facility, and (2) Mercy and Finley are seen by physicians as being comparable hospitals as physicians are willing to work out of either of them. By contrast, Dubuque physicians are [**24] not willing to work out of the rural hospitals, hence the rurals are not comparable and therefore they are not substitutes for Mercy and Finley.

The government also asserts that Dubuque physicians would not seek privileges at the rural hospitals as they do not see the rural hospitals as being able to provide the broad range of services which the majority of their patients require and because the rurals are not adequately staffed and do not have the equipment to do many inpatient surgical procedures.

The government then goes on to look at the inflow and outflow of patients from the market. The "Elzinga-Hogarty" test was employed by the government to argue that the relevant geographical market was quite limited. This test looks at the empirical data to determine (1) the area from which the hospitals draw their patients and (2) where the residents in that area go for hospital care. When both numbers are at 90%, the market definition is said to be "strong". Numbers at 75% are said to constitute a "weak" market definition. Robert Pitofsky, *New Definitions of Relevant Market and the Assault of Antitrust*, 90 Columbia Law Rev. 1805 (1990), Elzinga & Hogarty, *The Problem of Geographic [**25] Market Delineation Revisited: The Case of Coal*, 23 Antitrust Bull. 1, 2 (1978).

Looking at the government's proposed market definition -- Dubuque County and a fifteen mile radius into Illinois and Wisconsin -- 76% of Mercy's and Finley's inpatients come from within this defined market, and 88% of those residing within the market seek care within the market. Shrinking the market to include only the City of Dubuque, 55% of Mercy and Finley's inpatients come from within the market and 91% of those residing in Dubuque seek hospital care at either Mercy or Finley. Defining the market as a twenty-five mile radius around Dubuque, 85% of Mercy's and Finley's patients come from within the market and 89% of those persons within the market seek care inside the market. Broadening the market to a 35 mile radius around Dubuque, 89% of Mercy and Finley's inpatients come from within the market and 82% of the persons within that market seek care at Mercy or Finley.

Finally, the government asserts that the regional hospitals are not in the relevant geographic market as they only compete for patients at the "fringes," the area located at the midpoint between Dubuque and a particular regional hospital. [**26] The government reasons that people will not travel greater distances than necessary for inpatient care and, therefore, only those patients at the midway point between two regional hospitals could be [*978] induced to switch hospitals due to price concerns. The government concludes that DRHS would have the ability to raise prices as the rurals do not act as a competitive alternative to DRHS and the regional centers are only a competitive force at the fringes of Mercy's and Finley's service areas and therefore could not induce enough people to switch hospitals to defeat a price rise by DRHS.

The defendants criticize the government's market definition as being dependent on incorrect assumptions, and as not accounting for current market trends. The defendants also assert that the government's geographical market is too small because a 5% price increase would be easily defeated by patients who would choose to travel to other hospitals for cheaper care. In reaching this result, the defendants challenge the government's assumptions of strong doctor-patient loyalty, that outreach clinics only have an effect on hospital use at the fringes of a hospital's service area, and that there are significant [**27] barriers to entry into this market.

1. Analysis of the Relevant Geographic Market

The court finds that the government's case rests too heavily on past health care conditions and makes invalid assumptions as to the reactions of third-party payers and patients to price changes. The government's case also fails to undergo a dynamic approach to antitrust analysis, choosing instead to look at the situation as it currently exists within a competitive market.

HN13[] In determining the relevant geographic market, the court must determine "the market in which the seller operates and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S. Ct. 623, 628, 5 L. Ed. 2d 580 (1960); *Philadelphia National Bank*, 374 U.S. at 359. The analysis must focus not merely on where patients have gone for acute inpatient services, but where they could practicably go should DRHS become anticompetitive. *Bathke v. Casey's General Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995); *Morgenstern v. Wilson*, 29 F.3d 1291, 1295-1296 (8th Cir. 1994), cert. denied, 130 L. Ed. 2d 1068, 115 S. Ct. 1100 (U.S. 1995). This requires a fluid analysis. It is not sufficient to take [**28] a snapshot of the current situation and define the relevant geographic market to be synonymous with the current service areas of the defendant hospitals. See, *Bathke*, 64 F.3d at 345; *Morgenstern*, 29 F.3d at 1295; In the *Matter of Hospital Corporation of America*, 106 F.T.C. 361, 466 (1985), aff'd, *Hospital Corporation of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038, 95 L. Ed. 2d 815, 107 S. Ct. 1975 (1987); *Drs. Steuer & Latham v. Nat. Med. Enterprises*, 672 F. Supp. 1489, 1511 (D.S.C. 1987), aff'd, 846 F.2d 70 (4th Cir. 1988).

HN14[] In order to determine the actual geographic market, current market behavior must be put into a dynamic analysis which looks at possible competitive responses from other hospitals, third party payers and consumers. In this light, it is important to note that the government's reliance on **HN15**[] the Elzinger-Hogarty test is merely a starting point -- it states where Mercy and Finley are currently attracting patients and the area from which most patients seek services from either Mercy or Finley. This is the snapshot of the market as it exists under current conditions and does not pretend to answer the question of what would happen if there was [**29] an attempt to exercise market power by one of the market participants. See Robert Pitofsky, *New Definitions of Relevant Market and the Assault of Antitrust*, 90 Colum. L. Rev. 1805 (1990).

The government's case in general makes the mistake of relying too heavily on past conditions in the hospital industry and discounts the effects of outreach efforts, the strong emphasis that regional hospitals place on expanding their service areas and the willingness of managed care enrollees to make changes in their health care for financial reasons.

The government's case relies on several assumptions and conclusions that are not supported by the evidence. One of the assumptions is that there is strong doctor-patient loyalty. This assumption supports the argument that patients cannot be enticed [*979] to use a non-Dubuque hospital because the patient already has a Dubuque doctor to whom the patient is very loyal.

There are several problems with this assumption. First, the evidence shows that many hospital patients do not have an established physician relationship, or, are admitted by a specialist who is not the patient's regular physician.

Secondly, the evidence does not support a finding [**30] of strong patient-physician loyalty that prevents patient shifting for financial reasons. The medical professionals testified there is a large amount of patient shifting that occurs when an employer changes or modifies a health insurance plan so as to encourage usage of a particular

physician or group of physicians. Testimony also shows that managed care entities have been very successful in enrolling patients in HMO's that require switching physicians or agreeing to be seen by any available physician.³

The government's assertion that the outreach clinics have little effect on hospitalization patterns is also erroneous. There are several communities where referral practices have been dramatically altered due to outreach efforts. Most notably Manchester, Independence and Clarion, Iowa. While the effect of the [**31] outreach clinics has not been quantified, the fact that they are established is significant as it is only through the generation of inpatient and outpatient referrals that these clinics become profitable. Outreach efforts have been characterized by the regional hospitals as being pivotal in their efforts to expand patient volume at a time when all other trends are causing them to lose volume. In other words, without growth in these areas most hospitals acknowledge they would incur a significant decrease in revenue. The start-up of outreach clinics cannot be justified based solely upon the direct business they obtain on site. They are economically justified due to the increased referrals they bring to the physicians and hospitals sponsoring them. Outreach clinics generally attract patients from a fifteen mile radius and these clinics have been established within twenty-five miles of Dubuque. 18.8% of Mercy and Finley's patients come from within fifteen miles of an outreach clinic associated with another regional hospital.

The government attempts to argue that outreach clinics are only effective in shifting patients from the fringe areas to other hospitals as people will not agree [**32] to be hospitalized at a hospital a significant distance away from their home and family. The government argues that most hospitalizations require two pre-operative visits to the hospital, the actual hospitalization and two or three post-operative visits to the hospitals and patients will not want to incur the expense and inconvenience of travel for these visits. However, the evidence was clear that one reason why the outreach clinics are so effective in altering hospitalization practices is because the pre- and post-operative visits take place at the outreach clinic and the patient is only required to travel to the hospital for the actual surgical procedure.

In fact, people will use outreach clinics which are associated with hospitals that are a significant distance from their hometown. To illustrate, the Platteville and Lancaster areas are 25 miles from Dubuque and sixty to seventy miles from Madison, Wisconsin, yet Medical Associates, which refers persons back to Dubuque for inpatient care, meets strong competition in these communities from the Dean Clinic which refers its patients to St. Mary's Hospital in Madison.

The fact that the residents of southwest Wisconsin are willing [**33] to drive to Madison for their inpatient needs also shows that the government's assumption that persons within twenty-five miles of Dubuque will only go to Dubuque for their inpatient needs is an incorrect assumption. The government has also failed to account for the fact that there are several zip codes within 25 miles of Dubuque which currently send over one-third of their inpatients to other hospitals. Looking at the zip codes encompassing Cuba City, Wisconsin; Galena, Illinois; New Vienna, Iowa; Potosi, Wisconsin; and Hazel Green, Wisconsin, there were 930 discharges in a six month period from these zip codes and only [*980] 560 were discharged from Mercy or Finley (60.2%). 179 of these discharges were to hospitals other than Mercy, Finley, the seven rurals or the University of Iowa (19.2%). Obviously, these persons are already being attracted to hospitals outside the immediate area. Discharges from these five zip codes account for 7.7% of Mercy and Finley's total discharges.

The main point made by the government which the court does agree with is the inability of the rural hospitals to prevent DRHS from acting in an anticompetitive manner. The government argues that it would not be [**34] feasible for more patients to use the rural hospitals as the rural hospitals are not equipped to handle anything but the least complicated hospitalizations. The defendants counter that the rural hospitals are a practicable alternative as they have a great number of empty beds and are capable of meeting the needs of a significant number of inpatients.

Due to the high utilization rates of some of the rurals by those in the same zip code as the hospital, many of the rurals can apparently care for a wide range of diagnoses. For example, in the zip code encompassing Guttenberg,

³ Medical Associates HMO does not guarantee the availability of a particular physician for office visits and John Deere has been successful nationally even though it has a limited panel of doctors.

Iowa, where Guttenberg Hospital lies, 178 out of 269 hospitalizations were at the Guttenberg hospital (66.1%). Further, Guttenberg Hospital has cared for inpatients hospitalized for 68% of the DRGs for which Mercy and Finley admit patients. However, in the zip code encompassing Galena, Illinois, where Galena-Stauss lies, only 93 out of 340 hospitalizations were at Galena-Stauss Hospital (27.3%) and Galena-Stauss has admitted patients for only 27% of the DRGs for which Mercy and Finley admit patients. Therefore, the rural hospitals have a wide divergence as to each's ability to care for more patients than are currently [**35] hospitalized there.

This evidence shows that the rural hospitals are technically qualified to meet the hospitalization needs of more patients than currently choose to go there. However, other barriers exist to prevent greater utilization of the rurals, the largest barrier being individual attitudes toward the rurals. Persons living any distance from the rurals simply do not seek them out for care. For example, despite the high utilization rate by the population living within the same zip code as Guttenberg Hospital, in the rest of Clayton County, in which the Guttenberg hospital lies, only 92 out of 579 hospitalizations were at the Guttenberg Hospital (15.8%). In all of Jo Davies County, in which Galena, Illinois is a part, there were 63 out of 702 hospitalizations at Galena-Stauss (8.9%). Further, a survey done by Jackson County Public Hospital in Maquoketa found they were significantly used by persons within 20 miles of the hospital, but not by persons of any greater distance.

Another barrier to the rurals taking on a greater patient volume is the difficulty the rurals have in obtaining qualified doctors and nursing staff willing to live and work in a rural community. It is not [**36] at all apparent that the rurals could attract the staff necessary to expand patient volume.

Further evidence that the rurals could not significantly expand their utilization rate is that Mercy and Finley do not consider the rurals as competitors. Both Mercy and Finley look to the rurals as a source of referrals for the services that the rurals do not provide and try to cooperate with the rurals in order to capture some of this referral business. While the rurals could conceivably capture some patients should the managed care payers give incentives for their use, it does not appear to be a large percentage of the current population using Mercy and Finley.

2. 5% Price Increase

The government also argues that there are no competitors who could defeat a 5% price increase by DRHS and that therefore, the merger would result in an anticompetitive effect. The 1984 Merger Guidelines instituted the 5% test -- suggesting that if a merged entity could sustain a 5% price rise for approximately one year, the merger should be enjoined as a violation of the antitrust laws. The government concluded that a 5% price increase would be profitable, in large part, due to the following assumptions: [**37] (1) people have strong loyalties to their doctors and will not switch hospitals as this [*981] would entail switching doctors, (2) the outreach clinics only influence behavior in the "fringe areas" between two regional hospitals, and (3) persons within twenty-five miles of Dubuque will only use Dubuque hospitals.

Both parties agreed that for a 5% price increase to be unprofitable, DRHS would have to lose 8% of its present population. The government asserts that this will not happen as (1) at most, 4% of those within twenty-five miles of Dubuque would shift to a non-Dubuque hospital, and (2) at most, 3.2% of the 13% of Dubuque patients living outside this 25 mile radius might shift. The government argues that those within twenty-five miles of Dubuque would not shift as they would not travel outside of Dubuque for health care needs partly because they would find it inconvenient, and partly because a shift would necessitate changing physicians which most would be unwilling to do.

The government broke down the 13% of Mercy and Finley's patients who reside outside the 25 mile radius into categories and found that the following persons would be unlikely to switch in the event of a 5% price [**38] rise: (1) the .6% admitted who reside completely outside the area (e.g. California), (2) the 1.2% who are admitted through the emergency room whom the government assumes happened to be in the Dubuque area when their emergency arose, (3) the 1.1% who are admitted by Medical Associates physicians because these patients will not change hospitals due to their loyalty to their physicians and because their physicians only have privileges at Mercy and Finley, and (4) the 3.6% who were admitted by their Dubuque primary care physician, who the government

assumes will not switch because they have ties to Dubuque and that particular doctor. The government asserts of the remaining 6.5% who do not fall in any of the above categories, only half, or 3.2% would switch.

The court finds the government's numerical conclusions to be incorrect, again due to the government's assumption of strong patient-physician loyalty and the government's erroneous belief that persons within twenty-five miles of Dubuque will not travel outside of Dubuque for hospital care. Adding in the percentages which the government excluded due to these assumptions puts the total of those likely to switch in the event of a 5% price [**39] rise at a number higher than the 8% necessary to make the price rise unprofitable.

3. Elimination of Managed Care Discounts

The government contends the more likely scenario is that DRHS would reduce or eliminate all current discounts to managed care entities resulting in a 15-30% increase in prices. The evidence was that such a price increase would have to be countered by a 20-35% loss of patients to make such a price increase unprofitable. The government asserts that with a total abandonment of managed care discounts, to defeat a price rise, DRHS would have to lose all of its patients residing outside of the government's proposed market area (24%) and perhaps a number of those residing within the market area. The government argues that it is inconceivable that such a large exodus from the Dubuque hospitals would occur.

The government presumably relies on its assumptions that persons within twenty-five miles of Dubuque will not shift to other facilities, that outreach clinics are largely irrelevant to the analysis, and that there is strong doctor-patient loyalty preventing shifting. For the reasons stated above, the court has already found that these assumptions are erroneous.

[**40] The government continues to fail to look at the merger within the context of current market trends. All evidence is that there is a great deal of competition for health care dollars -- including stiff competition between the managed care entities. As hospitalization costs account for approximately 40% of an HMOs' fee, a 15-30% price increase in hospitalization rates would equate to a 6-12% increase in the cost of an HMO. HMOs which could avoid this increase would be much more cost competitive and presumably would be able to attract more enrollees. Therefore, if DRHS acted in a noncompetitive manner, an HMO that could successfully induce Dubuque area residents to use alternative hospitals would be at a significant cost advantage.

[*982] The government asserts that those within twenty-five miles of Dubuque cannot be induced to travel outside of Dubuque for health care, however, the court finds to the contrary for several reasons: (1) a significant portion of the population already chooses to go outside Dubuque for health care, (2) managed care entities have successfully shifted patients in the past, and (3) managed care enrollees are increasingly willing to travel for financial savings.

[**41] Turning to the first point, already, a significant number of Dubuque residents use the University of Iowa Hospitals and Clinics ("UIHC"), a ninety mile drive, due to quality concerns. The government asserts that these persons are only going to the University of Iowa for health care that cannot be obtained in Dubuque, and supports this assertion by testimony from doctors stating that they only send patients to the UIHC for care unavailable in Dubuque. However, 63% of Dubuque residents using the UIHC are self-referrals who are not going to the UIHC on the referral of a Dubuque doctors. Further, the zip code data shows a widely varied use of the UIHC across zip codes, indicative of the defendants' position that persons are not going only for care unavailable in Dubuque. Presumably, if persons were only using the UIHC for care unavailable in Dubuque, the percentages of persons going to the UIHC from each zip code would be fairly equal.

There was also testimony that a plastic surgeon from Cedar Rapids successfully induces Dubuque residents to travel to Cedar Rapids for plastic surgery by offering them lower prices on the surgery and hospitalization. Plastic surgery is not often covered [**42] by private health insurance and therefore persons wanting plastic surgery have to pay for the full cost out of their own pocket.

A final example of persons traveling outside of Dubuque for health care needs is that of a Dubuque physician who successfully directs cardiac patients needing catheterization, angioplasty and open heart surgery to Iowa City.

Although this is reportedly done for political reasons and not for price considerations, it nevertheless does show that persons can be induced to travel from the Dubuque area for inpatient care available in Dubuque.

There is also evidence that managed care entities can successfully induce Dubuque residents to use other regional hospitals for their inpatient needs. Heritage shifted patients in need of open heart surgery and substance abuse treatment from Dubuque to Waterloo and Davenport in a successful attempt to obtain lower prices from Mercy in these service areas. The government vehemently argues that this evidence is irrelevant as these are services outside the product market and that there is no evidence that people who would switch for these services would switch for the services within the relevant product market. The court [**43] finds, however, that it may rely on this evidence for two reasons: (1) the evidence is that it is generally harder to induce people to travel for the longer term hospital care necessitated by these services than for the type of hospital care within the relevant product market, and (2) there is no evidence that patients distinguish these types of care when considering whether to travel for hospital care. The main basis for the government's assertion that people inside Dubuque will not travel for hospital care is that they have not done so in the past, they are not willing to go to the extra expense of having to travel and put their families through the expense and inconvenience of having to stay in a hotel to be near them during their hospitalization, and they do not want to switch physicians. Persons traveling for substance abuse treatment and open heart surgery would apparently have these same concerns, yet they are traveling.

Finally, the court turns to the third point -- that financial incentives can induce people to travel. Many witnesses testified that employees are more willing to travel now that they are covering a greater portion of their health care costs. Survey results [**44] indicate that, for less than \$ 1000.00, Dubuque residents could be induced to travel to another hospital for care. The government disputes the reliability of the surveys, but the survey outcomes are confirmed by the testimony of officers within the managed care [*983] corporations and employers purchasing health care plans.

For example, Doug Sesterhahn testified that SISCO has induced enrollees to travel an hour to an hour-and-a-half for health care by providing financial incentives. Mr. Sesterhahn also testified that he felt SISCO could provide incentives that would induce Dubuque employees to go to Platteville and Southwest Medical Center for care. James Thompson felt that for some categories of patients -- nonsurgical, cancer care and heart care patients -- a \$ 200 incentive would be enough to induce some Dubuque residents to travel to another regional center for their care. While he was unsure as to the numbers of persons who would travel for a \$ 200 inducement, Mr. Thompson also testified that, with financial inducements of between \$ 500-1000, Heritage could shift patients from inside Dubuque to the regional hospitals for many services in the relevant product market.

The average [**45] full charge for inpatient hospitalization at Finley and Mercy is approximately \$ 6,000. Thus, the current 20% discount to managed care payers averages \$ 1,200. If that discount was eliminated at DRHS but available at one of the regional hospitals, the managed care payers would be able to offer a very significant financial incentive in order to get patients to travel. The managed care payers could include a Dubuque hospital in their health care package but also impose different co-pay requirements between the DRHS hospital and regional hospitals so as to induce travel by enough patients to defeat the price increase.

The court must also consider the present trend in hospitalizations toward shorter and fewer hospital stays requiring hospitals to enter into intense competitions for an increased population base. The court finds it relevant that the regional hospitals are in an intense competition to increase the population base from which they draw patients due to the trend in shorter hospital stays and less frequent stays. Mercy has recognized, beginning with its long range plan of 1990, that, to maintain its average daily patient census, it is dependent on increasing its base of patients [**46] residing beyond Dubuque County. DRHS would be under similar pressures. The current state of hospital competition would require that DRHS strongly attempt to expand the use of its hospital by those persons outside Mercy and Finley's traditional catchment areas. If DRHS raised its prices so as to become noncompetitive with other institutions, it would not be able to expand beyond its traditional service area.

The court also notes that 23.7% of Mercy and Finley's patients currently reside in a zip code in which 33% of the residents within that zip code currently use a hospital other than Mercy or Finley. In addition there are an additional 5.9% of Mercy and Finley's patients coming from other zip codes which lie within 15 miles of a regional outreach

location. The government makes no attempt to state why these individuals would not be able to switch hospitals in the event of a 15-30% price rise.

4. City of Dubuque as the Relevant Market

The government has offered an alternative geographic market. It contends that the City of Dubuque is a geographic market within which DRHS would be able to exercise market power because Dubuque residents will not travel to the rurals or other **[**47]** regional hospitals for hospital care that is available in Dubuque. While this is a much smaller area than DRHS would service, it may be the relevant market if it is a significant market area and DRHS could successfully exert market power over this group. See, *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* P 518.1b, at 534 (Supp. 1993) (geographic **HN16**[↑] market can be shown by showing resulting market power over any group of buyers)). **HN17**[↑] To be the relevant market, there must not be any other supplier of inpatient services who could constrain the price raising capability of DRHS to purchasers of inpatient services who reside within the City of Dubuque. See Phillip E. Areeda & Herbert Hovenkamp P 518.1d, at 538 (Supp. 1993).

HN18[↑] The validity of a horizontal merger must be determined based on the merger's **[*984]** "effect on competition generally in an economically significant market." *Brown Shoe Co.*, 370 U.S. at 335. How large a market must be to be economically significant has never been fully addressed. See 2A Phillip E. Areeda & Herbert Hovenkamp P 530e, at 154 (1995). However, the Supreme Court **[**48]** in *Brown Shoe Co.* found that, **HN19**[↑] under some circumstances the relevant geographic area may be as small as a single metropolitan area. *Brown Shoe Co.*, 370 U.S. at 337. The court went on to explain:

HN20[↑] The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place their merger outside the scope of § 7. That section speaks of "any... section of the country," and if anticompetitive effects of a merger are probable in "any" significant market, the merger -- at least to that extent -- is proscribed.

370 U.S. at 337. The issue is "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Philadelphia National Bank*, 374 U.S. at 357. For purposes of this analysis, the court will assume Dubuque is large enough to be an economically significant geographic area for purposes of the antitrust laws.

The government's argument that hospital services are local and that persons residing within Dubuque will not go elsewhere for hospital services is largely based upon the government's perception of inpatients' **[**49]** desires for the convenience of a local hospitalization for themselves and for their family members who will be visiting them. The government analogizes the present case with that of *Philadelphia National Bank*. The government contends that hospital services, like the banking services at issue in *Philadelphia National Bank* are local in nature and that people want the convenience of a local hospital. **374 U.S. at 358** ("The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries.").

The government next argues that this geographical region is relevant as DRHS could raise prices to all managed care enrollees within the immediate Dubuque area while providing more favorable pricing to those persons that might possibly switch to other hospitals. It is the government's contention that managed care entities cannot get residents of Dubuque to use hospitals outside of Dubuque, and therefore, the merger would substantially lessen competition to those persons residing within the immediate Dubuque area. The government relies heavily on its assertion that residents of Dubuque will not travel for medical care available in Dubuque. **[**50]** However, the court finds, as stated above, that Dubuque residents have in the past traveled for their health care needs and would travel in the future should DRHS prices become noncompetitive.

Much was made of the "Ottumwa Situation" -- in that the government argued that the two hospitals in Ottumwa, Iowa were allowed to merge and upon merger, promptly eliminated the discounts to the managed care entities in

the area. While the court does not find that there was sufficient evidence presented on the Ottumwa merger to determine how closely the facts behind the Ottumwa merger reflect those of DRHS, the court does note significant differences -- the regional hospitals were not targeting areas around Ottumwa for expansion, to this date there has been little outreach activity in the Ottumwa area, and Ottumwa is further from other regional hospitals than is Dubuque.

The court does recognize that other courts have discounted the ability of third party payers to prevent price rises. See *University Health, Inc., 938 F.2d at 1213*; *Hospital Corp. of America, 807 F.2d at 1391*. These courts found that large insurers who "purchase" hospital services on behalf of their insured merely pass [**51] any increased cost on to the consumer. In *University Health Inc.*, the court found that the third party payer could not refuse to reimburse its insured because it deemed the price of the hospital services was too high. *University Health Inc., 938 F.2d at 1213*. However, these cases did not focus on managed care entities, but focused instead on traditional indemnity insurers. In the case at hand, the defendants have shown that the third party payers of [*985] interest in this matter -- the managed care entities -- can cause their enrollees to shift to other hospitals if prices at one hospital are too high, thus avoiding having to pay the higher price and providing strong incentive for the anticompetitive hospital to lower its charges.

Further, the competition has become fierce between HMO's. If an HMO were merely to pass on increased hospitalization costs to enrollees, it will lose enrollees to plans that offer a cheaper rate. This pattern has been evidenced in Platteville, Wisconsin, an area where Medical Associates HMO has met strong competition from competing plans.

Even assuming Dubuque residents would not shift in the event of a price increase by DRHS, the government has also [**52] failed to establish that DRHS could successfully initiate a price discrimination program. Mr. Thompson testified in general terms that it would be possible for the hospitals to price discriminate on the basis of where a patient resided, but no one established the mechanics of how this would work. Generally, managed care payers contract with the hospitals at one price, but it is conceivable that they could either 1) establish different prices according to which employer the inpatient was insured through, or 2) establish different prices according to where the inpatient resided. If the hospital were to price discriminate by employer, this would presumably lead to the same rate being offered to all Dubuque employees without regard to where they reside. However, a substantial number of persons employed in Dubuque reside significant distances from Dubuque and would presumably have greater access to alternative hospital care. These employees would shift from using a managed care plan that used DRHS to a plan using other hospitals. The government did not address how many employees reside outside of Dubuque and therefore would shift to managed care entities with presumably lower premiums. [**53] Without any quantification, it is only speculation on the government's part that such a program would be feasible.

Should DRHS attempt the other option, charging different rates based on where the employee resides, this would appear to require complex accounting by both the managed care entity and the hospital. The government has not attempted to prove that employers would agree to offer the same plan to its employees at different rates depending on where the employee resides nor has it proven that the managed care payers would agree to offer such plans. Again, that such a plan is feasible is mere speculation on behalf of the government.

Further, looking specifically at those managed care entities that currently receive discounts off their hospitalizations from Mercy or Finley, there is little evidence to support the government's contention that discounts to these businesses could profitably be eliminated if the hospitals merge. Mercy gives discounts to Medical Associates, Heritage National Health Plan, SISCO, Blue Cross Alliance, HMO of Wisconsin, Wisconsin Education Association Insurance and the Affordable Health Plan.

Presumably discounts to the two Wisconsin companies would [**54] have to be maintained as there is substantial competition for the residents of southwest Wisconsin. Also, the discount to Blue Cross Alliance could not be eliminated as it offers a contract with hospitals on a "take it or leave it" basis and DRHS would either have to accept its terms or deny admittance to Blue Cross Alliance enrollees. That leaves Self Insured Systems Corporation (SISCO), Heritage National Health Plan and Medical Associates. As discussed above, Heritage has shown it has the general ability to transfer patients out of the Dubuque area to another regional hospital so it could prevent

DRHS from denying it a discount. It is uncertain where SISCO's enrollees come from, but assuming they do all come from the immediate Dubuque area, it is not apparent that they could not transfer patients as does Heritage. The government has asserted no reason why SISCO would be less effective at altering hospitalization patterns than is Heritage. If SISCO did not have the patient volume to enable it to adequately threaten DRHS into maintaining discounts, presumably another managed care entity with the volume to obtain discounts could win some of SISCO's accounts and the end user of the [*986] hospital [*^{**55}] services -- the enrollee would still have competitive options for hospitalization.

The government argues that Medical Associates would not shift patients to other hospitals because it is physician owned and prefers to use only the physician services of its Dubuque physicians. Shifting patients to other hospitals would require it to also pay outside physicians for services provided to their enrollees while hospitalized at a non-Dubuque hospital. However, [HN21](#)[↑] the antitrust laws protect competition, not competitors. [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 \(1977\)*](#). If DRHS were to refuse to give Medical Associates a discount, but did give discounts to other managed care entities who would shift patients, Medical Associates would soon lose many of its enrollees as it would no longer be price competitive.

However, the more likely scenario would be that DRHS would continue to give discounts to Medical Associates as it would be very dependent on Medical Associates to perform outpatient services at DRHS and to attract inpatients through its outreach efforts. In 1991, Mercy recognized that because of fewer and shorter hospitalizations, its patient [*^{**56}] volume was decreasing and it needed to increase its market share of the population base outside of Dubuque County. Mercy has focused on its relationship with Medical Associates as the major method of attracting new populations. As a would-be large purchaser of DRHS's services, Medical Associates could also bargain for discounts from DRHS through threats to discontinue use of DRHS outpatient services. Currently 1/3 of Medical Associates payments to both Mercy and Finley are for outpatient services, many of which Medical Associates could potentially perform at its own facilities if DRHS prices discriminated against it.

D. Distinction from Rockford

The plaintiff relies heavily on [*United States v. Rockford Mem. Corp., 898 F.2d 1278 \(7th Cir. 1990\)*](#), to argue that it is ridiculous to conceive of a relevant geographic market area encompassing more than a few counties. The *Rockford Mem. Corp.* court stated that:

But for the most part, hospital services are local. People want to be hospitalized near their families and homes, in hospitals in which their own -- local -- doctors have hospital privileges [The defendants'] proposal is ridiculous -- a ten-county [*^{**57}] area in which it is assumed (without any evidence and contrary to common sense) that Rockford residents, or third party payors, will be searching out small, obscure hospitals in remote rural areas if the prices charged by the hospitals in Rockford rise above competitive levels.

Id. at 1285. The evidence in this case shows, however, that the *Rockford Mem. Corp.* assumptions are not correct. There is strong evidence of (1) individuals' willingness to travel, given price incentives, (2) patient-doctor loyalty is not strong enough to overcome price differentials, and (3) there are options other than the rural hospitals should DRHS raise prices. A further distinction is that the *Rockford Mem. Corp.* case did not discuss how outreach clinics can impact on hospital accessibility and choice.

The court also wishes to note that other hospital merger cases have not considered the impact of outreach clinics in their discussions of barriers to entry into the relevant geographic market. Most hospital cases have stated the inability to build new hospitals as a strong barrier to entry. See [*University Health, Inc., 938 F.2d at 1211*](#). The parties to this dispute have stipulated [*^{**58}] that no new hospital would be built in the tri-state area within the relevant time frame. However, entry would not necessitate the building of a new hospital, but merely requires that another entity be able to enter a market it was not previously servicing. The regional hospitals are able to do this through the establishment of outreach clinics.

E. Probability of a Reduction in Quality of Care

The government also attempts to argue that DRHS will be able to lessen the quality of the health care provided due to the market power it will obtain through the merger.

[*987] The government contends that by no longer remodeling its facilities and providing "free" infant car seats, this would be a price increase to inpatients. However, the free give away of car seats and the condition of the hospital room itself is unrelated to the hospitals decision to give a discount, and does not appear to have any relation to where a managed care entity sends its patients. The "amenities" competition has gone on for some period of time prior to the advent of price competition between hospitals and the court finds that it is mainly used for public relations purposes and possibly to attract persons [**59] covered by indemnity insurance, Medicare, and Medicaid, who are not price conscious. The government has not shown that these amenities improve the quality of health care received and it can certainly be argued that they unnecessarily add to health care costs. Further, even if not giving away car seats or failing to remodel can be considered a price increase, the government has not shown these to be significant price increases for purposes of antitrust analysis.

F. Conclusion

The government has failed to establish the relevant geographical area and hence has failed to establish that the merger of Mercy and Finley Hospitals will likely result in anticompetitive effects.

III. Defendants' Affirmative Defenses

Since [HN22](#) the government has failed to carry its burden in this case, the defendants are not required to prove their affirmative defenses. However, in order that the record is complete in this matter, the court will address the two affirmative defenses which remain in this case. Based upon the defendants' post-trial submissions, the defendants are still asserting two affirmative defenses: (1) that the efficiencies which result from the merger will outweigh any [**60] anticompetitive effects which may result from the merger; and (2) the hospitals nonprofit status will prevent anticompetitive behavior. For the reasons stated below, the court finds that the defendants have failed to meet their burden as to each of these defenses.

A. Efficiencies Defense

The courts have recognized that [HN23](#) in an appropriate case, "... a defendant may rebut the government's *prima facie* case with evidence showing that the intended merger would create significant efficiencies in the relevant market." [University Health, Inc., 938 F.2d at 1222](#). The parties dispute the proper standard of proof which is required to establish an efficiencies defense. The government argues that the defendants are required to establish such a defense by clear and convincing evidence. The defendants counter by arguing that case law only requires the normal preponderance of the evidence standard to apply. The court concludes, however, that for purposes of this case, the [HN24](#) defendants have failed to meet even the lower burden of showing an efficiencies defense by a preponderance of the evidence.

The irony of this case is, that while the government has failed to meet its burden of showing [**61] that the merger will result in anticompetitive behavior in the relevant market, the court must conclude that the defendants have fallen far short in several respects in proving the efficiencies which it claims will result from the creation of DRHS. The defendants have failed to meet this burden in several significant respects: (1) a merger is not required to achieve many of the efficiencies;⁴ (2) implementation of the steps necessary to achieve the efficiencies is highly speculative; and (3) the Gallagher Report overstates the efficiencies which can be achieved.

Each side presented an efficiencies expert who prepared various reports and testified at trial. The defendants presented Duncan Gallagher, a senior manager at Peat Marwick & Co., as their expert. The government countered with a [**62] report and testimony of Dr. Robert Taylor. On balance, the testimony and report of Dr. Taylor is far more persuasive and credible.

⁴ It is generally accepted that if the efficiencies may be obtained through a method which would not limit competition, then they may not be used as a valid defense. See [University Health Inc., 938 F.2d at 1222 n.30](#).

[*988] Mr. Gallagher estimates that the total operating efficiencies that can be achieved as a result of the merger are approximately \$ 5.2 million per year. However, approximately \$ 2.1 million of that figure represents savings from "best practices." Best practices is somewhat of an illusive concept. Generally it can be defined as an attempt by hospitals to become more efficient in utilization of resources and the avoidance of duplication of expenses. Best practices can be contrasted from general attempts at efficiencies by its focus on physician practices. The defendants argue that as a merged entity they can review items such as the number of x-rays a particular physician may order and compare that number to practices of other physicians in order to determine the number of tests which are most efficient while still maintaining patient care. This efficiency becomes the "best practice."

Based upon the evidence and testimony, including Dr. Taylor's analysis, it is apparent there are a number of flaws with the best practices analysis used by Mr. Gallagher. [**63] First, Mr. Gallagher concedes that this is the first time he has ever used best practices as a part of an efficiencies analysis in a hospital merger case. This points out one of the fundamental flaws with the analysis, that is, that there is little evidence a merger is necessary in order to implement the best practices savings the hospitals hope to achieve. Even one of the defendants' own witnesses, Gary Gutzko, testified that best practices does not require a merger. The hospitals argue that they need to merge in order to create a database for every department in the hospital. Dr. Taylor points out, however, there are a multitude of alternative databases available which can be used to compare the practices at Mercy and Finley in order to achieve optimum efficiencies.

There is also a serious question about the methodology used in determining the savings from best practices. Mr. Gallagher stated that the numbers he came up with for the best practices were essentially those given to him by Terry Steele.

In summary, I find the testimony of Dr. Taylor is more credible on the issue of the efficiencies which can be achieved from the merger. Dr. Taylor's report shows that the optimum [**64] efficiencies which can be achieved from the merger total approximately \$ 2 million per year for both operating and capital expenses.

The defendants argue that even if the \$ 2 million figure of Dr. Taylor's is used, that the efficiencies outweigh any alleged anticompetitive effects from the formation of DRHS. However, the hospitals proof of its abilities to implement the efficiencies is also lacking. The government argues that the whole efficiencies issue is speculative because the DRHS Board has made no decision as to which actions will be taken in order to implement any of the changes which will result in the efficiencies. The government's argument is not well founded in this regard. The DRHS Board cannot come into existence until the merger is approved and becomes effective. Consequently, the DRHS Board can make no decisions at this time as to how it is going to operate the merged entity. The testimony shows that the proposed members of the DRHS Board are serious about obtaining optimum efficiencies from the merger and will do everything within their power to achieve all the potential efficiencies that may result from the merger.

The more serious problem, which was not adequately [**65] addressed by the hospitals, is the ability of the DRHS Board to impose on the physicians and other parties the type of changes that will be required in order to achieve the efficiencies outlined in either the Gallagher or Taylor reports. As an example, both reports envision efficiencies being achieved by merging all of the obstetrical services at Finley Hospital. It is highly questionable as to whether the DRHS Board can impose such a change on the medical community given the strong opposition of Medical Associates to the merger, and the unwillingness of Medical Associates physicians to use Finley for obstetrical services when Finely offered the Medical Associates HMO a substantial discount if more Medical Associates' patients were directed to Finley. Given the fact that Medical Associates physicians were not willing to use Finley Hospital when they had a strong personal financial incentive to do so, leads to the conclusion [*989] that there very likely will be significant opposition to eliminating the obstetrics unit at Mercy Hospital.

In summary, if the government had been successful in showing anticompetitive effects from the merger, the hospital efficiencies defense must fail. The evidence [**66] is inadequate to warrant a finding of maximum potential efficiencies in any amount in excess of the \$ 2 million found by Dr. Taylor in his report. Moreover, there is a lack of evidence on behalf of the hospitals as to their actual ability to implement proposed efficiencies.

B. Non-Profit Status

The hospitals have also asserted as a defense their non-profit status and procompetitive intent. The hospitals cite United States v. Carilion Health Sys., 707 F. Supp. 840, 849 (W.D.Va.), *aff'd without op.*, 892 F.2d 1042 (4th Cir. 1989), for the proposition that the non-profit status of the hospitals can be considered in determining whether the hospitals would act in an anticompetitive manner. The government points out, this is a questionable legal proposition. No other courts have explicitly adopted this theory of defense. Moreover, the facts in this case would not support the defense even if it were legally viable.

The government has presented substantial evidence to demonstrate that Mercy Hospital, in particular, has operated in a fashion similar to a for-profit corporation. Mercy Health Center of Dubuque is an operating division of Mercy Health Services of Detroit, **[**67]** Michigan. The evidence shows that in recent years Mercy Hospital of Dubuque has been required to return approximately 30% of its profits to the parent corporation. This figure has totaled approximately \$ 1.5 million to \$ 2 million per year over the past several years. Obviously, the operations of the parent corporation cannot be funded out of a percentage of the profits if there are no profits generated by the Dubuque subsidiary. This is not a criticism of the payment of money to the Detroit parent. There are legitimate business and charitable reasons for the payments to the parent corporation. However, the fact remains that the practical effect of the funds transfer is to operate the hospital as the functional equivalent of a profit making subsidiary of an out-of-state corporation.

The court does not mean to imply by this decision that there is any evidence of an intent to act in an anticompetitive manner by any of the parties to the proposed merger. To the contrary, the testimony of proposed Board members such as Don Moody, is extremely credible. Individuals such as Mr. Moody and other proposed members of the DRHS Board have only the highest motives in proposing this merger. It **[**68]** is clearly their intent to provide high quality and efficient health care to the Dubuque community. However, the fact remains, that for antitrust analysis, the court must assume that new and different Board members can take control of the corporation, and that if there is the potential for anticompetitive behavior, there is nothing inherent in the structure of the corporate board or the non-profit status of the hospitals which would operate to stop any anticompetitive behavior.

ORDER

Accordingly,

It Is Ordered:

Plaintiff's request for an injunction to block the merger of Mercy Health Center and Finley Hospital is denied. Judgment shall enter for the defendants.

Done and ordered this 27th day of October, 1995.

/s/ Michael J. Melloy, Chief Judge

UNITED STATES DISTRICT COURT

APPENDIX

In addition to the findings of facts within the body of the opinion are these additional facts which the parties stipulated were correct.

1. Mercy and Finley, located six blocks apart, are the only general acute care hospitals in Dubuque and are the largest general acute care hospitals within a 70-mile drive of Dubuque.
2. Mercy has 302 licensed acute care (excluding skilled **[**69]** nursing, rehabilitation, intermediate, psychiatric and substance abuse) beds excluding Dyersville, and in 1993 it had net inpatient revenues of approximately \$ 44 million.

[*990] 3. Finely has 141 licensed acute care beds (excluding skilled nursing care beds) and, for its 1993 fiscal year, had net inpatient revenues of approximately \$ 21 million.

4. Mercy and Finley are each financially sound and viable institutions; they have fund balances in excess of \$ 45 million and \$ 30 million, respectively.

5. In April, 1994, the president of Mercy agreed that Mercy is financially healthy.

6. The assessment of the president of Mercy in April, 1994, that Mercy is financially healthy is true.

7. In April, 1994, the vice-president of finance of Mercy agreed that Mercy is in good, reasonable financial shape, and there are no key indicators of performance in Mercy's 1994 to 1996 Budget Report that he has any particular concern about.

8. The assessment of the vice-president of finance of Mercy in April, 1994, that Mercy is in good, reasonable financial shape is true.

9. In April, 1994 the president and chief executive officer of Finley stated that Finley has a Standard and Poors Rating of A-, [**70] which he agreed meant that Standard and Poors assesses Finley's financial condition to be strong.

10. Health Care Investment Analysts, Inc. and Mercer Management Consulting, Inc. issued a report in 1994 citing Finley as one of the 25 most efficient hospitals in the United States with fewer than 250 beds.

11. The proposed Mercy/Finley combination is not required to maintain the financial soundness or viability of either hospital.

12. The staff list provided to the Department of Justice by Mercy indicated that there were 173 physicians on the active medical staff. On December 31, 1993, Mercy had 168 physicians, including at least 15 surgeons, on its active medical staff.

13. The staff list provided to the Department of Justice by Finley indicated that there were 137 physicians on either its active or provisional medical staff (20 of these physicians had provisional privileges). On December 31, 1993, Finley had 144 physicians, including at least 11 surgeons, on its active medical staff.

14. In its 1993 fiscal year, Mercy had approximately 8,000 acute-care patient discharges (i.e., all discharges except for skilled nursing, intermediate care, rehabilitation, psychiatric and substance [**71] abuse discharges), and its average daily census of such acute-care patients was approximately 110.

15. In its 1993 fiscal year, Finley had approximately 4,500 acute-care patient discharges (i.e., all discharges except for skilled nursing discharges), and its average daily census of such acute-care patients was approximately 67.

16. The Department of Justice filed a verified complaint on June 10, 1994 seeking to prevent the merger of Mercy and Finley and to have the transaction adjudged to be a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

17. In providing inpatient hospital services, both Mercy and Finley regularly receive substantial health care insurance reimbursement payments and shipments of equipment and supplies from outside of Iowa. For example, in 1993 Mercy paid more than \$ 6 million to vendors located outside Iowa for supplies or services used by Mercy, and Finley paid more than \$ 5 million to vendors located outside Iowa.

18. Mercy and Finley are each engaged in interstate commerce.

19. Mercy and Finley are each engaged in activities substantially affecting interstate commerce.

20. The [**72] United States has met its burden of proof on the issue of "effect on interstate commerce."

21. The Court has jurisdiction over the subject matter of this lawsuit under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.
22. Mercy and Finley are subject to the personal jurisdiction of this Court.
23. Mercy and Finley each provide high quality general inpatient acute care services to consumer-patients and having reputations [*991] among local physicians and the public for doing so.
24. Mercy and Finley each will be able to provide consumer-patients with high quality general inpatient acute care services even if the proposed combination does not take place.
25. Third-party payers of acute care inpatient services provided by Mercy and Finley include traditional indemnity health care insurers, managed care plans, the federal Medicare program and the Medicaid programs of the states of Iowa, Illinois and Wisconsin.
26. In April, 1994, the vice-president of finances of Mercy, who is that hospital's primary officer with responsibility for contracting with managed care companies, agreed that one of the effects of managed care payers not paying Mercy's full charges is to put incentives [**73] on Mercy to be more cost effective.
27. In a Preliminary Official Statement, dated November 23, 1993, relating to a new bond issue, Finley represented to the public that of the eight metropolitan areas in Iowa, only one area had a lower rate of adjusted expense per hospital admission than Dubuque and of the 31 metropolitan areas in the States of Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota and South Dakota, only 3 areas had a lower rate of adjusted expense per hospital admission, according to the American Hospital Association.
28. Finley's management made the above-summarized representation concerning how the adjusted expenses per hospital admission in Dubuque compares to other metropolitan areas in Iowa and elsewhere to demonstrate how effective Finley is at controlling hospital costs, and Finley's management had a good faith basis for believing these representations to be true.
29. The creation of DRHS will end the competition between Mercy and Finley on price, quality and otherwise.
30. Outpatient care usually is less expensive than inpatient care.
31. In April 1994, the president and chief executive officer of Finley agreed that outpatient care is generally [**74] less costly than inpatient care.
32. The assessment of the president and chief executive officer of Finley, in April, 1994, that outpatient is generally less costly than inpatient care is true.
33. During the past decade, there have been major advances in medical technology including diagnostic and therapeutic equipment, medications, anesthetics, surgical techniques, monitoring systems, and other medical equipment. These advances have made it possible for services that once were appropriately and safely performed only on an inpatient basis to be performed on an outpatient basis -- in outpatient clinics, surgery centers and doctors' offices.
34. There are certain medical procedures for which many third-party payers that do business with Mercy and Finley will reimburse hospitals only if the particular procedure is performed on an outpatient basis, unless some specific medical condition requires inpatient admission.
35. In conjunction with developing criteria for mandatory outpatient procedures, many third-party payers may also require "pre-admission certification" of inpatient admissions, which is a procedure designed to confirm the appropriateness of inpatient care for the treatment [**75] of the patient's diagnosis. After evaluating the patient, the third-part payer may conclude that a course of outpatient treatment is appropriate, rather than the generally more costly inpatient treatment. In such an instance, the third-party payer may refuse to reimburse hospitals for any charges rendered in connection with uncertified patients.

36. Third-party payers that do business with Mercy and Finley often conduct concurrent and post-discharge utilization review. Concurrent review is the process by which current inpatients are evaluated by health professionals retained by third-party payers to determine when the patient should be discharged and treated as an outpatient. Post-discharge utilization review is a process used by many third-party payers to evaluate [*992] retrospectively the propriety of admission and decide whether or to what extent to reimburse hospitals.

37. Presently and in the foreseeable future, there are limitations from a medical perspective, upon the types of patients and the types of illnesses and medical conditions that can be treated appropriately through outpatient services. There are patients who require services and monitoring that are too intensive to [**76] be done on an outpatient basis; in addition, for certain types of procedures especially surgical ones, some inpatient hospital care is necessary after the procedure is performed, so that they cannot be performed appropriately on an outpatient basis.

38. If a patient's admission to a hospital is not medically justified then, pursuant to implementation of utilization review procedures, third-party payers may refuse to pay for the patient's use of such services.

39. Many patients who receive inpatient hospital care cannot be treated safely and effectively on an outpatient basis.

40. In part, as a result of the utilization review procedures of third-party payers for patients who are hospitalized today at Mercy and Finley, outpatient services are not a good substitute for the hospital services that are provided only by acute-care hospitals on an inpatient basis.

41. It is unlikely that any new general acute care hospital will be established in the Dubuque area in the foreseeable future.

42. Iowa's CON statute likely would prevent any new general acute care hospital from being established in Dubuque in the foreseeable future.

43. It is unlikely that any new general acute care [**77] hospital will be established in the foreseeable future in Illinois within twenty miles of Dubuque, Iowa.

44. It is unlikely that any new general acute care hospital will be established in the foreseeable future in Wisconsin within twenty miles of Dubuque, Iowa.

45. The creation of DRHS does not fit within the "safety zones" as set forth in the *Statements of Antitrust Enforcement Policy in the Health Care Area* issued September 15, 1993 by the Department of Justice and the Federal Trade Commission.

46. Mercy and Finley do not contend that the proposed combination is justified by virtue of "the failing company defense."

47. Each of Mercy and Finley has a 24 hour emergency room and trauma center, 24 hour operating rooms, a mobile MRI, a CT scanner and an occupational health program.

48. The hospitals' have stated in both their "Vision Statement" and Partnership Agreement that the purpose in forming DRHS is to":

a. provide joint governance and management of the Hospitals in order to reduce duplicative services and expenditures, strengthen the Hospitals' ability to contract for managed care and enhance the quality of care provided by the Hospitals;

b. enable [**78] the Hospitals to reduce their respective overall costs, to more effectively and economically provide efficient and integrated quality hospital services, and to perform the purposes for which each was formed and operated;

c. enable the Hospitals to compete more effectively, better serve the citizens of Iowa, Illinois, Minnesota and Wisconsin, and offer a broader range of services and programs;

d. provide needed health care services, own and operate facilities to provide such services, and take such actions as are necessary or appropriate in connection with providing such services and owning and operating such facilities.

49. Medical Associates Clinic, P.C. is a competitor of Mercy and Finley for some but not all out-patient services, and would be a competitor of DRHS for some but not all out-patient services if DRHS was formed.

50. A competitor (meaning a competitor for the services of the hospital whose prices are posited to be higher or lower) of Mercy and Finley could, other things being equal, benefit from the hospitals' charging higher [*993] prices and could, other things equal, be harmed by the hospitals' charging lower prices, since such a competitor can take advantage [**79] of higher prices and gain more business at the expense of the hospitals and could lose business if the hospitals' prices are lower.

51. A competitor (meaning a competitor for the services of the hospital whose quality are posited to be higher or lower) of Mercy and Finley could, other things being equal, benefit from the hospitals' providing services of lower quality and could, other things equal, be harmed by the hospitals providing services of higher quality, since such a competitor can take advantage of lower quality and gain more business at the expense of the hospitals, and could lose business to the hospitals if they provided higher quality.

52. Managed care plans, such as HMOs, may derive competitive advantages over other payers as a result of receiving discounts from hospitals relative to the hospitals' charges. An HMO or other managed care plan may be better off competitively if it receives a discount from hospital charges than if it receives no discount, but pays lesser reimbursement. This is because HMOs and managed care plans may receive competitive advantages from paying rates of reimbursement to hospitals which are lower than those paid by competing payers and by [**80] employers.

53. Allen Memorial Hospital in Waterloo, Iowa, has approximately 194 staffed acute care beds with a 1993 average daily census of approximately 145. Allen Memorial Hospital is approximately a 41-mile drive from the edge of Mercy's and Finley's service areas.

54. Covenant Medical Center in Waterloo, Iowa, has approximately 322 staffed acute care beds with a 1993 average daily census of 173. Covenant Medical Center is approximately a 410-mile drive from the edge of Mercy's and Finley's service areas.

55. St. Luke's Methodist Hospital in Cedar Rapids, Iowa, has approximately 441 staffed acute care beds with a 1993 average daily census of 28. St. Luke's Methodist Hospital is approximately a 37-mile drive from the edge of Mercy's service area and approximately an 18-mile drive from the edge of Finley's service area.

56. Mercy Medical Center in Cedar Rapids, Iowa, has approximately 353 staffed acute care beds with a 1993 average daily census of 193. Mercy Medical Center is approximately a 37-mile drive from the edge of Mercy's service area and approximately an 18-mile drive from the edge of Finley's service area.

57. St. Mary's Hospital Medical Center in Madison, Wisconsin, [**81] has approximately 345 staffed acute care beds with a 1993 average daily census of 265. St. Mary's Hospital Medical Center is approximately a 55-mile drive from the edge of Mercy's service area and approximately a 41-mile drive from the edge of Finley's service area.

58. Freeport Memorial Hospital in Freeport, Illinois, has approximately 143 staffed acute care beds with an average daily census of 70. Freeport Memorial Hospital is approximately a 28-mile drive from the edge of Mercy's service area and approximately an 18-mile drive from the edge of Finley's area.

59. University of Wisconsin Hospital and Clinics in Madison, Wisconsin, has approximately 496 staffed acute care beds with a 1993 average daily census of 386. University of Wisconsin Hospital and Clinics is approximately a 55-mile drive from the edge of Mercy's service area and approximately a 41-mile drive from the edge of Finley's service area.

60. Meriter Hospital in Madison, Wisconsin, has approximately 429 staffed acute care beds with a 1993 average daily census of 258. Meriter Hospital is approximately a 55-mile drive from the edge of Mercy's service area and approximately a 41-mile drive from the edge of Finley's [**82] service area.

61. University of Iowa Hospitals and Clinics in Iowa City, Iowa, has approximately 868 staffed acute care beds with a 1993 average daily census of 677. University of Iowa Hospitals and Clinics is approximately a 63-mile drive from the edge of Mercy's and Finley's service areas.

62. Mercy's service area extends approximately 40 miles from Mercy.

[*994] 63. Finley's service area extends approximately 40 miles from Finley.

64. Galena-Stauss Hospital is within Mercy's and Finley's service areas.

65. Jackson County Public Hospital is within Mercy's and Finley's service areas.

66. Delaware County Memorial Hospital is within Mercy's and Finley's service areas.

67. Central Community Hospital is within Finley's service area.

68. Guttenberg Municipal Hospital is within Mercy's and Finley's service areas.

69. Lancaster Memorial Hospital is within Mercy's and Finley's service areas.

70. Southwest Health Center is within Mercy's and Finley's service areas.

71. The city of Bellevue is approximately a 23-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Bellevue is approximately a 20-mile drive from Jackson County Public Hospital.

72. The city [**83] of Holy Cross is approximately a 25-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Holy Cross is approximately a 27-mile drive from Southwest Health Center.

73. The city of Hazel Green is approximately a 13-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Hazel Green is approximately a 15-mile drive from Southwest Health Center.

74. The city of Farley is approximately a 20-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Farley is approximately a 26-mile drive from Delaware County Memorial Hospital.

75. The city of Cascade is approximately a 25-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Cascade is approximately a 36-mile drive from Delaware County Hospital.

76. The city of Dickeyville is approximately an 11-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Dickeyville is approximately an 11-mile drive from Southwest Health Center.

77. The city of Monticello is approximately a 34-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Monticello is approximately a 34-mile drive to St. Luke's Methodist Hospital in Cedar [**84] Rapids, Iowa.

78. The city of Dyersville is approximately a 26-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Dyersville is approximately a 19-mile drive from Delaware County Memorial Hospital.

79. The city of Cuba City is approximately a 19-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Cuba City is approximately a 10-mile drive from Southwest Health Center.

80. The city of Epworth is approximately a 16-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Epworth is approximately a 30-mile drive from Delaware County Memorial Hospital.

81. The city of Potosi is approximately a 20-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Potosi is approximately a 12-mile drive from Lancaster Memorial Hospital.

82. The city of Elizabeth is approximately a 30-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Elizabeth is approximately a 13-mile drive from Galena-Strauss Hospital.

83. The city of Zwingle is approximately a 15-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Zwingle is approximately a 16-mile drive from Jackson County **[**85]** Public Hospital.

84. The city of Worthington is approximately a 31-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Worthington is approximately a 25-mile drive to Delaware County Memorial Hospital.

85. The city of North Buena Vista is approximately a 21-mile drive from Dubuque, and is within Mercy's and Finley's service areas. North Buena Vista is approximately a 13-mile drive from Guttenberg Municipal Hospital.

86. The city of LaMotte is approximately a 19-mile drive from Dubuque, and is within **[*995]** Mercy's and Finley's service areas. LaMotte is approximately a 20-mile drive from Jackson County Public Hospital.

87. The city of Shullsburg is approximately a 28-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Shullsburg is approximately a 19-mile drive from Galena-Stauss Hospital and a 24-mile drive from Southwest Health Center.

88. The city of Delmar is approximately a 37-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Delmar is approximately a 37-mile drive from Genesis Medical Center in Davenport, Iowa.

89. The city of Sabula is approximately a 45-mile drive from Dubuque, and is within Mercy's **[**86]** and Finley's service areas. Sabula is approximately a 51-mile drive from Genesis Medical Center in Davenport, Iowa.

90. The city of Wyoming is approximately a 42-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Wyoming is approximately a 38-mile drive from St. Luke's Methodist Hospital and Mercy Medical Center in Cedar Rapids, Iowa.

91. The city of Monmouth is approximately a 42-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Monmouth is approximately a 44-mile drive to St. Luke's Methodist Hospital in Cedar Rapids, Iowa.

92. The city of Baldwin is approximately a 41-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Baldwin is approximately a 45-mile drive from St. Luke's Methodist Hospital in Cedar Rapids, Iowa.

93. The city of Nashville is approximately a 36-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Nashville is approximately a 50-mile drive from St. Luke's Methodist Hospital and Mercy Medical Center in Cedar Rapids, Iowa.

94. The city of Charlotte is approximately a 45-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Charlotte is approximately **[**87]** a 33-mile drive from Genesis Medical Center in Davenport, Iowa.

95. The city of Spragueville is approximately a 45-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Spragueville is approximately a 55-mile drive from Genesis Medical Center in Davenport, Iowa.

96. The city of Lost Nation is approximately a 46-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Lost Nation is approximately a 45-mile drive from Genesis Medical Center in Davenport, Iowa, and approximately a 55-mile drive from St. Luke's Methodist Hospital in Cedar Rapids, Iowa.

97. The city of Miles is approximately a 54-mile drive from Dubuque, and is within Mercy's and Finley's service areas. Miles is approximately a 60-mile drive from Genesis Medical Center in Davenport, Iowa.

98. The Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Mergers Among Hospitals states that the Department of Justice and Federal Trade Commission "often have concluded that an investigated hospital merger will not result in a substantial lessening of competition in situations where market concentration might otherwise raise an inference of anticompetitive [**88] effects" and that "such situations include transactions where the Agencies found that:

... The merger would allow the hospitals to realize significant cost savings that could not otherwise be realized
..."

99. Hospital mergers have occurred in Iowa in the last 2 years in Mason City (where one independent acute care hospital remains), and in Davenport (where two independent acute care hospitals remain). Neither of these transactions was challenged by the Government.

100. At least 40 physicians with offices in Dubuque provide out-patient clinics on at least a monthly basis at distances from 15 to more than 40 miles from Dubuque. At least 9 of these physicians traveled at least 40 miles to do so. At least 17 of these physicians traveled at least 30 miles to do so.

101. Genesis Medical Center in Davenport, Iowa, has approximately 462 staffed acute care beds. Genesis Medical Center is [*996] approximately a 35-mile drive from the edge of Mercy's and Finley's service areas.

102. Managed care plan payments as a percentage of Mercy's revenues, including inpatient care revenues, are expected to continue increasing in the future.

103. Managed care plan payments as a percentage [**89] of Finley's revenues, including inpatient care revenues, are expected to continue increasing in the future.

104. The percentage of patients admitted to Mercy for inpatient care who are covered by a managed care plan is expected to continue increasing in the future.

105. The percentage of patients admitted to Finley for inpatient care who are covered by a managed care plan is expected to continue increasing in the future.

106. No final decision has been made as to which, if any, clinical programs at Mercy or Finley will be consolidated after the proposed combination occurs.

107. No final decision has been made as to whether the following program at Finley or Mercy will be consolidated after the proposed combination occurs:

- a. Cardiovascular
- b. Oncology
- c. Women's & Child Health
- d. Emergency/Trauma
- e. Obstetrics
- f. Orthopedics/Neurology
- g. Surgery
- h. Anesthesiology
- i. Administration
- j. Human Resources

k. Public Relations/Marketing

l. Maintenance/Bio-Med

m. Billing

n. Magnetic Resonance Imaging Program

108. Defendants have no present plans to make DRHS into a tertiary care hospital.

109. Mercy's Board of Directors has not changed a price recommendation **[**90]** of Mercy's finance committee in the past three years.

110. Finley has made efforts in the last three years to attract patients away from Mercy.

111. There are no present plans for the proposed combination to add additional services or upgrade any particular services.

112. No proof has been submitted to Finley's Board that community-based boards of directors control hospital costs better than other types of boards.

113. Finley does better than many hospitals in controlling its costs.

114. In 1990, Mercy, through KCA Research, conducted a community telephone survey ("the survey") to assess Mercy's role in the community to help lay the foundation for future strategic planning.

115. The largest percentage of the survey's respondents said: (i) Mercy or Finley was the first hospital that came to mind when the word "hospital" was mentioned; and (ii) overall they prefer to go to Mercy or Finley in Dubuque for their health care needs.

116. 40.7% of the survey's respondents lived in Dubuque, Iowa, zip code 52001. 59.3% of the survey's respondents lived outside of Dubuque, in 51 other zip codes from Dubuque County and Jackson County, Iowa, Grant County, Wisconsin, and Jo Davies County, **[**91]** Illinois.

117. More than three-quarters of the survey's respondents said the hospitals' being near their home was either very important or somewhat important to them when choosing a hospital.

118. Almost 97 of the survey's respondents said a wide variety of specialists is important to them when choosing a hospital.

119. Mercy and Finley receive a bulk of their revenues from providing general acute care inpatient hospital services, i.e., services provided for the diagnosis and treatment of patients who, because of the seriousness of their specific illness or general medical condition, require at least an overnight hospital stay. In Fiscal Year 1993, Mercy had total gross patient revenue of approximately \$ 100 million, of which approximately \$ 60 million was derived from inpatient acute care services **[*997]** (which excludes revenue from emergency room care, intermediate care, newborn nursery, outpatient services, psychiatric care, rehabilitation, substance abuse, and skilled nursing care). In Fiscal Year 1993, Finley had total gross patient revenue of approximately \$ 57 million of which approximately \$ 32 million was derived from inpatient acute care services (which excludes revenue from **[**92]** emergency room services, outpatient care, and skilled nursing).

120. Several of the managed care plans that contract with Mercy and Finley have non-exclusive relationships with both hospitals, i.e., they negotiate contracts with both hospitals. Two other managed care plans have exclusive contracts with Mercy.

121. Mercy and Finley cooperated in containing health care costs through the formation of United Clinical laboratories in the mid-1990s, as a joint venture for providing laboratory services for Mercy and Finley.

122. The seven small rural hospitals primarily serve patients within their immediate locales, where the phrase "immediate locales" means "closer to the rural hospital than to any other hospital."

123. Mercy and Finley are closer for those persons that both live and work within Dubuque than hospitals outside of Dubuque; however, the convenience of a particular hospital depends upon a variety of factors, including, but not limited to, the hospital's location, the location of resident's physician's practice, the accessibility of the hospital, and the location of the resident's employment.

124. Finley has advertised to attract patients away from Mercy.

125. One **[**93]** of the reasons Mercy gives manage care plans discounts is to attract a greater volume of patients.

126. Mercy stated in its 1991-94 Strategic Plan that Mercy and Finley are in direct competition for Dubuque County inpatients. The 1991-94 Strategic Plan also states that in 1988 only 6.5% of discharges for patients residing in Dubuque County were at hospitals other than Mercy or Finley.

127. Mercy's vice-president of finance has stated that it is speculation to make hospital budget projections beyond three years.

128. Mercy's vice-president of finance has stated that it is speculation to make projections about efficiencies from the proposed consolidation beyond a three-year period.

129. Mercy's vice-president of finance has stated that managed care plans use financial incentives to pressure hospitals to be as efficient as possible.

130. Central Community Hospital in Elkader, Iowa has 29 licensed beds and is located within Finley's service area. In 1993, the hospital's average daily census was three to four acute-care and nursery patients. There are four physicians on the active medical staff, including one general surgeon. In 1993, Central Community Hospital had gross inpatient **[**94]** revenues of approximately \$ 1.3 million and recently undertook a \$ 1.4 million expansion of its facilities. Central Community Hospital is at least a 60 minute drive from Dubuque but the drive time could be longer, depending on traffic, road and weather conditions. Physicians from the Dubuque area conduct specialty outreach clinics in Elkader.

131. Delaware County Memorial Hospital in Manchester, Iowa, has 58 licensed beds and is located within Mercy's and Finley's service area. The hospital has recently undergone renovations and added new birthing facilities. In 1993, the hospital's average daily census was 12 acute-care patients. There are 10 physicians on the active medical staff, including one general surgeon. In its fiscal year 1993, Delaware County Memorial Hospital had gross inpatient revenues of approximately \$ 4.5 million. Delaware County Memorial Hospital is at least a 40 minute drive from Dubuque but the drive time could be longer, depending on traffic, road and weather conditions. Physicians from the Dubuque area conduct specialty outreach clinics in Manchester. Physicians from the Cedar Rapids area conduct specialty outreach clinics in Manchester. Several physicians from **[**95]** the Dubuque area have courtesy staff privileges at the hospital, which allow them to admit up to 11 inpatients a year and to consult on an unlimited number of patients. In 1993, Delaware County Memorial Hospital **[*998]** treated patients discharged in 180 different DRG categories.

132. Galena-Stauss Hospital in Galena, Illinois, has 25 licensed beds and is located within Mercy's and Finley's service area. In 1993, the hospital's daily average census was three acute-care patients. There are four physicians on the active medical staff, Galena-Stauss is at least a 15 minute drive from Dubuque but the drive time could be longer, depending on traffic, road and weather conditions. At least 6 physicians from the Dubuque area conduct specialty outreach clinics in Galena. Fourteen physicians from the Dubuque area have courtesy staff privileges at the hospital, which allows them to occasionally admit inpatients and to consult on an unlimited number of patients. In 1993, Galena-Stauss Hospital treated patients discharged in 93 different DRG categories.

133. Guttenberg Municipal Hospital in Guttenberg, Iowa, has 37 licensed beds and is located within Mercy's and Finley's service area. In 1993, the **[**96]** hospital's daily average census was seven acute-care patients. There are

five physicians on the active medical staff, including one general surgeon. In its 1993 fiscal year, the hospital and net inpatient revenues of \$ 1.8 million. Guttenberg Municipal Hospital is a 40 minute drive from Dubuque but the drive time could be longer, depending on traffic, road and weather conditions. At least 6 physicians from the Dubuque area conduct specialty outreach clinics in Guttenberg. The hospital has recently purchased a new surgery table and fiberoptic surgical equipment. Additionally, the hospital has budgeted for the purchase of equipment in FY 1995, including ultrasound and additional surgical equipment. Fourteen physicians from the Dubuque area have courtesy staff privileges at the hospital, which allows them to occasionally admit inpatients and to consult on an unlimited number of patients. In 1993, Guttenberg Municipal Hospital treated patients discharged in 149 different DRG categories.

134. Jackson County Public Hospital in Maquoketa, Iowa, has 99 licensed beds and is located within Mercy's and Finley's service area. It currently has the facilities to support, and is staffed, for 43 [**97] beds. In 1993, the hospital's average daily census was 12.4 acute-care patients. There are 11 physicians on the active medical staff, including one general surgeon and one internist. In its 1993 fiscal year, Jackson County Hospital's net total patient revenues were \$ 7.6 million which constitutes more than a fourteen (14%) percent increase over 1992. Jackson County Hospital is at least a 30 minute drive from Dubuque but the drive time could be longer, depending on traffic, road and weather conditions. At least 8 physicians from the Dubuque area conduct specialty outreach clinics in Maquoketa. Several Dubuque-based physicians have courtesy staff privileges at the hospital, which allows them to occasionally admit inpatients and consult on an unlimited number of patients. Some Davenport-based physicians have courtesy staff privileges at the hospital, which allows them to occasionally admit patients and to consult on an unlimited number. In 1993, Jackson County Hospital treated patients discharged in 188 different DRG categories.

135. Lancaster Memorial Hospital in Lancaster, Wisconsin, has 35 licensed beds and is located within Mercy's and Finley's service area. In 1993, the hospital's [**98] average daily census was 20 acute-care patients. There are 9 physicians on the active medical staff. In its 1993 fiscal year, Lancaster Memorial Hospital's gross inpatient revenues were \$ 3.7 million. Lancaster Memorial Hospital is at least a 30 minute drive from Dubuque but the drive time could be longer, depending on traffic, road and weather conditions. At least four physicians from the Dubuque area conduct specialty outreach clinics in Lancaster. Physicians from the Madison, Wisconsin area conduct specialty outreach clinics in Platteville. Several physicians from the Dubuque area have courtesy staff privileges at the hospital, which allows them to occasionally admit patients and to consult on an unlimited number of patients. In 1993, Lancaster Memorial Hospital treated patients discharged in 202 different DRG categories.

136. Southwest Health Center in Platteville, Wisconsin, has 35 licensed beds and is located within Mercy's and Finley's service [*999] area. In 1993, the hospital's daily average census was 11 acute-care patients. There are eight physicians on the active medical staff, including two general surgeons and one internist. In its 1993 fiscal year, Southwest's net inpatient [**99] revenues were \$ 3.5 million. Southwest Health Center is at least a 30 minute drive from Dubuque but the drive time could be longer, depending on traffic, road and weather conditions. At least ten physicians from the Dubuque area conduct specialty outreach clinics in Platteville. Physicians from the Madison, Wisconsin, area conduct specialty outreach clinics in Platteville. In 1993, Southwest Health Center treated patients discharged in 204 different DRG categories.



American Booksellers Ass'n v. Houghton Mifflin Co.

United States District Court for the Southern District of New York

October 30, 1995, Decided ; October 31, 1995, FILED

No. 94 CIV 8566 (JFK)

Reporter

1995 U.S. Dist. LEXIS 21035 *; 1995-2 Trade Cas. (CCH) P71,217

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al., Plaintiffs, v. HOUGHTON MIFFLIN COMPANY, INC., et al., Defendants.

Core Terms

retailers, publisher, consent order, allowances, terms, mediator, Booksellers, discount, prices, documents, returnable, non-returnable, wholesaler, settlement, resale, initiating, annually, titles, customers, display, post-Consent, affiliated, conditions, stringent, parties, copies, media, purchases, resell, proportionally

Counsel: [*1] Jerald A. Jacobs, Brent N. Rushforth, Kit A. Pierson, John B. Morris, Jr., Bruce V. Spiva, Jenner & Block, Washington, D.C. Michael R. Klekman, Gubman, Sitomer, Goldstein & Edlitz, New York, NY, COUNSEL FOR AMERICAN BOOKSELLERS ASSOCIATION, INC., DICKENS BOOKS, LTD., B & R BOOKS, INC., OLSSON ENTERPRISES, INC., SAM WELLER'S ZION BOOK STORE, INC., and TATTERED COVER, INC.

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Alan L. Marx, Patrick M. Thomas, King & Ballow, Nashville, TN, COUNSEL FOR RUTLEDGE HILL PRESS, INC.

Judges: JOHN F. KEENAN, United States District Judge

Opinion by: JOHN F. KEENAN

Opinion

CONSENT [*2] ORDER

WHEREAS, American Booksellers Association, Inc.; Dickens Books Ltd. (d/b/a/ Harry W. Schwartz Bookshops); B&R Books, Inc. (d/b/a/ Little Professor Book Center); Olsson Enterprises, Inc., Sam Weller's Zion Book Store, Inc.; and Tattered Cover, Inc., being all of the plaintiffs in the above-captioned action (collectively and individually "Plaintiffs"), and Defendant Houghton Mifflin Company, Inc. ("Houghton Mifflin"), have jointly submitted this consent order to resolve all of the claims of Plaintiffs against Houghton Mifflin; and

WHEREAS, in this litigation, Plaintiffs have alleged that Houghton Mifflin has violated Sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(d), and 13(e), by discriminating with respect to price and the provision of promotional services, facilities, and compensation for service and facilities in the sale of books to competing booksellers, all as set forth in more detail in the Amended Complaint in this action; and

WHEREAS, without any admission of any liability whatsoever by Houghton Mifflin, the parties desire to amicably settle Plaintiffs' claims against Houghton Mifflin on the terms set forth in this Order, including [*3] all exhibits (collectively referred to as the "Consent Order"); and

WHEREAS, upon review of the proposed Consent Order, the Court finds that it is in the interests of justice and the prompt resolution of the issues in this litigation to approve this order.

It is therefore hereby ORDERED that:

1. This Court makes no finding of liability by Houghton Mifflin; this Consent Order reflects a compromise of disputed factual and legal claims.
2. Effective January 1, 1996, Houghton Mifflin shall, in the sale of a) books published by Houghton Mifflin and offered for resale, and b) books distributed by Houghton Mifflin and offered for resale on price or promotional allowance terms set by Houghton Mifflin, comply with the Rules for Application of the Robinson-Patman Act to Book Publishing (the "Rules") attached as Exhibit A and incorporated into this Consent Order by reference. These Rules reflect the parties' agreement as to the Robinson-Patman Act's application to the practices of Houghton Mifflin addressed by the Rules. Plaintiffs waive any and all claims or causes of action that each or all of them has, have, or may have arising under the Robinson-Patman Act, any other antitrust law, or [*4] any law of unfair competition with respect to any of Houghton Mifflin's pricing and promotional practices from the beginning of time until the date of this Consent Order, but reserve the right to challenge, pursuant to the terms of this Consent Order, any of Houghton Mifflin's pricing and promotional practices in effect after January 1, 1996, and that are not included in the Pricing and Promotional Allowances Plan (the "Plan") set forth in Exhibit B to this Consent Order and incorporated herein by this reference.
3. It is conclusively agreed and adjudged that the Plan set forth in Exhibit B to this Consent Order complies fully and in all respects with the Rules set forth in Exhibit A and that none of the Plaintiffs will seek to impose any liability on, or obtain any relief from, Houghton Mifflin insofar as it prices, or provides promotional allowances with respect to, books that it sells for resale in accordance with the Plan. Notwithstanding the foregoing, Plaintiffs and Houghton Mifflin disagree as to whether the Plan's non-returnable discount schedule, which requires retailers to annually elect to do business with Houghton Mifflin on a non-returnable basis in order to avail themselves [*5] of the discounts in that schedule, meets the requirements of practicable availability under the Robinson-Patman Act. If, within two years of entry of this Consent Order, Plaintiffs resolve this issue by future settlement or judgment against another present or future defendant (as defined in paragraph 8 below) in a manner that results in a specific restriction being placed on such defendant that is materially more stringent than the comparable restriction placed on Houghton Mifflin with respect to the Plan's non-returnable discount schedule and the election required with respect to it, then this Consent Order shall be construed, and amended if necessary, to comport with the more stringent restriction imposed in that settlement or judgment, taking into account the differences, if any, in the nature of the business of Houghton Mifflin and such other defendant. (By way of example only, an agreement by another defendant with respect to a category of books that constitutes a minor portion of the defendant's business would not automatically compel Houghton Mifflin to modify this Consent Order with respect to a category of books that constitutes a significant portion of Houghton Mifflin's [*6] business.) If no such settlement or judgment is reached or entered, Plaintiffs and Houghton Mifflin will attempt to negotiate a mutually satisfactory resolution of their dispute and, if they fail to do so, Plaintiffs or Houghton Mifflin may submit the issue in a post-Consent Order motion under the provisions of paragraph 6 below, provided, however, that neither Houghton Mifflin nor any of the Plaintiffs may do so earlier than three years after the entry of this Consent Order. Nothing herein shall modify the provisions of paragraph 8 or paragraph 9 hereof or compel Houghton Mifflin to continue to offer a returnable or non-returnable discount schedule.

4. Nothing in the Plan or the foregoing paragraph shall in any way preclude Houghton Mifflin from varying or altering any provision of the Plan, or from adopting and implementing any additional or other pricing or promotional practices so long as those variations, alterations, or practices are consistent with the Rules set forth in Exhibit A. Similarly, nothing shall preclude Plaintiffs from challenging, in accordance with the provisions of this Consent Order, any such variation or alteration of the Plan or additional or other pricing [*7] or promotional practice by Houghton Mifflin.

5. If an issue or question arises with respect to the permissibility of any pricing or promotional practice of Houghton Mifflin, that issue or question shall be resolved, to the fullest extent possible, by reference to the Rules set forth in Exhibit A. It is the intention of the parties that the Rules be interpreted as comprehensively addressing and resolving, if possible, all factual and legal issues and questions addressed by the terms and spirit of the Rules. If the issue or question cannot be resolved pursuant to the terms and the spirit of the Rules, then the issue or question shall be resolved in accordance with and pursuant to the then-effective provisions of the Robinson-Patman Act and the decisions and pronouncements under the Act by the courts and by the Federal Trade Commission, respectively, giving due consideration to the general purposes and spirit of the Rules.

6. Any party may move the Court to take action with respect to this Consent Order, which action may include, by way of example only: (a) holding another party in contempt for failure to comply with the Consent Order; (b) issuing an interpretation of the Consent Order [*8] where its terms are considered by the moving party to be unclear; or (c) modifying the Consent Order to reflect amendment or repeal of the Robinson-Patman Act or interpretation of the Act by federal courts or by the Federal Trade Commission [other than in In the matter of Harper & Row, et al. (F.T.C., filed 1988)] substantially modifying the legal bases or premises of the Consent Order, provided, however, that there shall be no alteration of Houghton Mifflin's payment obligation under paragraph 11. Before any party may move the Court to take any action with respect to this Consent Order it must follow the Dispute Resolution Procedures set forth in Exhibit C and incorporated into this Consent Order by reference. Any bookseller member of the American Booksellers Association that is not a named party in this action may also avail itself of the Dispute Resolution Procedures, but by so doing agrees conclusively and shall be deemed to be strictly bound by all provisions of this Consent Order for all purposes as if it were a named party in this action, including but not limited to the waiver of claims or causes or actions pursuant to Paragraph 2 of this Consent Order.

7. To the fullest [*9] extent permissible by law with respect to any claim for equitable relief, this Consent Order shall bind and inure to the benefit of all members of the American Booksellers Association on whose behalf the Association purports to bring this suit seeking injunctive relief. Nothing in this Consent Order shall be used or submitted as evidence or to establish any standard of conduct or interpretation of applicable law, or be construed to have the effect of res judicata, collateral estoppel, waiver, admission, or any other effect on Houghton Mifflin in any suit or claim filed or brought against Houghton Mifflin (a) by any person or entity not deemed to be bound by the terms of this Consent Order as provided herein or (b) by any person or entity whatsoever, whether or not otherwise bound by the terms of this Consent Order, if the suit or claim seeks damages, attorneys fees, or declaratory or injunctive relief that may be the basis for an award of damages or attorneys fees, unless the suit or claim is by a party to this action and seeks solely to enforce this Consent Order (including a request for an award of attorneys fees). Nothing in this Order, however, shall preclude Houghton Mifflin from [*10] arguing that non-named-party bookseller members of the American Booksellers Association are in fact bound by the terms of this Consent Order for all purposes. Plaintiffs agree to use their best efforts to discourage damages suits by non-named-party bookseller members of the American Booksellers Association against Houghton Mifflin for issues, occurrences, or practices addressed by this Consent Order and to encourage all members to use, pursuant to paragraph 6 of this Consent Order, the Dispute Resolution Procedures set forth in Exhibit C to resolve disputes relating to such matters.

8. If, on or after the date of this Consent Order, some or all of the Plaintiffs resolve by future settlement or judgment their claims against any other present or future defendant in a manner that: (a) results, by settlement or judgment, in any specific restriction being placed on that defendant that is materially less stringent than any comparable restriction placed on Houghton Mifflin under the terms of this Consent Order, or (b) results in a settlement that does not include any material term relating to alleged discrimination arising from a pricing or promotional practice in book

publishing that is [*11] placed on Houghton Mifflin under the terms of this Consent Order, then this Consent Order shall be construed, and amended if necessary, to comport with the less stringent restriction imposed in that settlement or judgment or to delete the material term not included in that settlement. Plaintiffs shall share with Houghton Mifflin the terms of any settlement with any other present or future defendant and shall not enter into any confidentiality agreement with such defendant that precludes disclosure of those terms to Houghton Mifflin. Plaintiffs represent that, except for the prior agreement with format defendant Hugh Lauter Levin Associates, Inc., Plaintiffs have no settlement agreement with any other defendant that has not been disclosed to Houghton Mifflin. Nothing in this paragraph shall alter Houghton Mifflin's payment or fees and costs specified in this Consent Order. A "present or future defendant" is any defendant named in this action or added after the date of this Consent Order and any defendant in any other action brought by one or more of the Plaintiffs that raises issues substantially the same as the issues raised in this action.

9. If, on or after the date of this Consent [*12] Order, the pending Federal Trade Commission proceeding involving other publishers not defendants in this action, *In the Matter of Harper & Row, et al.* (F.T.C., filed 1988), is resolved by Commission order in a manner that results in any specific and detailed restriction as to alleged discrimination arising from a pricing or promotional practice in book publishing being placed on and made effective as to any publisher respondent in that proceeding that is materially, less stringent than any closely comparable restriction placed on Houghton Mifflin under the terms of the Rules accompanying this Consent Order, then those Rules shall be construed, and amended if necessary, to comport with the less stringent restriction imposed in that resolution of the FTC proceeding; provided, however, that this paragraph shall not relieve Houghton Mifflin from the terms of this Consent Order, nor from any of the accompanying Rules that is not directly addressed in any resolution of any FTC proceeding. If the resolution, when effective, of the FTC proceeding results in any specific and detailed restriction as to alleged discrimination arising from a pricing and promotional practice in book publishing [*13] being placed on any publisher respondent in that proceeding that is materially more stringent than any closely comparable restriction placed on Houghton Mifflin under the terms of the Rules accompanying this Consent Order, then the Rules shall be construed, and amended if necessary, to comport with the more stringent restriction imposed in that resolution of the FTC proceeding; provided, however, that the more stringent restriction is also imposed on all present and future defendants (as defined in paragraph 8) as a result of any future settlement or judgment resolving the claims of some or all of the Plaintiffs' against any other present or future defendant.

10. This Consent Order shall terminate automatically ten (10) years after the date of this Consent Order and shall have no force and effect after its termination.

11. The claims of each Plaintiff against Houghton Mifflin are DISMISSED WITH PREJUDICE; provided, however, that the Court retains jurisdiction over this action and the parties to it to hear and resolve any post-Consent Order motion. Houghton Mifflin agrees to reimburse Plaintiff American Booksellers Association, Inc. the amount of \$ 275,000.00 for fees and costs associated [*14] with this litigation.

IT IS SO ORDERED.

Dated: New York, New York, October 30, 1995.

JOHN F. KEENAN

United States District Judge

EXHIBIT A

RULES FOR THE APPLICATION OF THE ROBINSON-PATMAN ACT TO BOOK PUBLISHING

A. Price Discrimination

1. The publisher must make available the same price terms (including discounts) to all competing book retailers * for book purchases of the same size, regardless of the size or type of the book retailer that makes the purchase. The size of the book retailer shall not affect the price terms. The administrative requirements to qualify for a particular price term (including, for example, requirements for shipping and documenting returns), and the publisher's implementation and enforcement of those requirements, must be the same for all competing book retailers, large and small alike.

[*15] 2. The publisher must make available the same credit terms in the sale of books to all competing book retailers, regardless of size or type, that pose the same or substantially similar credit risks; it may make available different credit terms to different book retailers that pose substantially different credit risks only after specifically identifying and documenting the variances in risks. Those risks may be identified and documented on a category-by-category basis. The publisher must impose on all competing book retailers within a designated risk category, regardless of size or type, the same consequences for failure to make payments according to the publisher's terms (including, for example, discontinuance of new shipments, COD, mandatory use of credit cards, and requirements of security or personal guarantees).

3. To the extent that the publisher sells books on a non-returnable basis to any book retailer, it must at approximately the same time make available books on the same non-returnable basis to any other competing book retailer.

4. Any difference in book price terms to competing book retailers must be justified by, and not exceed, a difference in cost to the [*16] publisher, or be practicably available to competing book retailers, unless it falls within the meeting competition or changing conditions exceptions. Before providing any differing price terms based on cost justification, the publisher must reasonably determine and specifically document the rationale and calculations for any cost difference used to justify the difference in price terms. Documentation must be maintained for three years after it is generated. Differing price terms are practicably available to competing book retailers where competing book retailers can avail themselves of the terms with no, or only minimal, additional expense, delay, or inconvenience beyond the competing retailers' then-current common business practices.

5. If the publisher does not make available to competing book retailers the same book price terms in reliance upon the meeting competition exception, it must be able to demonstrate and document that, at the time the publisher first offered the better price term, it had a good faith belief that: (a) a competitor offered the same or more favorable terms, and (b) the publisher would lose a significant amount of business (for example, in terms of total [*17] sales, sales in a particular product or geographic market, or sales to a particular customer) if the publisher failed to meet this competition. Documentation must be maintained for three years after it is generated. The publisher must limit the size, scope, and duration of the price concession to the size, scope, and duration of the competitive offer it believes in good faith that it is meeting.

6. If the publisher does not make available to competing book retailers the same book price terms in reliance upon the changing conditions exception, it must be able to demonstrate and document that it offered the reduced price in response to changing conditions affecting the market for, or the marketability of, the books concerned. Documentation must be maintained for three years after it is generated. Changing conditions justifying a price reduction shall be limited to: (a) the obsolescence of seasonal books in imminent danger of losing substantially all of their value; (b) a distress sale under court process; or (c) a sale in good faith in discontinuance of business in either all copies of a specific book or title or in identifiable lines or types of books. Nothing here shall prevent [*18] the publisher from "remaindering in place," i.e., offering an additional discount or rebate on a specific title to all book retailers that have already purchased the title including, in the discretion of the publisher, the imposition upon all book retailers that accept the offer additional conditions or qualifications such as cancellation of return rights.

* "Book retailer" includes all businesses that purchase new, undamaged books for resale to consumers in competition with one another in contemporaneous transactions, including but not limited to independent and chain bookstores, warehouse clubs, department stores, grocery or drug stores, gift or gourmet shops, mail order houses, book clubs, catalog sales, news stands, airport shops, and television or other broadcast-, cable-, or satellite-fed sales promotions; book retailers are "in competition with one another" if they offer for sale the same or similar books to consumers in the same geographic market.

7. If the publisher provides price concessions on books to a book retailer that will resell the publisher's books with concessions in retail prices, the publisher must make available equivalent terms to all competing book retailers that will likewise resell the books with concessions in retail prices.

8. For any books that the publisher sells to a wholesaler affiliated with a book retailer, no wholesale discount may be provided under the functional discount exception if the books are shipped directly to the affiliated retailer. If a discount is justified on the basis that it reimburses the retailer-affiliated wholesaler for functions performed, the publisher shall reimburse the retailer-affiliated wholesaler only for the percentage of the wholesaler's purchases that are not resold to affiliated retailers at prices different [*19] from the prices at which the books are resold to unaffiliated retailers. The retailer-affiliated wholesaler must certify and document to the publisher the percentage of the wholesaler's purchases that are resold to other than affiliated retailers and the prices at which books are sold to affiliated and unaffiliated retailers. The publisher must maintain the documentation for three years after it is generated. These discounts shall be made available to other competing retailers to the extent that they undertake the same wholesale functions, and certify and document to the publisher the percentage of their purchases deriving from the wholesale functions. Any other discount provided to a retailer-affiliated wholesaler must be cost-justified according to Paragraph 4.

9. The availability, duration, and all other terms and conditions of book sales to book retailers, including discounts and credit terms, must be published annually in the American Booksellers Association's *ABA Book Buyer's Handbook* ("The Red Book"), with all changes or additions published promptly in ABA's weekly "Bookselling This Week" newsletter, in *Publishers Weekly* magazine, or in any other media reasonably [*20] available to all book retailers, with contemporaneous notice to ABA as to the other media.

B. Promotional Allowance Discrimination

1. In connection with the sale or books for resale, the publisher must make all promotional allowances, if any -- including any payments, support, facilities or services provided by the publisher to a book retailer in connection with the retailer's promotional or other services or facilities -- proportionally available to all competing book retailers, * regardless of the size or type of the book retailer. Nothing shall require a publisher to make available promotional allowances or prohibit the publisher from imposing limitations or conditions on the use of promotional allowances by book retailers, provided that those limitations or conditions are imposed on all competing book retailers, large and small alike, and that there is no disproportionate impact on smaller book retailers.

[*21] 2. If the publisher provides promotional allowances for one kind of promotional activity undertaken by individual larger book retailers in connection with the resale of the publisher's books, the publisher must make available proportionally equal alternatives for smaller competing book retailers that cannot practicably undertake the same kind of promotional activity. Accordingly, a smaller book retailer must be permitted to use a promotional allowance for different promotional activities (such as direct mail and point-of-sale displays) if the allowance is too small to permit it to engage in the same kind of promotional activities (such as newspaper, television, or radio advertising) for which larger book retailers use their allowances.

3. If the publisher provides promotional allowances to book retailers in connection with the resale of the publisher's books, the publisher must make available to competing book retailers that buy through wholesalers promotional allowances proportionally equal to those made available to book retailers that buy directly from the publisher.

4. If the publisher provides promotional allowances to a book retailer in connection with the resale [*22] of the publisher's books, the publisher must make available proportionally equal promotional allowances to all competing

* "Book retailer" includes all businesses that purchase new, undamaged books for resale to consumers in competition with one another in contemporaneous transactions, including but not limited to independent and chain bookstores, warehouse clubs, department stores, grocery or drug stores, gift or gourmet shops, mail order houses, book clubs, catalog sales, news stands, airport shops, and television or other broadcast-, cable-, or satellite-fed sales promotions; book retailers are "in competition with one another" if they offer for sale the same or similar books to consumers in the same geographic market.

book retailers within the book retailer's geographic market. The publisher shall use its best efforts to assure that the book retailer utilizes its promotional allowances on a geographically proportional basis.

5. The administrative requirements for a book retailer to qualify for promotional allowances in connection with the resale of a publisher's books, and the publisher's implementation and enforcement of those requirements, must be the same for all competing book retailers, large and small alike.

6. A publisher may make available to book retailers in connection with the resale of its books promotional allowances that are not proportionally equal only on the basis of the meeting competition exception. This exception requires the publisher to be able to demonstrate and document that, at the time the publisher first offered the more favorable promotional allowance, it had a good faith belief that: (a) a competitor offered the same or a more favorable allowance, and (b) the publisher would lose a significant amount of business (for example, in terms of [*23] total sales, sales in a product or geographic market, or sales to a particular customer) if the publisher failed to meet this competition. Documentation must be maintained for three years after it is generated. The publisher must limit the size, scope, and duration of the competitive allowance to the size, scope, and duration of the competitive offer it believes in good faith it is meeting.

7. If the publisher provides promotional allowances to a book retailer that will resell the publisher's books with concessions in retail prices, the publisher must make available proportionally equal promotional allowances to all competing book retailers that will likewise resell the books with concessions in retail prices.

8. A publisher must make available to a book retailer not affiliated with a wholesaler promotional allowances in connection with the resale of the publisher's books that are proportionally equal to those received by competing book retailers affiliated with a wholesaler.

9. The availability, duration, and all other terms and conditions of promotional allowances to book retailers in connection with the resale of the publisher's books must be published annually in [*24] the American Booksellers Association's *ABA Book Buyer's Handbook* ("The Red Book"), with all changes or additions published promptly in ABA's weekly "Bookselling This Week" newsletter, in *Publishers Weekly* magazine, or in any other media reasonably available to all book retailers, with contemporaneous notice to ABA as to the other media.

Exhibit B

Houghton Mifflin Company Proposed New Terms and Promotional Program

I. Book Discount Schedules

* Effective date: Jan 1, 1996

* New definition of book customer types:

1. End-users: customers who purchase or obtain HM books for their own use and not for resale.
2. Retailers: business entities who resell or otherwise make HM books available to end users.
3. Libraries: institutional entities who lend or otherwise make available and do not resell HM books to end-users.
4. Wholesalers: business entities who resell at least 80% of their annual HM book purchases to libraries or unaffiliated retailers and certify annually to that effect.

(Those who do less than 80% will be required annually to calculate and document the dollar amount of their business resold to affiliated retailers. HM will rebill them [*25] for this portion at retail terms unless they certify annually that prices and terms to affiliated and unaffiliated retailers are the same.)

* All customers will be reclassified as per the above definitions by Jan 1, 1996.

* Retailers must annually elect to do business with HM on either a returnable or a non-returnable basis. Such election may only be changed annually. Should a customer decide to change its status from non-returnable to returnable, all purchases made prior to the change will remain non-returnable and coop allowances available to them as a returnable retailer (see below) will be based exclusively on their returnable purchases.

* Retail returnable customers may avail themselves of HM's retail cooperative advertising program (see below). Non-returnable retailers may not.

* Retail returnable discount schedule:

1-15 assorted copies	20%
16+ assorted copies	47%

* Non-returnable discount schedule:

1-15 asst. copies	20%
16-99	47%
100-499	50%
500+ asst. copies	53%

* Both retail returnable (RR's) and retail non-returnable customers (NRR's) may elect to open a "warehouse account" with HM and avail themselves [***26**] of the following preferential discounts, provided they submit all orders according to the following rules:

- a. single ship-to location which can receive shipments delivered by long distance carriers (including on pallets).
- b. carton quantities only (HM reserves the right to round up or down) (HM will attempt to standardize these quantities).
- c. no sub-shipments (requiring separate packing) within any order

* Retail returnable warehouse discount schedule (RRW):

1-15 asst. copies	20%
16+ asst. copies	49%

* Non-returnable retail warehouse discount schedule (NRRW):

1-15 asst. copies	20%
16-99	47%
100-499	52%
500+ copies	55%

* Non-returnable retail warehouse (NRRW) customers may order from a list of "commodity HM titles" and, by clearly marking such orders "special reference title orders," receive their normal discounts at the following reduced minimums:

1-15	20%
16-99	47%
100+ asst. titles	55%

(The list of titles will be published seasonally in PW and AB. No other titles may be included in these orders.)

* Retailers may not have both returnable and non-returnable accounts.

* Both returnable [***27**] and non-returnable retailers may elect to have both a warehouse and a regular account and order specifically from each as per their respective restrictions.

* Effective Jan 1, 1996, HM will discontinue its Freight Pass-Through Policy, Accounts returning HM titles after that date will be credited for returned books at the discounts and invoice list prices which were awarded on the customer's last purchase of those titles from HM.

II. Promotional Program

* Available to returnable retailers only.

* An allowance for use by eligible retailers in the current calendar year will be established at the beginning of the calendar year.

This allowance will be calculated by adding the following:

a. 5% of previous calendar year's net HM book billings (exclusive of DK business) up to \$ 100,000, 3% of net HM book billings (exclusive of DK business) thereafter. Retailers having more than one account may add them together (The \$ 100,000 break point will activate when all accounts total \$ 100,000, not each account separately.)

b. 5% of 85% (4.25%) of previous year's net book billings (only HM books, not DK) from wholesaler(s) who provide documentation acceptable to HM.

* **[*28]** Coop reimbursements will take the form of credits to the retailer's account(s).

* Restrictions on use:

a. Available for use in promoting only designated HM titles (to be announced seasonally in PW, AB, with no other or advance announcement to any retailer)

b. Prior approval by HM is required.

c. Documentation (that verifies that the promotional activity has been undertaken) is required (e.g. tear sheets, documentation verifying that display space was used, etc.) No coop reimbursement will be credited or permitted for any retailer until acceptable documentation is received.

d. Allowances will be approved on a first-come, first-served basis. HM reserves the right to close out particular titles which have been oversubscribed but will make available alternative titles throughout the calendar year.

* New features:

a. HM will make available on a seasonal basis the opportunity for any retailer (returnable) to avail itself of specific display allowances for placing the aforementioned HM coop titles in promotional areas of its store(s). These will offer a certain dollar amount per week per retail location for such display. As with all other qualified promotional **[*29]** activities, display allowance will be paid only within the overall annual allowance described above. HM will assure that each retailer (returnable) has the opportunity to utilize approximately the same percentage of its overall coop allowance in this display allowance program. All other specifics on these display allowance opportunities will be published seasonally in PW and AB.

b. In addition to the above display allowance program, HM may occasionally provide the opportunity to draw additional funds from its overall coop allowance to any retailer who resells promotionally displayed, designated HM titles at prices at or below a certain percentage of HM's suggested list price. HM will assure that each retailer (returnable) has the opportunity to utilize approximately the same percentage of its overall coop allowance in this display/discount program. These opportunities will also be announced seasonally in PW and AB.

c. For those retailers who operate in more than one media area of the country (defined by the various media vehicles in which the retailer chooses to expend its coop allowance), HM will establish a separate advertising allowance for the year for each of the media **[*30]** areas in which the account uses HM coop funds.

This calculation will be made by breaking down the previous year's purchases by the respective media areas into which they were shipped (either by HM directly, by the accounts distribution centers or by wholesalers who serve them).

Such accounts will be restricted to expending HM coop allowances only within the pool allowances earned for each respective media area.

EXHIBIT C

DISPUTE RESOLUTION PROCEDURES

These procedures shall apply to any motion by the American Booksellers Association or individual bookstore plaintiffs ("the Plaintiffs"), by any member of ABA, or by Houghton Mifflin Co., Inc. for any action with respect to the Consent Order ("post-Consent Order motion") as specified in paragraph 6 of the Consent Order.

1. Each year prior to January 1, ABA and Houghton Mifflin will select and engage, on a year-to-year basis, an expert neutral mediator. To the extent practicable, ABA and Houghton Mifflin will select a mediator with expertise and experience in the areas of: (1) The Robinson-Patman Act, and (2) the book publishing and book selling industry, in that order of priority. If ABA and Houghton Mifflin fail to agree [*31] upon a mediator by January 1, they will, by January 15, together move the court for an order appointing a mediator from candidates suggested separately by ABA and by Houghton Mifflin. All fees and expenses of the mediator will be divided equally between ABA and Houghton Mifflin.

a. Any planned post-Consent Order motion will be initially submitted in writing directly to ABA, if the initiating party is Houghton Mifflin, or to Houghton Mifflin if the initiating party is ABA itself or any individual bookseller. If the initial submission is by a bookseller not a named party to the action resolved by the Consent Order, that submission must expressly state that it is being made pursuant to, and in accordance with, the terms and provisions of the Consent Order and this Exhibit C and that the bookseller agrees to be bound by all provisions of the Consent Order. The party receiving the inquiry shall respond in writing within fifteen (15) business days following receipt of the initiating party's communication, unless a different time is agreed to in writing.

b. If the initiating party is Houghton Mifflin or ABA, and the initiating party is not satisfied with the response it received, or if [*32] no response is received, the initiating party may then present the post-Consent Order motion, in writing, to the mediator.

c. If the initiating party is an individual bookseller deemed a party to this Consent Order and if it is not satisfied with the response it received from Houghton Mifflin, it may submit its post-Consent Order motion, in writing, to ABA and notify Houghton Mifflin of that action. ABA will examine the inquiry and notify the initiating party, within fifteen (15) days after receipt of the submission, unless a different period is agreed to, as to whether ABA will take the matter to the mediator on behalf of the initiating party. A copy of that notice will be given to Houghton Mifflin. The decision of ABA shall be final as to the bookseller initiating party. ABA shall only bring to the mediator a post-Consent Order motion submitted by an individual bookseller if ABA believes, in good faith, that the motion has merit.

2. Prior to the submission of an unresolved post-Consent Order motion to the mediator, the parties shall confer and reach agreement regarding the exchange of: (a) documents and information in the moving party's possession or in the possession of any initiating [*33] individual book retailer relevant to the motion, (b) documents and information in the nonmoving party's possession relevant to any defense or opposition to the motion, and (c) other relevant documents and information; the parties shall also confer and attempt to reach agreement regarding the confidentiality of those documents and information. If the parties are unable to reach agreement on documents and information to be exchanged, that issue shall be presented to the mediator at the conclusion of an expedited telephonic conference before the underlying dispute is submitted to the mediator on the merits. Any decision of the mediator regarding the appropriate documents or information to be exchanged shall neither control nor affect the scope of permissible discovery before the Court should either party appeal the mediator's decision on the merits.

3. Upon submission of a matter to him, the mediator will, on the most expedited and efficient basis possible, issue a written ruling. In so doing, the mediator may conduct interviews, require the parties to appear before him, request submission of short briefs or position papers [not to exceed fifteen (15) pages, double spaced], conduct [*34] an

informal hearing, and adopt other procedures appropriate for an expedited mediation program consistent with the overriding goal that the process be as quick and as inexpensive as possible. The parties will fully cooperate with one another in the mediation process, and failure to do so may be considered sufficient reason for the mediator to rule against a noncooperating party. Each party will be solely responsible for its own expenses in connection with the mediation program. The mediator is not permitted to recommend any award of damages or monetary compensation.

4. If any party believes that the mediator's ruling is erroneous, that party may, within five (5) business days after issuance of the ruling, petition the Court for *de novo* review, which shall be conducted on an expedited basis under the Federal Rules of Civil Procedure.

5. If book publishers other than Houghton Mifflin enter into similar settlement agreements with Plaintiffs, Plaintiffs will use their best efforts to require that those other publishers also agree to abide by these dispute resolution procedures. If other publishers are included, the annual selection of the mediator will be by ABA, as one participant [*35] in the selection process, and by the book publishers together, as the other participant in the selection process. If the parties fail to agree upon a mediator, they will together move the Court for an order appointing a mediator from candidates suggested separately by ABA and by the book publishers. All fees and expenses of the mediator will be divided equally between ABA (and the members represented by ABA), on the one hand, and the publisher participants in the specific dispute resolution proceeding, on the other hand; i.e., one share for ABA and one share for the participating book publishers, collectively.

6. Any notice, including the submission of any post-Consent Order motion, permitted or required to be given to a party hereto shall be sufficient if delivered by certified mail upon the following:

To Houghton Mifflin: Executive Vice President

Trade & Reference Division

Houghton Mifflin Co., Inc.

222 Berkeley Street

Boston, MA 02116

With a copy to: Senior Vice President &

General Counsel

Houghton Mifflin Co., Inc.

222 Berkeley Street

Boston, MA 02116

To ABA: President

American Booksellers Association, Inc.

828 South Broadway

Tarrytown, NY [*36] 10591

Either party may hereafter designate in writing some other or additional person or address to receive such notice.



Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.

United States District Court for the Western District of New York

November 2, 1995, Dated ; November 2, 1995, FILED

95-CV-6045L

Reporter

908 F. Supp. 1194 *; 1995 U.S. Dist. LEXIS 17133 **

KAMINE/BESICORP ALLEGANY L.P., Plaintiff, v. ROCHESTER GAS & ELECTRIC CORP., Defendant.

Core Terms

preliminary injunction, anti trust law, injunction, energy, costs, plant, antitrust, buyer, irreparable harm, electric, merits, regulated, imminent, default, buy, foreclose, allegations, facilities, remedies, oil, anticompetitive, competitors, producers, monopoly, parties, prices, rights, drive, likelihood of success, partnerships

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] Injunctions, Preliminary & Temporary Injunctions

In the Second Circuit a court may issue a preliminary injunction upon a showing of irreparable harm and either (1) a likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation with a balance of the hardships tipping decidedly toward the party requesting the injunction.

Civil Procedure > Remedies > Damages > Monetary Damages

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] Damages, Monetary Damages

An applicant for an injunction must show injury for which a monetary award cannot be adequate compensation because where money damages is adequate compensation, a preliminary injunction will not issue.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

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[**HN3**](#) [] **Injunctions, Preliminary & Temporary Injunctions**

With respect to irreparable harm, doubts as to whether an injunction sought is necessary to safeguard the public interest should be resolved in favor of granting the injunction. It is clear, however, that "possible irreparable injury" is a requirement of all preliminary injunctions.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[**HN4**](#) [] **Injunctions, Preliminary & Temporary Injunctions**

Whether a particular harm is irreparable turns on its imminence and the lack of an adequate remedy at law.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[**HN5**](#) [] **Grounds for Injunctions, Irreparable Harm**

An applicant for a preliminary injunction must show that he is likely to suffer irreparable harm if equitable relief is denied. Thus, a mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[**HN6**](#) [] **Injunctions, Preliminary & Temporary Injunctions**

In making the determination of irreparable harm, both harm to the parties and to the public may be considered.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[**HN7**](#) [] **Injunctions, Grounds for Injunctions**

As to the likelihood of success on the merits in antitrust cases, it is up to a court to decide whether the evidence demonstrates that plaintiff's allegations are of sufficient substance to warrant an examination of the other requirements for granting an injunction. The ultimate inquiry is whether the probable future effect of the transaction will be substantially to lessen competition.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[**HN8**](#) [] **Injunctions, Preliminary & Temporary Injunctions**

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Besides irreparable harm, the moving party must either show that it is likely to succeed on the merits or that the balance of hardships tips decidedly in its favor.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN9 Utility Companies, Rates

Fixed costs are just that, fixed. As such, they cannot be "avoided."

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN10 Estoppel, Collateral Estoppel

For the doctrine of collateral estoppel, or issue preclusion, to apply, the issues involved in the current and prior litigation must be "substantially the same."

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN11 Injunctions, Preliminary & Temporary Injunctions

The more serious and imminent the potential harm to a movant, the less need there is for a movant to show a likelihood of success on the merits.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN12 Regulated Industries, Energy & Utilities

The chief danger associated with monopsony power, market power on the buying side of the market, occurs when a company has significant market power both "upstream" and "downstream," meaning that a company can control the level of demand for a product that it buys and the level of supply for a product that it sells to its own buyers. Such a market position allows a company to demand a low price from its suppliers while simultaneously raising the prices it charges its buyers.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN13[**Regulated Industries, Energy & Utilities**

Where the risk of injuring consumers by forcing up the price of the end product is slight or nonexistent, monopsony power per se does not create an antitrust concern.

Energy & Utilities Law > Antitrust Issues > General Overview

HN14[**Energy & Utilities Law, Antitrust Issues**

See [16 U.S.C.S. § 2603\(1\)](#).

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Price Terms

Energy & Utilities Law > Cogeneration & Independent Companies > Public Utility Regulatory Policies Act > General Overview

Energy & Utilities Law > Cogeneration & Independent Companies > Public Utility Regulatory Policies Act > Purchasing Requirements

HN15[**Purchase Contracts, Price Terms**

Under the Public Utility Regulatory Policies Act, a qualifying facility may force a sale only at the purchasing utility's avoided cost.

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Price Terms

HN16[**Energy & Utilities Law, Antitrust Issues**

Antitrust cases not involving utilities hold that refusing to pay an above-market price does not constitute antitrust activity.

Antitrust & Trade Law > Regulated Industries > 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

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Cogeneration & Independent Companies > Public Utility Regulatory Policies Act > General Overview

HN17[**Antitrust & Trade Law, Regulated Industries**

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The Public Utility Regulatory Policies Act does not affect the applicability of the antitrust laws. [16 U.S.C.S. § 2603\(1\)](#)

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Price Terms

[HN18](#) [] **Monopolies & Monopolization, Conspiracy to Monopolize**

Where an alleged anticompetitive conspiracy is predicated on a failure to buy a service worth money for a moneys worth price, a plaintiff has the burden of demonstrating that his product has some value above the price paid or offered.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Compliance > ... > Negotiable Instruments > Enforcement > Joint & Several Instruments

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

[HN19](#) [] **Federal Regulations, Antitrust Regulations**

Courts hold that the ability of government regulation to keep monopolization power in check tends to minimize whatever dangers to the public might otherwise exist as a result of anticompetitive activity.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Energy & Utilities Law > Antitrust Issues > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

[HN20](#) [] **Remedies, Injunctions**

Where monopoly power is regulated, the regulator, not a court, bears the burden of determining whether prices are reasonable.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

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HN21 [blue document icon] Regulated Industries, Energy & Utilities

The antitrust laws do not prohibit a buyer from bargaining for the best deal possible.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

HN22 [blue document icon] Injunctions, Preliminary & Temporary Injunctions

See [Fed. R. Civ. P. 65\(c\)](#).

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN23 [blue document icon] Injunctions, Preliminary & Temporary Injunctions

A temporary restraining order ordinarily expires within ten days. [Fed. R. Civ. P. 65\(b\)](#).

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN24 [blue document icon] Injunctions, Preliminary & Temporary Injunctions

Preliminary injunctions have no time limit and in fact are of potentially unlimited duration.

Counsel: **[**1]** For KAMINE/BESICORP ALLEGANY L.P., plaintiff: Anthony R. Palermo, Esq., Hodgson, Russ, Andrews, Woods & Goodyear, Rochester, NY. William A. Escobar, Esq., Alan R. Kusinitz, Esq., Kelley Drye and Warren, New York, NY.

For ROCHESTER GAS & ELECTRONIC, defendant: John Stuart Smith, Esq., David M. Schraver, Esq., Flor M. Colon, Esq., Nixon, Hargrave, Devans & Doyle LLP, Rochester, NY.

Judges: HON. DAVID G. LARIMER, UNITED STATES DISTRICT JUDGE. USMJ Kenneth R. Fisher

Opinion by: DAVID G. LARIMER

Opinion

[*1196] DECISION AND ORDER

BACKGROUND

This is an antitrust action brought by plaintiff, Kamine/Besicorp Allegany L.P. ("Kamine"), against defendant Rochester Gas & Electric Corporation ("RG&E"). Kamine, which seeks both damages and injunctive relief, asserts

causes of action under [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), and [Sections 4](#) and [16](#) of the Clayton Act, [15 U.S.C. §§ 15, 26](#).

The facts of this case have been set out at some length in a prior decision of this court,¹ and will be repeated here only as necessary. In short, the case arises from RG&E's unwillingness to purchase power from Kamine at the price set in a Power Purchase Agreement ("PPA") that Kamine and RG&E entered into [\[*2\]](#) in 1990 with the approval of the New York State Public Service Commission ("PSC"). Kamine alleges that RG&E is trying to drive Kamine out of business so that RG&E can maintain its monopoly as a producer and seller of electricity within RG&E's service area.

The current price that RG&E must pay for power under the PPA is \$.06 per kilowatt hour ("kwh"). RG&E claims that the contract price is far above RG&E's "avoided cost," which is what it would cost RG&E to buy or produce the same power at current market rates or under the current tariff (known as the "SC5") filed by RG&E and approved by the PSC. RG&E contends [\[*1197\]](#) that its avoided cost is now about \$.02 per kwh. RG&E asserts that the PPA price is so much higher than its avoided cost that the contract should be rescinded or reformed. RG&E is currently prosecuting an action against Kamine in New York State Supreme Court seeking such relief.

Shortly after this case was commenced, Kamine moved for a temporary restraining [\[*3\]](#) order ("TRO") and preliminary injunction ordering RG&E to comply with the terms of the PPA. On March 20, 1995, I granted the motion for a TRO, and directed RG&E to accept electric power from Kamine under the terms of the PPA, and, in accordance with the PPA, to pay Kamine no less than six cents per kilowatt hour for that power.

As stated in the March 20 decision, the purpose of the TRO was to preserve the situation "long enough for the court to decide the motion for a preliminary injunction." Decision and Order, March 20, 1995, at 15. The parties then engaged in discovery relating to the preliminary injunction motion.

Both sides have submitted substantial additional written materials in support of their respective positions, and the court heard extensive oral argument on the injunction motion. At oral argument, counsel for both sides agreed that no factual hearing was necessary, and that the written and documentary materials that had been submitted were adequate for the court to render a decision. By stipulation of the parties, the TRO has been extended throughout this period, pending issuance of the court's decision on the preliminary injunction motion.

DISCUSSION

[**4] I. Standards For Granting A Preliminary Injunction

[HN1](#) In the Second Circuit a court may issue a preliminary injunction upon a showing of irreparable harm and either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation with a balance of the hardships tipping decidedly toward the party requesting the injunction. [Acquaire v. Canada Dry Bottling Co. of New York](#), 24 F.3d 401, 409 (2d Cir. 1994); [Consolidated Gold Fields PLC v. Minorco, S.A.](#), 871 F.2d 252, 256 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989). [HN2](#) The applicant for an injunction must show "injury for which a monetary award cannot be adequate compensation . . . [because] where money damages is adequate compensation a preliminary injunction will not issue." [Jackson Dairy, Inc. v. H.P. Hood & Sons](#), 596 F.2d 70, 72 (2d Cir. 1979).

[HN3](#) With respect to irreparable harm, "doubts as to whether an injunction sought is necessary to safeguard the public interest . . . should be resolved in favor of granting the injunction." [Gulf & Western Indus., Inc. v. Great A.& P. Tea Co., Inc.](#), 476 F.2d 687, 699 (1973). It is clear, however, that [\[*5\]](#) "possible irreparable injury" is a requirement

¹ See Decision and Order, March 20, 1995.

of all preliminary injunctions. [S.E.C. v. Unifund SAL, 910 F.2d 1028, 1039 \(2d Cir. 1990\); Gulf & Western, 476 F.2d at 692.](#)

HN4 [↑] Whether a particular harm is irreparable turns on its imminence and the lack of an adequate remedy at law. "Irreparable harm must be shown by the moving party to be imminent, not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages." [Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 \(2d Cir. 1990\)](#) (citations omitted). **HN5** [↑] "An applicant for a preliminary injunction 'must show that it is *likely* to suffer irreparable harm if equitable relief is denied.' Thus, a mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction." [Borey v. National Union Fire Ins. Co., 934 F.2d 30, 34 \(2d Cir. 1991\)](#) (quoting [JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 \(2d Cir. 1990\)](#)). Finally, **HN6** [↑] "in making the determination of irreparable harm, both harm to the parties and to the public may be considered." [Long Island R.R. Co. v. International Assoc. of Machinists, 874 F.2d 901, 910 \(2d Cir. 1989\)](#), cert. denied, 493 U.S. 1042 (1990).

HN7 [↑] As to the likelihood of success on the merits in antitrust cases, it is up to the court to decide whether the evidence demonstrates that plaintiff's allegations are of sufficient [*1198] substance to warrant an examination of the other requirements for granting an injunction. [Gulf & Western, 476 F.2d at 693.](#) The ultimate inquiry is "whether the probable future effect of the transaction will be substantially to lessen competition." [Id. at 694](#) (citations omitted).

II. Irreparable Harm

Kamine contends that if an injunction does not issue, Kamine will be forced to default on certain financial obligations to its lender, General Electric Capital Corporation ("GECC"), and GECC may foreclose on its loans to Kamine, driving Kamine into bankruptcy. In support of this allegation, Kamine alleges that RG&E's prior refusal to purchase power at the PPA price prevented Kamine from repaying a \$ 90 million construction loan on time, which in turn has made it impossible for Kamine to obtain permanent financing. As a result of these difficulties, GECC has exercised some of its rights under its contract with Kamine, including the imposition of a [*7] default interest rate on Kamine's loans. In addition, GECC has elected to exercise its right to apply RG&E's payments to Kamine's obligation to GECC. In other words, the payments from RG&E are now going directly to GECC, not to Kamine. GECC can then advance funds to Kamine upon Kamine's request, if GECC chooses to. Without an injunction, Kamine contends, that source of revenue would dry up, and GECC might foreclose on the loan.

GECC, however, has not demonstrated any particular desire to pursue its remedies under the agreement to the fullest extent. On September 13, 1994, for example, GECC sent to Kamine what GECC described as a "draft of GECC's forbearance letter for your [*i.e.* Kamine's] review & comments." Defendant's Exhibit Book in Opposition to Motion for Preliminary Injunction ("Def. Ex.") Ex. L. This letter stated that GECC had reviewed a default notice sent by Kamine to its planned "thermal host," the greenhouse which was supposed to buy the steam produced by Kamine's plant. Kamine had sent a default notice to the greenhouse operator because the greenhouse was not prepared to purchase the steam as planned. The problems between Kamine and the greenhouse operator were [*8] never resolved, and the deal was never consummated.

The presence of a thermal host was a precondition to Kamine's obtaining status as a qualifying facility ("QF") under the Public Utility Regulatory Policies Act ("PURPA"), [16 U.S.C. §§ 796\(18\)\(B\)](#). QF status in turn was a condition that Kamine was obligated to achieve and maintain under its agreement with GECC. That is what prompted GECC to send the forbearance letter to Kamine.

In the draft letter, GECC stated that it "agreed to forebear [sic] from exercising any remedies" available to it under its agreement with Kamine for thirty days. The letter stated that GECC reserved all of its rights to exercise such remedies at the end of that period. However, it does not appear that GECC did pursue any further remedies regarding this matter.

In another letter, dated January 31, 1995, GECC "reiterated its previously stated concern with respect to [Kamine's] ability to satisfy the conditions precedent to funding of further construction loan draws and the conditions precedent

to permanent financing as set forth in the operative documents." It also noted that "RG&E has now purported to terminate [sic] the Power Purchase Agreement," which **[**9]** "would constitute a Special Event of an Event of Default." Def. Ex. N. Although again reserving all its rights and remedies in the event of a default, however, GECC stated that it had elected to fund Kamine's requested construction loan draw. *Id.*

A similar letter is dated February 27, 1995. Again, GECC recited that it reserved all its rights in the event of a default, but stated that it had elected to fund the February construction loan draw. Def. Ex. O.

On April 13, 1995, GECC sent a letter to Kamine stating that Kamine was in default on its construction mortgage bond payment that had come due on March 31, 1995. GECC stated that it was "terminating its obligation (but not its right)" to make further project loans, and that it was exercising its right to have RG&E's future payments **[*1199]** applied directly to Kamine's obligations to GECC. Def. Ex. P.

Notably, however, GECC added that it was not at that time electing to exercise certain more drastic rights, "including the acceleration of any obligation not already due, the remedy to take possession of or title to all or any material part of the assets of [Kamine], or seek to cause repayment by [Kamine] of moneys not otherwise already **[**10]** due (other than through capture of moneys otherwise available to [Kamine])." *Id.*

Although GECC has exercised some of its rights under the agreement with Kamine, then, it has also displayed a certain hesitation about pursuing its rights to the fullest at the earliest opportunity. The relatively modest steps taken by GECC do not support Kamine's previous assertions at the time of the TRO application, which depicted GECC eager waiting to lower the boom on Kamine at a moment's notice.

At the time that the TRO decision was entered, the purportedly threatened foreclosure was, according to Kamine, only about two weeks away from becoming a reality. That allegedly imminent foreclosure, and Kamine's ensuing bankruptcy, were the basis for my finding that Kamine had demonstrated a serious enough threat of imminent irreparable harm to justify granting the TRO in order to preserve the status quo long enough to decide the motion for a preliminary injunction. Now that additional facts about GECC's actions and intentions have been obtained in discovery and submitted to the court, however, it appears that the threat of foreclosure is less imminent than Kamine alleged previously.

It is understandable **[**11]** why GECC would *not* want to foreclose while litigation is still pending between Kamine and RG&E, both here and in state court. According to Kamine, foreclosure would drive Kamine out of business, leaving GECC in possession of the power plant. There seems to be little incentive at this stage for GECC to want that to happen, however. For one thing, Kamine is a party to the PPA, the continued effectiveness of which represents its (and therefore GECC's) best hope of obtaining at least \$.06 per ("kwh") for the energy produced by the plant.

Without Kamine, then, GECC would be left in the position of taking over the plant faced with the prospect of either running it itself, or attempting to find a new buyer for the plant. The former option would be less attractive than simply allowing Kamine to continue running the plant in the hopes that Kamine would ultimately prevail on its bid to enforce the PPA, especially since RG&E's payments are already going directly to Kamine. By foreclosing and taking over the plant, GECC might accomplish little other than disrupting the plant's operations.

Assuming control of the plant might also make things considerably worse for GECC at this point. In **[**12]** its motion for leave to intervene in a pending FERC proceeding concerning the retroactive waiver of Kamine's QF requirement, GECC states that upon a default by Kamine, GECC has the right to step into Kamine's shoes under the PPA. See Def. Ex. BB at 12. If the reason for Kamine's default were RG&E's refusal to pay the prices set in the PPA, however, GECC might well also find itself stepping into Kamine's shoes in the current litigation with RG&E. Presumably, GECC would prefer to have the brunt (and the cost) of the legal battles with RG&E borne by Kamine. Indeed, GECC's statement in the motion to intervene that GECC had not decided what course it would take if RG&E's interpretation of the PPA *prevails* suggests that GECC, for the time being at least, is content to let the litigation between Kamine and RG&E play itself out completely before GECC takes any decisive steps.

Furthermore, even if Kamine fails in its attempts to enforce the PPA, Kamine would still be able to get the same price for its power that GECC would get if GECC were running the plant itself. Regardless of who runs the plant, then, the price of power is going to be the same. By foreclosing and taking possession **[**13]** of the plant, then, GECC would gain little, and in fact might be worse off.

Trying to sell the plant would be an equally unappealing proposition. The PPA provides that "other than for collateral security **[*1200]** purposes, if the Plant is to be sold to any entity, this Agreement shall be assigned to and assumed by the purchaser ..." PPA at 49. As with GECC, however, a potential buyer who wanted to be assigned Kamine's rights to the PPA price for power produced by the plant would have to consider the possibility of engaging in litigation with RG&E--litigation which had contributed to driving the previous operator of the plant out of business. Naturally this would hardly enhance the market value of the plant.

Of course, if a prospective buyer were willing to sell power at RG&E's avoided cost in order to avoid the costs of litigation, that would also lessen the plant's market value compared to what it was when Kamine entered into its agreement with GECC. Instead of expecting a long-term contract with rates of at least \$.06 per kWh, the buyer might have to settle for shorter-term contracts at a much lower price. Even a newly-negotiated PPA would probably have a lower contract price than Kamine's **[**14]** PPA, since the rates that were used in negotiating the latter were later found by the PSC to have been unrealistically high, and are no longer in effect.

It should also be noted that RG&E has stated its willingness to purchase power from Kamine at RG&E's current avoided cost as set by the SC5. Kamine maintains that this would not suffice for Kamine to meet its obligations to GECC, because the financing arrangements were all based on the assumption that Kamine would receive the PPA price. In light of the facts before me, however, I am not convinced that Kamine has demonstrated that foreclosure would be likely to result, at least in the short term, if it sold power at the SC5 rate. Again, GECC itself could not hope to receive a higher price without engaging in a legal battle with RG&E, the outcome of which would be uncertain.

Furthermore, until the TRO was entered, Kamine simply refused to sell power to RG&E at anything less than the PPA price, so for some time it was not receiving any payments from RG&E at all. As noted, though, GECC showed some restraint in pursuing its remedies against Kamine. If GECC (which, as stated, is now receiving the payments directly) can get at least a **[**15]** limited cash flow from sales at the SC5 rate, it may be even less likely to take drastic action now, while these court actions are pending. Kamine's all-or-nothing approach up until now has left this middle path untested.

Sales at the avoided-cost price, then, might well dissuade GECC from foreclosing, since some cash would be coming in. Certainly the harm would seem to be less imminent than if Kamine sold no power to RG&E at all. In addition, if GECC did not foreclose, any harm that did result to Kamine would be remediable, should Kamine prevail in its litigation with RG&E. If the PPA is found to be enforceable, the harm would simply be that Kamine had not been paid enough by RG&E. That harm could be remedied by the payment of damages by RG&E.

In my March 20, 1995 decision, citing *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969 (2d Cir. 1989), I noted that "the ability of a creditor to foreclose ... can suffice to establish irreparable harm." Decision and Order, Mar. 20, 1995 at 16. However, the above-recited facts, some of which have been revealed in the ensuing discovery, make it less than likely than it previously appeared that the alleged harm to Kamine will in **[**16]** fact occur prior to resolution of the pending lawsuits.

These facts also demonstrate a significant distinction between this case and *Tucker*. In that case, the plaintiffs, who were limited partners in the defendant partnerships, sought to enjoin the partnerships from making payments to the defendant general partner, who the plaintiffs alleged had breached his fiduciary duties. One of the partnerships, which was "effectively insolvent," *id. at 971*, was indebted to a business co-owned by the general partner and another person in the amount of \$ 875,000. The partnership also owed a bank over \$ 2,000,000, due on demand. Based on these particular facts, the Court of Appeals rejected the defendants' argument that the danger of the plaintiffs' bankruptcy (by virtue of their liability for the partnerships' debts) was speculative. The court stated that the combination of the partnership's "precarious financial situation" and the bank's ability to demand immediate

[*1201] payment of its loan gave the general partner "ample incentive" to demand immediate payment of the amount owed to him, so as to limit his own financial exposure by having his loan paid ahead of the bank's. The court concluded [**17] that these facts "made the likelihood of bankruptcy more than merely speculative." [Id. at 975.](#)

As stated, the facts that have been developed in the case at bar have not shown a similar likelihood that GECC will foreclose. It has already displayed some reluctance to take any steps which might drive Kamine out of business or disrupt the operation of the plant, and indeed it seems logically to have little incentive to do so. I conclude, therefore, that the danger of foreclosure and Kamine's ensuing demise is too speculative at this point to justify the issuance of a preliminary injunction.

III. Balance of the Hardships

HN8  Besides irreparable harm, the moving party must either show that it is likely to succeed on the merits or that the balance of hardships tips decidedly in its favor. Kamine has not expressly chosen to proceed under one or the other of these routes, and so the court will address both.

For many of the same reasons that I find that Kamine has not shown a threat of imminent irreparable harm, I do not believe that it has demonstrated that the balance of hardships tips decidedly in its favor. Not only is the alleged harm to Kamine speculative, but RG&E has demonstrated [**18] that it or its ratepayers will be harmed if Kamine's requested injunction is granted. RG&E has submitted evidence, particularly affidavits of Paul G. Rughanis, RG&E's Group Manager of Strategy Development Services, that if it is forced to continue purchasing power from Kamine at the PPA price, it will cost RG&E significantly more money than if RG&E were able to purchase that same power at its actual avoided cost. Rughanis opines that payment of the PPA price will result in excess costs to RG&E of about \$ 57,000 per day, or \$ 20,000,000 per year.²

In the FERC proceeding concerning [**19] Kamine's QF waiver, the PSC has echoed those views. The PSC opposed Kamine's request for a waiver on the ground that the PPA price would force up RG&E's-- and ultimately its ratepayers'--costs by four percent. Def. Ex. G at 5. As noted, harm to the public may properly be considered in deciding a motion for a preliminary injunction. [Long Island R.R. Co., 874 F.2d at 910.](#)

In response to these contentions, Kamine has for the most part not challenged RG&E's figures as such. Instead, Kamine relies primarily on the argument that there can be no "harm" to RG&E because under the PPA, RG&E is paying its avoided cost. Kamine bases this assertion on its argument that under PURPA, avoided costs can be measured either at the time of delivery or at the time the contract was executed. In this case, Kamine states, avoided costs were measured at the time the PPA was entered into, based on the then-existing long-range avoided costs ("LRACs"), which were the PSC's predictions of future avoided costs.

Regardless of how sound a legal principle that may or may not be with respect to PURPA, however, I do not believe it is of much significance in this antitrust action for purposes of determining, [**20] as a factual matter, the relative harm to the two sides that may result from the issuance or denial of an injunction, *pendente lite*. The unavoidable fact is that if RG&E is not forced to pay the PPA price, it can purchase the same energy at its *actual* avoided cost, which bears no relation to the LRACs. In fact, the 1988 LRACs upon which Kamine relies later proved to be so inflated that the PSC withdrew them in 1991 on the ground that they had been "overstated." Kamine's argument is purely semantic and ignores the common-sense meaning of avoided costs in the context of this case.

[*1202] Kamine also argues that RG&E is actually paying far more than \$.06 per kwh for energy from some of its own plants, so that paying Kamine the PPA price will actually save RG&E money. RG&E disputes this assertion.

² Those figures do not appear unreasonable. Assuming a PPA rate of \$.06 per kwh and an avoided-cost rate of \$.02 per kwh under the SC-5 tariff, RG&E would pay an excess of \$.04 per kwh. The nominal capacity of Kamine's plant is 55 megawatts, or 55,000 kw. Purchasing 55,000 kwh of power at an excess cost of \$.04 per kwh would result in a total excess cost of \$ 2200 per hour, which equals \$ 52,800 per day, or \$ 19,272,000 per year.

It appears that the cause of this dispute is a difference of opinion over whether RG&E's fixed costs (*i.e.* costs stemming simply from the existence of a facility, irrespective of the costs of actual energy production) should be figured into the calculation of RG&E's energy costs. Kamine contends that they should be, RG&E that they should not.

I find RG&E's arguments in this regard more **[**21]** persuasive. [HN9](#)[↑] Fixed costs are just that--fixed. As such, they cannot be "avoided." Whether RG&E purchases power from Kamine or not, then, it will still have to bear these fixed costs. It is not logical, therefore, to say that RG&E will somehow save money by buying additional power from Kamine. The proper measure to determine the effect of buying power from Kamine under the PPA is to examine the difference between the PPA price and RG&E's cost of the same amount of power at RG&E's "variable", *cost-i.e.*, the actual cost of the power itself, not counting unavoidable, fixed costs. Kamine has not rebutted RG&E's showing that under that calculation, purchasing power under the PPA will greatly *increase* RG&E's costs for that power.

Kamine also asserts that RG&E is collaterally estopped from raising the whole issue of excess costs by reason of FERC's decision in [New York State Elec. and Gas Corp., 71 F.E.R.C. 61,027 \(1995\)](#) ("NYSEG") (Kamine's App. Tab H). In NYSEG, FERC rejected an argument by a utility (an argument in which RG&E joined as an intervenor) that the utility should not have to pay the contract price for power from a QF if that price exceeded the utility's actual **[**22]** avoided cost. FERC held that the contract price was controlling even if avoided costs had risen unexpectedly.

I am not persuaded by Kamine's argument that this ruling estops RG&E from raising issues concerning excess costs under the PPA. [HN10](#)[↑] For the doctrine of collateral estoppel, or issue preclusion, to apply, the issues involved in the current and prior litigation must be "substantially the same." [ITT Corp. v. United States, 963 F.2d 561, 564 \(2d Cir. 1992\)](#).

The utility's claim in NYSEG was based on PURPA; the utility argued in favor of a literal reading of PURPA's provision that the price paid by a utility for energy from a QF should not exceed the utility's actual avoided cost. RG&E, however, is currently litigating in state court whether, as a matter of state *contract* law, the PPA should be reformed or rescinded. RG&E is not arguing that the PPA price is invalid under PURPA.

Thus, the issues in NYSEG and in the state court action are not substantially the same. RG&E's present dispute with Kamine is basically about New York contract law, not PURPA. Since the legal issues therefore turn upon fundamentally different bodies of law, RG&E is not estopped from arguing **[**23]** in this court that the excess cost imposed by the PPA may be considered in assessing the harm that would result from the issuance of an injunction. Based on the evidence presented, I find that RG&E would be harmed by an injunction, and that the balance of hardships does not tip decisively in Kamine's favor.

IV. Likelihood of Success

In the TRO I stated that "there were serious questions going to the merits to make them a fair ground for litigation." Decision and Order, Mar. 20, 1995 at 18. I also noted, however, that [HN11](#)[↑] the more serious and imminent the potential harm to the movant, the less need there is for the movant to show a likelihood of success on the merits. *Id.* at 14, 17. It is clear from the language of the TRO that the primary reason for granting the TRO was not that Kamine was likely to succeed on the merits, but that, if Kamine's allegations were true, it was "faced with imminent, irreparable injury" which suggested that "at the very least, the situation should be preserved long enough for the court to decide the motion for a preliminary injunction." *Id.* at 15.

I also noted in the TRO decision, however, that "many of the facts have yet to be proved ..." **[**24]** **[*1203]** *Id.* at 18. As the preceding discussion explains, the evidence that has been produced during discovery and submitted to the court in connection with the motion for an injunction suggests that the potential harm to Kamine may not be as imminent or catastrophic as it previously alleged. That being so, whether Kamine is likely to succeed on the merits becomes of correspondingly greater concern.

I find that Kamine has not demonstrated a likelihood of success on the merits in this litigation. The fundamental difficulty with Kamine's case is that whatever the merits of its contentions regarding PURPA and state contract law, this action is predicated not on PURPA or contract law, but on the antitrust laws. Kamine has simply not shown that it is likely to succeed on an antitrust theory.

The basic thrust of Kamine's antitrust allegations is that RG&E has a monopoly in its geographic area as a producer and seller of electric power, and that RG&E wants to maintain that monopoly by preventing new producers or sellers from entering the market. Having failed thus far to prevent Kamine from entering the market (insofar as Kamine is now selling power to RG&E), RG&E is allegedly trying to drive [**25] Kamine out of business by its actions.

The principal means by which RG&E is doing this, Kamine alleges, is RG&E's use of its monopsony power as a buyer of wholesale electric power within RG&E's geographic area. Kamine contends that this monopsony power allows RG&E to demand a predatory price from Kamine, *i.e.*, a price below that which Kamine needs if it is to survive.

Kamine's allegations, however, fail to indicate a truly anticompetitive effect as a result of RG&E's actions. [HN12](#)[¹] The chief danger associated with monopsony power--market power on the buying side of the market--occurs when a company has significant market power both "upstream" and "downstream," meaning that the company can control the level of demand for the product that it buys and the level of supply for the product that it sells to its own buyers. Such a market position allows the company to demand a low price from its suppliers while simultaneously raising the prices it charges its buyers.³

[**26] The problem with this type of monopsony power, then, is that ultimately it can injure consumers by forcing up the price of the end product. [HN13](#)[¹] Where the risk of that happening is slight or nonexistent, however, monopsony power *per se* does not create an antitrust concern. IIA Areeda, *supra*, P 574 at 300 (citing [Kartell v. Blue Shield of Massachusetts](#), 749 F.2d 922, 930-31 (1st Cir. 1984), cert. denied, 471 U.S. 1029, 85 L. Ed. 2d 322, 105 S. Ct. 2040, 105 S. Ct. 2049 (1985)).

There is little evidence here that RG&E's alleged use of its monopsony power poses a threat of increased consumer prices. In fact, the evidence suggests the opposite--that paying the price under the *PPA*, which Kamine demands, will drive up the cost to the ratepayer. Furthermore, although RG&E does possess both upstream and downstream power in the energy market, its position is not analogous to that of a manufacturer of goods that can simply reduce its output in order to increase its price. As a state-regulated utility, RG&E cannot unilaterally reduce its output of electric power to the point where consumers are willing to pay an exorbitant price. If anything, if RG&E's own cost of power drops, [**27] it would have greater difficulty justifying approval of a rate increase. See IIA Areeda, *supra* at 300 (noting that "if selling prices are regulated, they may fall as costs fall").

A further weakness with Kamine's case is that it is based more on alleged violations of PURPA than of the antitrust laws. Although actions that violate PURPA could conceivably violate the antitrust laws as well, [*1204] they are not the same thing, and one does not necessarily flow from the other. Even if Kamine's allegations that RG&E has violated PURPA are true, that does not mean that RG&E has acted in an anticompetitive manner.

PURPA itself makes little mention of antitrust laws, other than the following statement contained in [16 U.S.C. § 2603\(1\)](#):

³ One commentator gives the following illustration:

For example, suppose bauxite is an indispensable element for making aluminum, that bauxite has no other use and that the defendant is the sole producer of aluminum. The defendant necessarily has monopsony power in the bauxite market. If he tries to force down the bauxite price by buying less--say, from the competitive level of 1,000 units to 800 units--he cannot make as much aluminum as before, and thus its selling price must rise.

HN14[] Nothing in this Act or in any amendment made by this Act affects--

- (1) the applicability of the antitrust laws to any electric utility or gas utility ...

This statement, then, indicates that while PURPA was not intended to *protect* utilities from the reach of the antitrust laws, neither was it meant to *create* antitrust liability where none existed previously. In short, PURPA was designed to be antitrust-neutral. As it states, it does **[**28]** not directly affect the applicability of the antitrust laws one way or the other.

This conclusion is also reinforced by the legislative history of PURPA, which reveals that Congress's motive in creating PURPA was not to foster competition in the utility industry, but to deal with a perceived energy crisis.

The Supreme Court analyzed the legislative history and objectives of PURPA at some length in FERC v. Mississippi, 456 U.S. 742, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982). The Court noted that at the time PURPA was enacted, "committees in both Houses of Congress noted the magnitude of the Nation's energy problems and the need to alleviate those problems by promoting energy conservation and more efficient use of energy resources. Congress was aware that domestic oil production had lagged behind demand and that the Nation had become increasingly dependent on foreign oil." Id. at 756 (citations omitted). The Court also noted that PURPA's provisions encouraging the development of cogeneration facilities were intended to "reduce the demand for traditional fossil fuels," Id. at 750. "Congress also determined that the development of cogeneration and small power production facilities **[**29]** would conserve energy." Id. at 757.

Thus, it is clear that the policies underlying PURPA are quite distinct from those underlying the antitrust laws. PURPA was created as a vehicle to reduce the nation's dependency on foreign oil and to conserve energy, not to foster competition.

Arguably, of course, the encouragement of the creation and development of cogeneration facilities and other alternative-energy sources would also promote competition in the power industry, inasmuch as new energy producers would enter the market. Nonetheless, it cannot be gainsaid that, while increased competition might be a *byproduct* of PURPA, it is not its *purpose*. In enacting PURPA, Congress was not concerned with fostering competition for competition's sake, but with energy conservation. As another court put in a case also involving both PURPA and the antitrust laws:

In establishing PURPA, ... Congress did not intend to place qualifying facilities in competition with public utilities. To the contrary, Congress has sought to encourage the development of qualifying facilities by insulating them from competition. ... In general, qualifying facilities produce a component which is used by public **[**30]** utilities and consume utility service; but, they are not competitors of public utilities.

Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1373 (N.D.Ga. 1986), aff'd, 844 F.2d 1538 (11th Cir. 1988).

Although it does not appear that any reported case has yet dealt with the precise type of antitrust claim raised in this case, there are some cases that have discussed the relationship between PURPA and the antitrust laws. In Environmental Action, Inc. v. FERC, 291 U.S. App. D.C. 229, 939 F.2d 1057 (D.C.Cir. 1991), several parties petitioned the court to set aside a FERC decision that approved a merger between two power companies on the condition, *inter alia*, that the new firm would be required to "wheel," i.e. transmit, power for any utility that requested it, other than QFs. The court held that the exclusion of QFs from the wheeling requirement was arbitrary and capricious, and remanded to FERC for further consideration.

[*1205] One rationale advanced by FERC for excluding QFs was that affording QFs mandatory wheeling access would give them an unwarranted competitive preference over other utilities by enabling QFs to force distant utilities other than **[**31]** their own "native" utility (such as RG&E is to Kamine) to buy their power. The court found this unpersuasive because HN15[] under PURPA, a "QF may force a sale only at the purchasing utility's avoided cost." 939 F.2d at 1061 (citing 16 U.S.C. § 824a-3(d)). Thus, the court reasoned, a QF would only have an advantage over its competitors if it produced energy at a lower cost than they did; that might harm the QF's

competitors, but not *competition*. The court also noted that "such advantage as a QF may have stems directly from the Congress's policy choice to encourage the sale of power by QFs rather than by traditional utilities." *Id. at 1062*.

Several points raised by the *Environmental Action* court are particularly salient with respect to the instant case. The first is the court's reasoning that QFs would not have an unfair advantage over other utilities because under PURPA, QFs could charge *no more* than the buyer's avoided cost. That, however, is exactly the opposite of the situation in the case at bar. Here, the avoided cost is precisely what RG&E seeks to pay. It is Kamine that wants to force RG&E to pay *more* than its avoided cost by using the LRACs that have long [**32] since been recognized as grossly inflated. It is obvious that what the court was saying in *Environmental Action* was that allowing QFs wheeling access would not hurt competition because they could not charge more than the buyer's *actual* avoided cost *i.e.*, the price charged by the QFs' competitors. If a QF could not produce energy as efficiently as its competitors, it would actually find itself at a disadvantage.

In contrast, to allow a QF, such as Kamine, to charge more than the buyer's actual avoided cost would give it a leg up on non-QF producers. The QF could produce energy relatively less efficiently and still make the same or a greater profit than its competition because the buyer would be forced to pay an above-market price.

Of course, such protection is to some extent envisioned by PURPA. Again, however, it must be borne in mind that this case is not about PURPA directly, but about the antitrust laws, which are meant to protect competition, not individual competitors. *K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)). [**33] However consonant with PURPA's aims it may be to shield a QF like Kamine from price competition, that end is not something that the antitrust laws were designed to protect.

That, in fact, is the second noteworthy point about the *Environmental Action* decision. The court noted that the interests served by PURPA's special protection of QFs "may or may not be wholly consistent with the antitrust laws ..." *Id.* (emphasis added). However, the court added, "being specifically relevant to that case it deserved at least as much consideration as the general interests embodied in the antitrust laws ..." *Id.* FERC, the court said, had not considered the interests served by PURPA at all. *Id.*

This reasoning, though compelling under the facts of *Environmental Action*, was expressed in the context of a situation quite distinguishable from the case at bar. *Environmental Action* involved a decision by FERC--an agency expressly charged in PURPA with the enforcement of that Act, see [16 U.S.C. § 824a-3](#)--to approve a merger of utility companies. As a primary enforcer of PURPA, FERC obviously could not ignore the policies underlying that statute. The instant case, on the other [**34] hand, is grounded in the antitrust laws. Conversely to *Environmental Action*, then, while the policies underlying PURPA may not be irrelevant to this action, it is the interests sought to be advanced by the antitrust laws that are of paramount importance here.

The district court's decision in [Greensboro Lumber](#), 643 F. Supp. 1345, contains an extensive and penetrating analysis of the interplay between PURPA and the antitrust laws. In *Greensboro Lumber*, a lumber company that operated a cogeneration facility alleged [*1206] that the defendants, various electricity producers and buyers, had acted improperly both in response to its attempts to sell power to them, and in response to its requests to purchase back-up power from them. The plaintiff alleged that certain power sales contracts among the defendants precluded it from competing in the energy transmission and wholesale markets, in violation of both the antitrust laws and PURPA.

The district court granted the defendants' motion for summary judgment, laying considerable stress on the fact that the plaintiff insisted on charging prices for its excess energy which were considerably higher than the defendants' avoided costs. Noting [**35] that Congress had expressly provided in PURPA that utilities should not pay QFs a price in excess of the utility's avoided cost see [16 U.S.C. § 824a-3\(b\)](#), the court stated that

this provision was enacted because PURPA was 'not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers.' H.R. Rep. No. 1750, 95th Cong., 2d Sess. at 98, reprinted in 1978 U.S. Code Cong. & Ad. News at 7832. The congressional purpose in limiting the price to qualifying facilities

was to ensure that PURPA did not become a utility-funded welfare program for qualifying facilities, since such "funding" would essentially come from the pockets of electric consumers.

Id. at 1369 n. 30.

The court also pointed out that one of the defendants, Oglethorpe, had offered to buy the plaintiff's excess energy at the same rate that Oglethorpe paid Georgia Power, its main supplier, under FERC-approved tariffs, but that the plaintiff had refused. The court said that

it flies in the face of reason to think that either Oglethorpe or the EMCs [the cooperatives which together comprised Oglethorpe] would be willing to pay Greensboro more for its energy [**36] and capacity than it could pay to Georgia Power for equivalent power. Nothing in the antitrust laws requires the Oglethorpe Group to pay Greensboro more for its power when the same power may be purchased from Georgia Power or others for less. ... Having been offered a price which is above the market rate as a result of FERC's regulations,⁴ Greensboro is in no position to demand a still higher price under any antitrust theory.

Id. at 1368-69.

In addition to these cases, [HN16](#)[] a number of other antitrust cases not involving utilities have held that refusing to pay an above-market price does not constitute antitrust activity. As noted earlier, [HN17](#)[] PURPA [**37] does not affect the applicability of the antitrust laws. [16 U.S.C. § 2603\(1\)](#). Thus, the principles set forth in these antitrust cases, which involve a variety of factual situations, are no less applicable here than they would be in any other antitrust case.

In [First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 279, 20 L. Ed. 2d 569, 88 S. Ct. 1575 \(1968\)](#), for example, a Sherman Act case, the Supreme Court, affirming summary judgment for the defendant on the plaintiff oil dealer's boycott claim based on the oil company's refusal to purchase plaintiff's oil at a specified price, stated that "obviously it would not have been evidence of conspiracy if [defendant] refused to deal with [plaintiff] because the price at which he proposed to sell oil was in excess of that which oil could be obtained from others."

Likewise, in [AT&T v. Delta Comm. Corp., 408 F. Supp. 1075, 1101 \(S.D.Miss. 1976\)](#), aff'd, [579 F.2d 972 \(5th Cir. 1978\)](#) (per curiam), aff'd on rehearing, [590 F.2d 100 \(5th Cir. 1979\)](#), the district court stated that [HN18](#)[] where an alleged anticompetitive conspiracy "is predicated on a failure to buy a service worth money for a moneys worth price, the plaintiff [**38] has the burden of demonstrating that his product has some value above the price paid or offered." The court further refused to recognize any "inference of conspiracy or anticompetitive activity" arising out of "a refusal [^{*}1207] to buy a product or service for more than it is worth," [id. at 1090 n. 29](#), stating that any additional payment "would have been a gift," and that the "Sherman Act does not command gratuitous compensation." [Id. at 1092.](#)

The fact that the utility industry is highly regulated by the state and federal governments is also significant. Several [HN19](#)[] courts have expressed the view that the ability of government regulation to keep monopolization power in check tends to minimize whatever dangers to the public might otherwise exist as a result of anticompetitive activity. [Westchester Radiological Associates P.C. v. Empire Blue Cross and Blue Shield, 707 F. Supp. 708](#) (S.D.N.Y.), aff'd, [884 F.2d 707 \(2d Cir. 1989\)](#) (per curiam), for example, was an antitrust action by hospital-based radiologists against an insurance company, whose contracts with its client hospitals provided that the radiologists could not bill patients directly for their services, but were limited to [**39] the amounts paid by the insurer to the hospitals for those services. The plaintiffs alleged that this arrangement "unnaturally" limited how much they could charge for their services. The court granted summary judgment for the insurer, stating that the insurer was "simply acting as a rational buyer attempting to get the best possible terms for its subscribers." [Id. at 713.](#) Noting that the state set the

⁴ The court noted that under "pure" market conditions, a seller would ordinarily have to offer a price somewhat lower than the price that the buyer is paying to his current supplier; otherwise, the buyer would have no incentive to switch suppliers. FERC-mandated prices are therefore above-market in comparison with pure market prices. [Id. at 1368 n. 28.](#)

reimbursement rate that the insurance company could pay to hospitals for patient care, the court said that "the state's supervision suggests that novel judicial applications of antitrust law are unlikely to be required to prevent Blue Cross from abusing its market power." *Id. at 714*.

The court in *Kartell*, 749 F.2d 922, expressed similar views in an action brought by physicians who claimed that the defendant insurance company's ban on "balance billing," i.e. billing a patient for amounts over the amount of the insurer's payment to the physician, violated the Sherman Act. Vacating the district court's injunction in favor of the plaintiffs, the court stated that HN20[¹] "where monopoly power is regulated, the regulator, not the court, bears the burden of determining whether prices [**40] are reasonable." *Id. at 928* (citing as examples state statutes pertaining to regulation of gas and electric rates). The court pointed out that "the price system here at issue is one supervised by state regulators," and that "while that fact does not automatically carry with it antitrust immunity, it suggests that strict antitrust scrutiny is less likely to be necessary to prevent the unwarranted exercise of monopoly power." *Id. at 931* (citation omitted). The court concluded that the insurance company, as a buyer of the physicians' services on behalf of its customers, "seemed simply to be acting as every rational enterprise does, i.e., [to] get the best deal possible." *Id. at 929-30* (quoting *Travelers Ins. Co. v. Blue Cross of Western Pennsylvania*, 481 F.2d 80, 84 (3d Cir.), cert. denied, 414 U.S. 1093, 38 L. Ed. 2d 550, 94 S. Ct. 724 (1973)).

The same principles apply here. As stated, the utility industry is heavily regulated by both the state and federal governments. Historically, those governments have allowed some monopoly power to exist in the industry, and that is probably part of the reason why prices in particular are subject to government regulation [**41] and approval. See, e.g., *N.Y. Pub. Serv. L. § 66* (setting forth powers of PSC with respect to rates). As the courts stated in *Kartell* and *Westchester Radiological Associates*, that supervisory power suggests that an expansive application of the antitrust laws is not appropriate here.

I conclude, therefore, that Kamine has not shown a likelihood of success on the merits in this action. It simply does not appear that the effect of RG&E's refusal to pay more than its actual avoided cost would have an anticompetitive effect. HN21[¹] "The antitrust laws do not prohibit a buyer from bargaining for the best deal possible." *Brillhart v. Mutual Med. Ins. Inc.*, 768 F.2d 196, 201 (7th Cir. 1985). That is all that RG&E is seeking to do-- get the best deal possible under *market*, i.e., competitive, conditions. The PPA, which Kamine is attempting to enforce, was not created as a result of market forces or a competitive process; it is a creature of a statutory scheme set up for reasons that have nothing to do with competition *per se*. From an economic standpoint, the PPA is little more than a "shotgun marriage" [*1208] in which the PSC was holding the trigger.

As I noted in my TRO decision, [**42] the PPA does not allow RG&E simply to walk away from the contract, but requires it to seek judicial review. That, however, is what RG&E is now attempting to do in state court. At any rate, whether RG&E has breached the PPA or not, Kamine has not sufficiently demonstrated an *antitrust* injury to warrant issuance of the injunction it seeks. The requested injunction might protect a competitor, but it is difficult to see how it would protect competition.

The fundamental dispute between the parties, then, concerns the interpretation and enforceability of the PPA. Those are matters relating to PURPA and to common-law contract principles. The mere fact that one of the parties to this dispute is a utility with a state-sanctioned monopoly does not automatically transform this contract dispute into an antitrust matter. There has to be a showing of unlawful, anticompetitive behavior, and on the evidence presented, I do not find a likelihood that Kamine will succeed in making that showing.

V. Bond Requirement Under Fed. R. Civ. P. 65(c)

Additionally, I note that under *Rule 65(c) of the Federal Rules of Civil Procedure*, HN22[¹] "no restraining order or preliminary injunction shall issue except [**43] upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Although I dispensed with the bond requirement in my TRO decision, I did so principally on the ground that the relatively short duration of the order meant that any possible overpayment by RG&E "during this purely temporary period of injunctive relief was unlikely to be so substantial that it could not be rectified at a later date." Decision and Order, Mar. 20, 1995, at 31. I also noted that

Kamine was financially not in a position to post a bond satisfactory to RG&E. *Id.* At oral argument on the preliminary injunction motion, Kamine reaffirmed that a bond which would protect RG&E in the event that the injunction were found to have been improvidently granted would have to be so large that "we [*i.e.*, Kamine] can't post it."

Although it is not my primary reason for denying Kamine's motion for a preliminary injunction, I believe that Kamine's inability to post a bond adds further support to my decision. As noted, the main reason for waiving a bond [**44] in the TRO was that the relief would be of short duration. As I stated at oral argument of the preliminary injunction motion, however, the matter remained "still of concern" to me, and I considered it "still a very viable issue here."

That concern is heightened by the fact that a preliminary injunction might remain in effect for a considerable period of time. Although the parties have stipulated so far to have the TRO remain in effect pending my decision on the motion for an injunction, absent such a stipulation [HN23](#)[⁵] a TRO ordinarily expires within ten days. [Fed. R. Civ. P. 65\(b\)](#). [HN24](#)[⁵] Preliminary injunctions, however, have no such time limit, and in fact are of "potentially unlimited duration." [Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70, 415 U.S. 423, 432 n. 7, 39 L. Ed. 2d 435, 94 S. Ct. 1113 \(1974\)](#). The alleged harm here to RG&E--paying more than it should for power from Kamine--is not constant, but continues to increase with each passing day, as the total alleged overpayment mounts higher. That situation also increases the possibility that, in the event that the injunction is later found to have been improvidently granted, the amount owed to RG&E by Kamine will have [**45] grown so large that it will be impossible for RG&E to be made whole. The danger of that happening, then, simply adds to the factors weighing against granting the injunction in this case.

CONCLUSION

Plaintiff's motion for a preliminary injunction is denied in part and granted in part.

Plaintiff's motion for a preliminary injunction is denied in all respects except to the extent that defendant, RG&E, has agreed [*1209] to purchase power from plaintiff, *pendente lite*, at the current tariff rate (SC5 rate).⁵

IT IS SO ORDERED.

DAVID G. LARIMER

UNITED STATES [**46] DISTRICT JUDGE

Dated: Rochester, New York

November 2, 1995.

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⁵ RG&E has maintained throughout the pendency of the preliminary injunction motion that it is willing to purchase power from Kamine at its actual avoided cost as measured by the SC5 rate. See, e.g. RG&E's Sur-Reply Memorandum in Opposition to Plaintiff's Motion at 17. That willingness has also been a substantial factor in my decision to deny Kamine's motion for a preliminary injunction, particularly with respect to the issue of irreparable harm.

Coleman v. Cannon Oil Co.

United States District Court for the Middle District of Alabama, Southern Division

November 3, 1995, Decided ; November 3, 1995, FILED, ENTERED

CIVIL ACTION NO. 90-T-414-S

Reporter

911 F. Supp. 510 *; 1995 U.S. Dist. LEXIS 19750 **; 1996-1 Trade Cas. (CCH) P71,310

T. R. COLEMAN, et al., Plaintiffs, v. CANNON OIL COMPANY, et al., Defendants.

Subsequent History: [**1] As Corrected March 14, 1996.

Core Terms

plaintiffs', attorney's fees, prevailing, expenses, gasoline, retail, injunction, reputation, skilled, cases, rates, anti trust law, lodestar, damages, lawsuit

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

[HN1](#) [down arrow] Antitrust & Trade Law, Clayton Act

Sections 4 and 16 of the Clayton Act provide for the recovery of reasonable attorney's fees to prevailing litigants. Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws shall recover the cost of suit, including a reasonable attorney's fee." 15 U.S.C.S. § 15. Section 16 provides that, "In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." 15 U.S.C.A. § 26.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

[HN2](#) [down arrow] Attorney Fees & Expenses, Reasonable Fees

The "starting point" in setting an attorney's fee is to determine the "lodestar" figure--that is, the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. The fee applicant bears the burden of "establishing entitlement and documenting the appropriate hours and hourly rates." After calculating the lodestar fee, the court should then proceed with an analysis of whether any portion of this fee should be adjusted upward or downward.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN3 Attorney Fees & Expenses, Reasonable Fees

In setting an award of attorney's fees a court is guided by the twelve factors. These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the clients; and (12) awards in similar cases.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN4 Attorney Fees & Expenses, Reasonable Fees

A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation. To determine the prevailing market rate, the court will consider the following Johnson factors: customary fee; skills required to perform the legal services properly; the experience, reputation, and ability of the attorneys; time limitations; preclusion of other employment; undesirability of the case; nature and length of the professional relationship with the clients; and awards in similar cases.

Counsel: For T. R. COLEMAN, et al., PLAINTIFFS: Edward M. Price, Jr., Dothan, AL. Rufus R. Smith, Jr., Dothan, AL. L. Andrew Hollis, Jr., Jeffrey C. Kirby, Birmingham, AL. Kenneth Millwood, Aaron Watson, Scott Tippett, John Latham, Sylvia Kochler, Valerie Verduse, Atlanta, GA. Edward C. Brewer, Atlanta, GA.

For Southeastern Oil, McGee Oil, A.W. Hernoan Oil Company, Inc., Defendants: W. Terry Travis, Dennis Pierson, George L. Beck, Jr., Montgomery, AL. For Home Oil, Thomas Shirley, Defendants: Joseph Mays, Jr., David Hymer, Cada Carter, Birmingham, AL. For Graceville Oil Co., Defendant: Charles L. Robinson, David Proctor, Birmingham, AL. For Sheffield Oil Co., Defendant: C. H. Espy, Jr., Dothan, AL. For Cannon Oil, Vernon Cannon, Defendants: T. E. Buntin, Jr., Dothan, AL, Thomas S. Lawson, James N. Walter, Montgomery, AL. For Sunshine Jr. Food Stores, Defendant: J. Riley Davis, Tallahassee, FL. For Sunshine Jr. Food Stores, Defendant: J. Riley Davis, Tallahassee, FL. For Davis & Harp Oil Co., Herndon Oil Co., Defendants: Ezra B. Jones, III, Atlanta, GA.

Judges: Myron H. Thompson, UNITED STATES DISTRICT JUDGE

Opinion by: Myron H. Thompson

Opinion

[*511] ORDER

Plaintiffs, who are individual gasoline consumers, brought this class-action ****2** lawsuit charging that defendants, who are retail sellers of gasoline, violated federal antitrust laws by conspiring to fix gasoline prices in Dothan, Alabama. Plaintiffs are: T. R. Coleman; Bernard J. Petit; and R. L. and Lucy Middleton. Defendants include: Rodney Parrish; Cannon Oil Company; Thomas Shirley and his company, Home Oil Company; and James Sheffield and his company, Sheffield Oil Company. Plaintiffs sought damages and injunctive relief under [§ 1](#) of the Sherman Act, [15 U.S.C.A. § 1 \(West Supp. 1995\)](#), and [§ 4](#) and [§ 16](#) of the Clayton Act, [15 U.S.C.A. §§ 15, 26 \(West Supp. 1995\)](#). Plaintiffs properly invoked the court's jurisdiction pursuant to [28 U.S.C.A. §§ 1331, 1337 \(West 1993\)](#). After a

month-long trial, a jury found that defendants had engaged in illegal price fixing but awarded only nominal damages of one dollar. Also, based upon the jury's findings, the court entered an injunction against defendants.

This lawsuit is again before the court, this time on plaintiffs' motions for award of attorney's fees and expenses in the amount of \$ 4,698,913.44 from defendants.¹ For the reasons [*512] given below, the court concludes that plaintiffs may recover \$ 2,035,658.00 [**3] in attorney's fees. The issue of plaintiffs' expenses will be addressed in a later, separate order.

I. BACKGROUND

Plaintiffs filed this lawsuit on April 19, 1990, charging several persons and their businesses with conspiring to fix the retail price of gasoline in Dothan, Alabama. The original defendants consisted of the following: Sunshine-Jr. Stores; Rodney Parrish; Vernon Cannon and his company, Cannon Oil Company; Thomas Shirley and his company, Home Oil Company; and James Sheffield and his company, Sheffield Oil Company; Southeastern Oil Company, Inc.; Davis & Harp Oil Company, Inc.; Herndon Oil Company, Inc.; Beard Oil Company; A. W. Herndon and his company; A. W. Herndon Oil Company, Inc.; McGee Oil; and Graceville Oil Company, [**4] Inc. The court certified a plaintiff class for "damages" consisting of "all individuals and entities who made retail purchases of gasoline from the defendants in the Houston County, Alabama area since April 15, 1986."² The court dismissed Beard Oil Company³ and entered summary judgment in favor of Southeastern Oil Company, Davis & Harp Oil Company, Herndon Oil Company, and McGee Oil Company.⁴ The plaintiffs settled their claims against Graceville Oil Company⁵ and against A. W. Herndon and his company, A. W. Herndon Oil Company.⁶ Vernon Cannon died after this lawsuit was filed, and the executrix of his estate replaced him as a defendant.⁷ For ease of discussion, however, the court will continue to refer to Vernon Cannon as a defendant.

[**5] This case went to trial as to the remaining defendants: Sunshine-Jr. Stores, Rodney Parrish, Vernon Cannon and Cannon Oil Company, Thomas Shirley and Home Oil Company, and James Sheffield and Sheffield Oil Company. A jury found that these defendants had engaged in illegal price fixing and that they should pay nominal damages of one dollar. The court set aside the jury's verdict as to Sunshine-Jr. Stores, and entered an injunction, to expire on November 19, 1996, prohibiting all remaining defendants, except Vernon Cannon, "from agreeing, directly or indirectly, to fix the retail price of gasoline in Dothan, Houston County, Alabama."⁸ The court later supplemented this injunction to require these defendants to do the following: to deliver a copy of this order to all of their current and future officers and employees engaged in the retail sale of gasoline in Dothan, Alabama; to adopt written personnel policies and procedures to help assure that each defendant and its employees engaged in the retail sale of gasoline in Dothan do not engage in price fixing in the future; and to conduct a training session to educate its

¹ The court has included only those fees sought by plaintiffs in their current fee petition filed on February 11, 1994, and in their brief filed on February 22, 1994. Should the plaintiffs prevail on appeal, the court will then consider all additional requested fees and expenses.

² *Coleman v. Cannon Oil Co., 141 F.R.D. 516, 519 (M.D. Ala. 1992)*. The court, however, denied plaintiffs' request to certify a plaintiff class with regard to "injunctive relief." *Id.*

³ Order of March 4, 1993.

⁴ Order of January 30, 1992.

⁵ Order of June 17, 1992.

⁶ Order of April 20, 1993.

⁷ First, Vernon Cannon's widow, Metha Jean Cannon, replaced him as a defendant in her capacity as executrix of his estate, and later, Pamela C. Weathers replaced Cannon's widow as a defendant in her capacity as executrix of his estate.

⁸ *Coleman v. Cannon Oil Co., 849 F. Supp. 1458, 1473 (M.D. Ala. 1993).*

officers and employees about the Sherman Act's prohibition on price [**6] fixing.⁹ Plaintiffs also recovered \$ 85,112.44 in court costs.¹⁰

Plaintiffs now seek \$ 4,698,913.44 in attorney's fees and additional expenses from all remaining defendants except Vernon Cannon.¹¹ Because plaintiffs' submissions contain [*513] several arithmetical but, relatively speaking, minor errors, it is impossible to state how they arrived at this precise figure. It is nevertheless still possible to calculate the total fees which they should receive.

[**7] II. DISCUSSION

HN1[[Sections 4](#) and [16](#) of the Clayton Act provide for the recovery of reasonable attorney's fees to prevailing litigants. [Section 4](#) provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws ... shall recover ... the cost of suit, including a reasonable attorney's fee." [15 U.S.C.A. § 15 \(West Supp. 1995\)](#). And [§ 16](#) provides that, "In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." [15 U.S.C.A. § 26 \(West Supp. 1995\)](#).

HN2[The "starting point" in setting an attorney's fee is to determine the "lodestar" figure--that is, the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. [Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 \(1983\)](#). Accord [Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1299 \(11th Cir. 1988\)](#). The fee applicant bears the burden of "establishing entitlement and documenting the appropriate hours and hourly rates." [Id. at 1303](#). After calculating the lodestar fee, the [**8] court should then proceed with an analysis of whether any portion of this fee should be adjusted upward or downward.¹² [Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565-66, 106 S. Ct. 3088, 3098, 92 L. Ed. 2d 439 \(1986\)](#); [Hensley, 461 U.S. at 434, 103 S. Ct. at 1940](#).

In making the above determinations, **HN3**[the court is guided by the twelve factors set out in [Johnson v. Georgia Highway Express, 488 F.2d 714, 717-19 \(5th Cir. 1974\)](#). See [Delaware Valley, 478 U.S. at 564, 106 S. Ct. at 3097-98](#); [Norman, 836 F.2d at 1293](#).¹³ These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of [**9] other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the clients; and (12) awards in similar cases.

A. Reasonable Hours

Plaintiffs' counsel have requested compensation for a total of 9,447.6 hours, as follows:

⁹ Order of November 2, 1995.

¹⁰ Orders of January 20, 1994, and December 6, 1993.

¹¹ Plaintiffs' brief filed on February 22, 1994, at 20. Plaintiffs also sought to recover attorney's fees and expenses from the executrix of Vernon Cannon's estate, but by orders entered on November 2, 1995, and January 30, 1992, the court held that they could not.

¹² In [Bonner v. Prichard, 661 F.2d 1206, 1209 \(11th Cir. 1981\)](#) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

¹³ It is presumed that most or all of the *Johnson* factors will be subsumed in the calculation of the lodestar. [Norman, 836 F.2d at 1299](#); see also [Hensley, 461 U.S. at 439 n.9, 103 S. Ct. at 1940 n.9](#).

ATTORNEYS	HOURS
Eugene A. Beatty	220.8
Ed C. Brewer, III	1151.6
Albert A. Chapar	276.3
B. Shane Clanton	82.6
James H. Davis	61.5
L. Andrew Hollis, Jr.	¹⁴ 1659.9
Ernest H. Hornsby	55.8
Kevin H. Hudson	511.8
Jeffrey C. Kirby	195.4
Sylvia K. Kochler	246.7
Archie C. Lamb, Jr.	17.0
John L. Latham	1985.8
Kenneth L. Millwood	639.8
Beth M. Myler	128.9
Edward M. Price, Jr.	151.5
Rufus R. Smith, Jr.	1615.7
Brian G. Smooke	188.3
Aaron Watson	251.2
Joel W. Weatherford	7.0

[**10] [*514] Each attorney has submitted itemized documentation of the time he or she has devoted to this case. The court has considered two *Johnson* factors--the novelty and difficulty of the case, and the amount involved and the result obtained--in assessing the reasonableness of the hours claimed.

[**11] There can be no question that this case presented extremely complex and difficult legal and factual issues. The case took a month to try and consisted of extensive expert testimony, documentary evidence, and anecdotal testimony. It posed sensitive and complex legal questions of how law and public policy are to work within the context of *antitrust law*. See *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1473 (M.D. Ala. 1993) (upholding jury verdict as to all defendants except Sunshine-Jr. Stores and imposing injunctive relief as to all remaining defendants except Vernon Cannon). There can also be no question that defendants mounted an aggressive and formidable defense.

Nevertheless, plaintiffs prevailed greatly. First, as this court has previously noted, "the defendants--that is, Cannon, Parrish, Shirley, and Sheffield and their employees--ceased their illegal price-fixing activity only after this lawsuit was filed. It was this litigation alone that brought an end to their illegal conduct." *Coleman*, 849 F. Supp. at 1471. Second, plaintiffs secured an injunction "prohibiting defendants from 'agreeing, directly or indirectly, to fix the retail price of gasoline in Dothan, Houston [**12] County, Alabama' ... [and] requiring that defendants take affirmative steps to undo their price-fixing conspiracy." *Id.* At 1473. And the fact that plaintiffs recovered only nominal damages does not detract from the enormity and importance of their victory. "That a defendant's illegal price-fixing activity may not in the past have resulted in unreasonable prices and may not even result in the future in unreasonable prices does not mean that the public does not need protection. The injury to the public is merely in the individual acquiring 'The power to fix prices.' *[United States v.] Trenton Potteries Co.*, 273 U.S. [392,] 397, 47 S. Ct. [377,] 379 [(1927)]. It does not matter whether that power is 'reasonably exercised or not.' *Id.*" *Coleman*, 849 F. Supp. at 1472.

¹⁴ There is some confusion about Hollis's number of hours. In their brief filed on February 22, 1994, at 21, plaintiffs stated that he had 1,669.3 hours. In their brief filed on March 4, 1994, at 4 n.4, Shirley and Home Oil Company stated that he had only 1660.3 hours. And in their brief filed on April 4, 1994, at 20, plaintiffs stated that he had 1659.9 hours. The court has used this last, lowest figure.

The court adds that none of the figures--1,669.3, 1660.3, or 1659.9--explains how plaintiffs arrived at a "corrected" total of \$ 494,645.00 for the entire Hollis firm, as reflected in plaintiffs' brief filed on February 22, 1994, at 18. However, as stated earlier, despite these arithmetical mysteries, the court has still been able to arrive at a reasonable total fee.

The court has conducted a detailed and independent review of the hours claimed and is satisfied that all of the hours were necessary and directly related to the successful pursuit of plaintiffs' antitrust claim in this litigation and that none of the hours is "excessive, redundant, or otherwise unnecessary." [Hensley v. Eckerhart, 461 U.S. at 434, 103 S. Ct. at 1939-40](#). Plaintiffs' attorneys may therefore [**13] recover for all of the hours claimed.

B. Prevailing Market Rate

HN4 [↑] "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." [Norman, 836 F.2d at 1299](#). To determine the prevailing market rate, the court will consider the following *Johnson* factors: customary fee; skills required to perform the legal services properly; the experience, reputation, and ability of the attorneys; [*515] time limitations; preclusion of other employment; undesirability of the case; nature and length of the professional relationship with the clients; and awards in similar cases. Plaintiffs' attorneys seek the following hourly rates for themselves:

	RATE
Eugene A. Beatty	\$ 150
Ed C. Brewer, III	170
Albert A. Chapar	115
B. Shane Clanton	115
James H. Davis	115
L. Andrew Hollis, Jr.	275
Ernest H. Hornsby	150
Kevin H. Hudson	115
Jeffrey C. Kirby	150
Sylvia K. Kochler	200
Archie C. Lamb, Jr.	115
John L. Latham	215
Kenneth L. Millwood	225
Beth M. Myler	115
Edward M. Price, Jr.	150
Rufus R. Smith, Jr.	275
Brian G. Smooke	115
Aaron Watson	115
Joel W. Weatherford	100

[**14] *Customary Fee*: The evidence reflects that the customary fee range for attorneys in complex litigation in Alabama, depending on each attorney's experience, reputation, and ability, is approximately \$ 100 to \$ 400 an hour.

Skill Required to Perform the Services Properly: This litigation has from beginning to end posed a difficult and demanding task. A lawyer skilled in, or capable of quickly learning about, the complex and rapidly changing law of **antitrust law** was thus required. A lawyer already skilled in the area could demand a higher rate because he or she would be more knowledgeable and could work more efficiently.

Of the 19 lawyers who participated in this case on behalf of plaintiffs, only three had had prior antitrust experience and that was limited. Although this absence of broad and lengthy experience in **antitrust law** weighs in favor of lower fee rates for plaintiffs' attorneys, the evidence reflects that plaintiffs' attorneys were highly competent and otherwise well experienced to various degrees, and they worked very efficiently.

Experience, Reputation, and Ability of the Attorney: All of plaintiffs' attorneys are experienced and highly competent attorneys. Indeed, [*515] defendants Shirley and Home Oil Company conceded that "the reputations of plaintiffs' attorneys ... are, by all accounts, excellent." ¹⁵

¹⁵ Shirley and Home Oil Company' brief filed on March 3, 1994, at 13.

Time Limitations: Where there has been "priority work that delays the lawyer's other work," this factor requires "some premium." [Johnson, 488 F.2d at 718](#). The court is not convinced that this factor was significant in this litigation.

Preclusion of Other Employment: This factor "involves the dual consideration of otherwise available business which is foreclosed because of conflicts of interest which occur from the representation, and the fact that once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes." [Johnson, 488 F.2d at 718](#). The court is not convinced that this factor has played a significant role in this litigation.

Undesirability of the Case: It does not appear that this case was undesirable.

*Nature and Length [**16] of Relationship with Client:* There is no evidence of a prior professional [*516] relationship between plaintiffs and their attorneys.

Awards in Similar Cases: Courts have awarded non-contingent fees in the range of \$ 100 to \$ 290 an hour in other complex cases. See, e.g., [Lee v. Randolph County Bd. of Educ., 885 F. Supp. 1526, 1532 \(M.D. Ala. 1995\)](#); [James v. City of Montgomery, No. 94- T-264-N, 1995 U.S. Dist. LEXIS 6143, 1995 WL 271138](#) at *4 (M.D. Ala. Apr. 19, 1995); [Medders v. Autauga County Bd. of Educ., 858 F. Supp. 1118, 1129 \(M.D. Ala. 1994\)](#); [Knight v. State of Alabama, 824 F. Supp. 1022 \(N.D. Ala. 1993\)](#); [Wyatt v. King, no. 3195-N, 1991 U.S. Dist. LEXIS 21578, 1991 WL 640065](#) (M.D. Ala. Dec. 17, 1991), aff'd, 985 F.2d 579 (11th Cir. 1993) (table); [Robinson v. Alabama State Dept. of Educ., 727 F. Supp. 1422, 1428 \(M.D. Ala. 1989\)](#), aff'd, 918 F.2d 183 (11th Cir. 1990) (table); [Hidle v. Geneva County Bd. of Educ., 681 F. Supp. 752, 756-758 \(M.D. Ala. 1988\)](#).

The court is of the opinion, based on these criteria, that the prevailing current rates for non-contingent work performed by attorneys of similar experience in similar cases are as follows for plaintiffs' attorneys:¹⁶

	\$ 140
Ed C. Brewer, III	160
Albert A. Chapar	115
B. Shane Clanton	115
James H. Davis	115
L. Andrew Hollis, Jr.	215
Ernest H. Hornsby	150
Kevin H. Hudson	115
Jeffrey C. Kirby	150
Sylvia K. Kochler	190
Archie C. Lamb, Jr.	115
John L. Latham	200
Kenneth L. Millwood	200
Beth M. Myler	115
Edward M. Price, Jr.	150
Rufus R. Smith, Jr.	215
Brian G. Smooke	115
Aaron Watson	115
Joel W. Weatherford	100

[**17] These rates reflect the varying experience and abilities of the attorneys.

C. Lodestar Calculation

¹⁶ By establishing the appropriate market rate on the basis of current rates, the court is also compensating plaintiffs for the delay in payment. See [Missouri v. Jenkins, 491 U.S. 274, 283-84, 109 S. Ct. 2463, 2469, 105 L. Ed. 2d 229 \(1989\)](#); [Norman, 836 F.2d at 1302](#).

The unadjusted lodestar consists, as stated, of the product of compensable hours multiplied by the prevailing market rate. The lodestar fees for those who worked on behalf of the plaintiffs are as follows:

ATTORNEYS	HOURS	RATE	AMOUNT
Eugene A. Beatty	220.8	\$ 140	\$ 30,912.00
Ed C. Brewer, III	1151.6	160	184,256.00
Albert A. Chapar	276.3	115	31,774.50
B. Shane Clanton	82.6	115	9,499.00
James H. Davis	61.5	115	7,072.50
L. Andrew Hollis, Jr.	1659.9	215	356,878.50
Ernest H. Hornsby	55.8	150	8,370.00
Kevin H. Hudson	511.8	115	58,857.00
Jeffrey C. Kirby	195.4	150	29,310.00
Sylvia K. Kochler	246.7	190	46,873.00
Archie C. Lamb, Jr.	17.0	115	1,955.00
John L. Latham	1985.8	200	397,160.00
Kenneth L. Millwood	639.8	200	127,960.00
Beth M. Myler	128.9	115	14,823.50
Edward M. Price, Jr.	151.5	150	22,725.00
Rufus R. Smith, Jr.	1615.7	215	347,375.50
Brian G. Smooke	188.3	115	21,654.50
Aaron Watson	251.2	115	28,888.00
Joel W. Weatherford	7.0	100	700.00
TOTAL			\$ 1,727,044.00

[**18] [*517] D. Paralegals

Plaintiffs also seek to recover for the work of paralegals, as follows:

	Hours	Rate	Amount
Anne G. Alford	33.90	\$ 70	\$ 2,373.00
Diane Bellew	16.00	50	800.00
Beth Cherry	6.30	50	315.00
Constance Cole	35.33	50	1,766.50
Arthur Davis	82.20	50	4,110.00
Laura Hull	71.00	50	3,550.00
Helen L. Sloat	1205.10	70	84,357.00
Myra Staggs	1368.05	50	68,402.50
Karen L. Taylor	2042.00	70	142,940.00
TOTAL			\$ 308,614.00 ¹⁷

The court is convinced, and so finds, that their services were necessary and appropriate and that the hours and rates claimed are reasonable. *Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. Unit B 1982)*.¹⁸

[**19] E. Adjustment

¹⁷ In their brief filed on February 22, 1994, at 20, plaintiffs incorrectly total these numbers to equal \$ 308,616.50. The amount for Arthur Davis should be \$ 4,110.00 rather than \$ 4,112.50. In their brief filed on April 4, 1994, at 18, plaintiffs give the correct total.

¹⁸ In *Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982)*, the Eleventh Circuit adopted as binding precedent all of the post-September 30, 1981 decisions of Unit B of the former Fifth Circuit.

Plaintiffs contend that they are entitled to a 100% upward enhancement because of "The significance of the result obtained in the case and the quality of the work required to obtain that result." ¹⁹ The court believes that, in this case, plaintiffs' success is already adequately reflected in the application of the above *Johnson* factors. An upward adjustment is not warranted.

Defendants Shirley and Home Oil Company contend that the fee should be reduced by 50 to 75% because the results of the litigation were limited. ²⁰ As previously stated, plaintiffs prevailed greatly in this litigation. A downward adjustment is not warranted either.

[*518] F. Expenses

Plaintiffs also request an award of [**20] \$ 424,136.94 for certain out-of-pocket expenses: \$ 12,964.00 for an investigator and \$ 411,172.94 for other "uncompensated expenses." ²¹ The court reserves reaching the issue of expenses at this time. The matter will be addressed in a later, separate order.

III. CONCLUSION

Plaintiffs are entitled to recover a total sum of \$ 2,035,658.00 in attorney's fees: \$ 1,727,044.00 for attorney's fees and \$ 308,614.00 for paralegal fees. Defendants Shirley and Home Oil Company contend that the total fee award should be apportioned among defendants. ²² The court cannot agree. Here all defendants actively and substantially participated in the antitrust violation. See *Council for Periodical Distributors Ass'n v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987) ("In cases where two or more defendants actively participated in a constitutional violation, it will frequently be appropriate to hold all defendants jointly and severally liable for the attorney's fees"). ²³ [**21]

For the foregoing reason, it is ORDERED that plaintiffs' petition to amend judgment to add attorney's fees and expenses, filed on May 29, 1992, their joint fee petitions, filed on June 5, 1992, and February 11, 1994, and their supplements filed on later occasions, are granted to the extent that plaintiffs shall have and recover from defendants Rodney Parrish, Cannon Oil Company, Thomas Shirley, Home Oil Company, James Sheffield, and Sheffield Oil Company the sum of \$ 2,035,658.00 in attorney's fees.

It is further ORDERED that the issue of plaintiffs' expenses will be addressed in a later, separate order.

DONE, this the 3rd day of November, 1995.

Myron H. Thompson

UNITED STATES DISTRICT JUDGE

Myron H. Thompson

UNITED [**22] STATES DISTRICT JUDGE

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¹⁹ Plaintiffs' brief filed on February 22, 1994, at 2.

²⁰ Shirley and Home Oil Company's brief filed on March 3, 1994, at 33-42.

²¹ Plaintiffs' brief filed on February 22, 1994, at 20.

²² Shirley and Home Oil Company's brief filed on March 3, 1994, at 48-49.



Gibson v. Walco Co.

United States District Court for the Northern District of California

November 6, 1995, FILED; November 9, 1995, ENTERED

No. C 95-2430 VRW

Reporter

1995 U.S. Dist. LEXIS 16976 *; 1995 WL 681274

ROBERT GIBSON, Plaintiff, v. WALCO CO., et al., Defendant(s).

Core Terms

Prison, electrical appliance, supplier, seller, antitrust violation, in forma pauperis, anti trust law, inmates, buy, pro se, competitors, Antitrust, implicate, monopoly, reasons

LexisNexis® Headnotes

Civil Procedure > Parties > Prisoners > Dismissal of Petitions

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Claim Dismissals

Civil Procedure > ... > In Forma Pauperis > Prisoners > General Overview

HN1 [down arrow] **Prisoners, Dismissal of Petitions**

28 U.S.C.S. § 1915(d) authorizes federal courts to dismiss a claim filed in forma pauperis prior to service if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious. Under this standard, a district court may review the complaint and dismiss sua sponte those claims premised on meritless legal theories or clearly lacking any factual basis. Pro se pleadings must be liberally construed, however.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN2 [down arrow] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Under an exclusive dealing arrangement, a buyer is required by the seller to deal only in the goods of that seller, and is prohibited from buying from the seller's competitors. Further, in order to constitute an antitrust violation, the effect of such arrangement must be to substantially lessen competition or tend to create a monopoly in any line of commerce. 15 U.S.C.S. § 14. Exclusive dealing arrangements are objectionable under the antitrust laws because they take away from the freedom of purchasers to buy in an open market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN3 Exclusive & Reciprocal Dealing, Exclusive Dealing

A contract to buy exclusively from one supplier does not violate **antitrust law** without evidence of coercion which has resulted in exclusion of competitors from the target market. The fact that a supplier may enjoy "monopoly power" within a market defined by an individual contract does not violate **antitrust law** unless such is the product of power within a larger market.

Civil Rights Law > Protection of Rights > Prisoner Rights > General Overview

HN4 Protection of Rights, Prisoner Rights

Courts will not second-guess the decisions of prison officials clearly related to security concerns. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a State penal system is involved, federal courts have additional reason to accord deference to the appropriate prison authorities. Absent substantial evidence to the contrary, courts should defer to prison officials' judgment regarding prison security and administration.

Civil Rights Law > Protection of Rights > Prisoner Rights > General Overview

HN5 Protection of Rights, Prisoner Rights

Federal courts should avoid interfering in prison administration whenever prisoners are inconvenienced or suffer de minimis injuries.

Counsel: [*1] Robert D Gibson, Plaintiff, [PRO SE], PBSP, Pelican Bay State Prison, Crescent City, CA.

Judges: VAUGHN R. WALKER, United States District Judge

Opinion by: VAUGHN R. WALKER

Opinion

ORDER OF DISMISSAL

Plaintiff, an inmate at Pelican Bay State Prison, has filed a pro se civil complaint. Plaintiff also seeks to proceed in forma pauperis.

I

Plaintiff has filed an action alleging antitrust violation under the Sherman and Clayton Acts, Title 15 USC §§ 1, et seq. against defendants Walco Company, Walkenhorst Company and Stewart Walkenhorst. Plaintiff maintains that defendant Walkenhorst Company, a vendor of electrical appliances and other devices, has entered into an agreement with state prison officials at Pelican Bay State Prison "to alter electrical appliances to meet the special

interest of prison officials in exchange for being allowed sole vending rights in Pelican Bay Prison." See Plaintiff's Amended Complaint ("Amended Complaint"), at 2. Apparently, the defendants have contracted with Pelican Bay to be the exclusive provider of certain electrical appliances to Pelican Bay inmates. This contract includes an additional \$ 10.00 charge by defendants to prisoners on each item purchased for "security alterations" that are allegedly required by the prison. Plaintiff states that defendants have [*2] entered into this agreement because they carry "low quality, outdated, discontinued merchandise [that] ... can not compete in a free market." Amended Complaint, at 2. Plaintiff seeks injunctive and declaratory relief and punitive damages.

II

HN1[] Title [28 USC § 1915\(d\)](#) authorizes federal courts to dismiss a claim filed in forma pauperis prior to service "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." Under this standard, a district court may review the complaint and dismiss sua sponte those claims premised on meritless legal theories or clearly lacking any factual basis. [Denton v. Hernandez, 504 U.S. 25, 32, 118 L. Ed. 2d 340, 112 S. Ct. 1728 \(1992\)](#). Pro se pleadings must be liberally construed, however. [Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 \(9th Cir. 1990\)](#).

III

Plaintiff complains of what can be most analogously referred to as an "exclusive dealing arrangement" between Pelican Bay State Prison and the defendants which he maintains constitutes an antitrust violation under the Sherman and Clayton Acts, Title [15 USC §§ 1, et seq.](#) **HN2**[] Under an exclusive dealing arrangement, a buyer is required by the seller to [*3] deal only in the goods of that seller, and is prohibited from buying from the seller's competitors. See [FTC v. Brown Shoe Company, 384 U.S. 316, 317-22, 16 L. Ed. 2d 587, 86 S. Ct. 1501 \(1966\)](#). Further, in order to constitute an antitrust violation, the effect of such arrangement must be "to substantially lessen competition or tend to create a monopoly in any line of commerce." [15 USC § 14](#). Exclusive dealing arrangements are objectionable under the antitrust laws because they take away from the freedom of purchasers to buy in an open market. [FTC v. Brown Shoe Company, 384 U.S. at 321](#).

As a threshold matter, plaintiff's claim is without merit for alleged anticompetitive activities engaged in by defendant sellers are not what have led to plaintiff's alleged deprivation. Rather, for security reasons, Pelican Bay State Prison has elected to allow only one electrical supplier to provide inmates with appliances.¹ **HN3**[] A contract to buy exclusively from one supplier does not violate [antitrust law](#) without evidence of coercion which has resulted in exclusion of competitors from the target market. See Phillip C. Jones, *Litigating Private Antitrust Actions* § 5.10 (1984). The fact [*4] that a supplier may enjoy "monopoly power" within a market defined by an individual contract does not violate [antitrust law](#) unless such is the product of power within a larger market. See [Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 246 \(2d Cir. 1985\)](#) (frustrations experienced by contractor upon realizing it could not secure products at price it would have liked do not implicate economic concerns of Sherman Act). Pelican Bay officials' choice to contract with only one supplier of electrical appliances in furtherance of its legitimate security concerns does not implicate the economic and judicial concerns contemplated by the Sherman and Clayton Acts. The facts alleged by plaintiff present no cognizable antitrust claim and this action is accordingly DISMISSED.²

¹ See Plaintiff's Exhibit "Memorandum" dated May 15, 1995, to all Pelican Bay State Prison inmates from Warden Steven Cambra, Jr.

² Further, to the extent that plaintiff may argue that Pelican Bay may not enter into such contracts limiting the access of prisoners to outside vendors, **HN4**[] the court will not second-guess the decisions of prison officials clearly related to security concerns. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." [Turner v. Safley, 482 U.S. 78, 84-85, 96 L. Ed. 2d 64, 107 S. Ct. 2254 \(1987\)](#). Where a state penal system is involved, federal courts have "additional reason to accord deference to the appropriate prison authorities." [Id. at 85](#). Absent substantial evidence to the contrary, courts should defer to prison officials' judgment regarding prison security and

[*5] IV

For the foregoing reasons, plaintiff's request to proceed in forma pauperis is DENIED and the instant allegations are hereby DISMISSED with prejudice to reasserting them in another unpaid complaint.

The Clerk shall close the file.

SO ORDERED.

VAUGHN R. WALKER

United States District Judge

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administration. *Id. at 86*; see also *Wright v. Rushen*, 642 F.2d 1129, 1132 (9th Cir. 1981) (courts should avoid enmeshing themselves in minutiae of prison operations in name of constitution).

In addition, as plaintiff has no constitutional right to own his own television or other electrical appliances while incarcerated, any injury he has suffered can be characterized as no more than de minimis. *HN5* [↑] Federal courts should avoid interfering in prison administration whenever prisoners are inconvenienced or suffer de minimis injuries. See, for example, *Hernandez v. Denton*, 861 F.2d 1421, 1424 (9th Cir. 1988) (allegation that inmate slept without mattress for one night is insufficient to state 8th Amendment violation), vacated on other grounds, 493 U.S. 801 (1989); *DeMallory v. Cullen*, 855 F.2d 442, 445 (7th Cir. 1988) (correctional officer spitting upon prisoner does not rise to level of constitutional violation).



Florida Seed Co. v. Monsanto Co.

United States District Court for the Middle District of Alabama, Northern Division

November 9, 1995, Decided ; November 9, 1995, FILED, ENTERED

CIVIL ACTION NO. 94-D-514-N

Reporter

915 F. Supp. 1167 *; 1995 U.S. Dist. LEXIS 20301 **; 1995-2 Trade Cas. (CCH) P71,240

FLORIDA SEED COMPANY, INC., and FRIT INDUSTRIES, INC., Plaintiffs, v. MONSANTO COMPANY, Defendant.

Core Terms

distributors, antitrust, anti trust law, acquisition, terminated, manufacture, herbicide, monopoly, products, non-selective, distributorship, residential, merger, Clayton Act, Sherman Act, competitor, allegations, antitrust claim, consumer, retail, antitrust violation, motion to dismiss, commerce, damages, injuries, garden, lawn, relevant market, anticompetitive, monopolize

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN1[] Private Actions, Standing

Whether a plaintiff has antitrust standing to bring suit is a question of law and may be raised by a motion to dismiss.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN2[] Motions to Dismiss, Failure to State Claim

In ruling on a motion to dismiss for lack of standing, the court must assume that the factual allegations in the complaint are true. [Fed. R. Civ. P. 12\(b\)\(6\)](#). Dismissal is warranted only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. The court further stresses that the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low.

915 F. Supp. 1167, *1167 1995 U.S. Dist. LEXIS 20301, **20301

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Penalties

[**HN3**](#) Sherman Act, Remedies

Section 2 of the Sherman Act provides sanctions for every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. [15 U.S.C.S. § 2.](#)

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > General Overview

[**HN4**](#) Antitrust & Trade Law, Clayton Act

Section 7 of the Clayton Act provides, in part, that 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 and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly. [15 U.S.C.S. § 18.](#)

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

[**HN5**](#) Clayton Act, Claims

Section 4 of the Clayton Act provides a damages remedy for violations of all federal antitrust laws, including [§ 2](#) of the Sherman Act and [§ 7](#) of the Clayton Act. Namely, when a private party claims monetary relief under the antitrust laws, § 4 of the Clayton Act permits recovery by any person injured in his or her business or property by reason of anything forbidden in the antitrust laws. [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

[**HN6**](#) Standing, Clayton Act

Despite the broad language of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), the courts limit a private party's right to bring an antitrust action through restrictions on standing. The United States Court of Appeals for the Eleventh Circuit traditionally has employed the two-pronged target area test to determine if a plaintiff has antitrust standing. The first step is to determine whether the plaintiff has suffered antitrust injury. The United States Supreme Court has defined "antitrust injury" as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anti competitive 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. While the Supreme Court's definition is somewhat obscure in application, it is clear that a plaintiff must prove more than injury causally linked to an illegal presence in the market.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

[**HN7**](#) Private Actions, Standing

The second prong of the antitrust standing test of the United States Court of Appeals for the Eleventh Circuit is to determine whether the plaintiff is an efficient enforcer of the antitrust laws. In other words, a plaintiff must prove that he or she is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry and be the target against which anticompetitive activity is directed.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

[**HN8**](#) Private Actions, Standing

Generally, but not always, a plaintiff must be either a consumer or competitor in the relevant market to have antitrust standing, or the injury likely will be too remote from the alleged violation.

915 F. Supp. 1167, *1167 1995 U.S. Dist. LEXIS 20301, **20301

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN9 [] **Distributorships & Franchises, Antitrust Issues**

Distributors terminated after illegal mergers of manufacturers usually lack standing to sue under the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN10 [] **Private Actions, Remedies**

A plaintiff who was never in a market sometimes can succeed on a claim that he or she would have entered if it had the defendant's antitrust violation not kept him or her out. To state such a claim, the plaintiff must show a financial ability to enter the market, the appropriate background and experience that makes success possible, and steps evidencing an intent to enter the market.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Governments > Local Governments > Claims By & Against

HN11 [] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss cannot be defeated with conclusory allegations if not supported by facts constituting a legitimate claim for relief.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN12 [] **Clayton Act, Claims**

Only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN13 [L] Private Actions, Standing

Stockholders do not have antitrust standing to bring an action on behalf of their subsidiary.

Counsel: [**1] Charles M. Crook, John F. Mandt, Birmingham, AL, for plaintiff(s).

Warren B. Lightfoot, John M. Johnson, John P. Dulin, Birmingham, AL, for defendant(s).

Judges: Ira DeMent, UNITED STATES DISTRICT JUDGE

Opinion by: Ira DeMent

Opinion

[*1169] MEMORANDUM OPINION AND ORDER

Before the court is defendant Monsanto Company's motion filed June 23, 1994, to dismiss the federal antitrust claims on the ground that the plaintiffs lack standing. Plaintiffs Florida Seed Co., Inc., and Frit Industries, Inc., responded in opposition on August 4, 1994. After careful consideration of the arguments of counsel, the applicable case law and the record as a whole, the court finds that the defendant's motion is due to be granted.

JURISDICTION AND VENUE

As to the federal antitrust claims, the plaintiffs predicate subject-matter jurisdiction under [28 U.S.C. § 1331](#) (federal-question jurisdiction). As to the state-law claims, the plaintiffs invoke the court's diversity-of-citizenship jurisdiction, [28 U.S.C. § 1332](#), and principles of supplemental jurisdiction, [28 U.S.C. § 1337](#). Personal jurisdiction and venue are not contested.

PARTIES

(1) Plaintiff Florida Seed Company, Inc. ("Florida Seed"), is engaged [**2] in the business of wholesale distribution and marketing of lawn and garden products. Florida Seed is incorporated in Florida and also maintains its principal place of business in Florida.

(2) Plaintiff Frit Industries, Inc. ("Frit"), is the sole stockholder of Florida Seed. Frit is incorporated in Alabama with its principal place of business in Alabama. In addition to its ownership of Florida Seed, Frit also is involved in a variety of businesses, including the development and production of lawn and garden products.

(3) Defendant Monsanto Company ("Monsanto") is engaged in the manufacture and sale of a diversified line of chemicals, including lawn and garden products. Monsanto is incorporated in Delaware with its principal place of business in Missouri.

FINDINGS OF FACT

In viewing the allegations of the complaint as true, the court finds the following facts controlling for purposes of ruling on Monsanto's motion:

On May 2, 1994, the plaintiffs commenced this action in the United States District Court for the Middle District of Alabama and have asserted that certain acts of Monsanto violate the federal antitrust statutes and state laws. This controversy primarily stems from [**3] Monsanto's alleged illegal acquisition of its competitor in the residential non-selective herbicide market, Ortho Consumer Products Division of Chevron Corporation ("Ortho"), and the subsequent termination of Florida Seed as an Ortho distributor.

Count I of the complaint asserts that Monsanto has attempted to create, and has in fact created, a monopoly in the residential non-selective herbicide market in violation of § 2 of the Sherman Act (15 U.S.C. § 2) and state antitrust laws. The plaintiffs assert that Count I also encompasses a monopoly leveraging claim under § 2 of the Sherman Act. Count II sets forth a cause of action under § 7 of the Clayton Act (15 U.S.C. § 18) for [*1170] Monsanto's alleged unlawful acquisition of Ortho.¹

[**4] Monsanto manufactures and sells an agricultural product named Roundup, a residential non-selective herbicide designed to kill all types of vegetation, such as brush, weeds and grasses. Monsanto holds a United States patent to Roundup's key ingredient called glyphosate. Although Monsanto's United States patent will not expire until the year 2000, its European patent expired in 1991. According to the plaintiffs, the expiration of Monsanto's patents and threatening competition caused Monsanto to take steps to maintain its market dominance, which included the acquisition of its competitor, Ortho. Those steps, assert the plaintiffs, are aimed at the destruction of Ortho and directed toward Florida Seed.

Until the Spring of 1993, Monsanto sold glyphosate to Ortho, which used the patented ingredient in a similar product sold under the brand name of Kleenup. According to the plaintiffs, Monsanto controls 63% of the residential non-selective herbicide market through its ownership of Roundup, and Kleenup accounts for another 22% of the market.

From the mid-1980s to 1992, Florida Seed had a nonexclusive distributorship agreement with Monsanto to distribute Roundup and other Monsanto products [**5] to retail stores chain accounts, such as Wal-Mart and The Home Depot. Under the agreement, which was renewed annually through course of dealing, Florida Seed's marketing and sales territory included Alabama, Florida and Georgia.

Florida Seed simultaneously held a nonexclusive distributorship agreement with Ortho to market and sale its products at wholesale (including Kleenup) in Alabama, Florida, Georgia, Louisiana and Mississippi. This agreement also was renewed annually through course of dealing. According to the plaintiffs, Florida Seed was one of Ortho's leading and most effective distributors in the nation.² During the period when Florida Seed acted as a distributor of Monsanto and Ortho products, both companies restricted Florida Seed from manufacturing competing lawn and garden products.

[**6] By letter dated July 1, 1992, Monsanto notified Florida Seed that it would not renew Florida Seed's distributorship agreement, which was scheduled to expire on September 30 of the same year. The letter stated that Monsanto had made a "strategic decision" to "work with fewer authorized Monsanto distributors." Pls' Compl. at P 24. Following the termination of its distributorship agreement with Monsanto, Florida Seed continued to market and sell Kleenup for Ortho.

By letter dated May 20, 1993, Monsanto notified Florida Seed that Monsanto had acquired Ortho and that it would honor all current distribution agreements. Subsequently, in a letter dated July 23, 1993, Monsanto again wrote Florida Seed and stated that when Florida Seed's current agreement to distribute Kleenup and other former Ortho

¹The plaintiffs also seek redress under state laws for breach of contract (Count III), misrepresentation (Count IV), and unfair competition wrongful termination in violation of Florida statutes "or other applicable state law" (Count V). The validity of the state law claims is not before the court.

²In support of this factual assertion, the plaintiffs aver that in 1992, Ortho began reducing the number of outside distributors and initiating direct sales to large retail chains. According to the plaintiffs, while Ortho terminated approximately thirty distributors under its "Distributor Rationalization Program," it retained Florida Seed. See Pls' Compl. at P 26.

products expired on September 30, 1993, Monsanto would not renew the distributorship agreement. The stated reason for non-renewal was again a purported business decision by Monsanto to use fewer distributors.

Later, Monsanto sent Frit, Florida Seed's parent corporation, a "Guaranty" demanding that Frit pay Ortho all indebtedness owed by Florida Seed and return any products not yet sold. [\[**7\]](#) Monsanto further stated that the "Guaranty" had been assigned to it in its acquisition of Ortho.

Monsanto's proposed acquisition of Ortho independently caused the Federal Trade Commission ("FTC") to file an administrative complaint against Monsanto. According to the plaintiffs, the FTC asserted, among other things, that the acquisition of Kleenup would [\[*1171\]](#) grant Monsanto a monopoly in the residential non-selective herbicide market, would reduce competition in the United States for the production and sale of this type of herbicide and would create barriers to market entry.

Subsequently, on September 1, 1993, Monsanto entered into a consent decree with the FTC to resolve allegations that the acquisition violated federal antitrust laws. The consent decree allowed Monsanto to acquire Ortho but placed certain divestiture restrictions on the purchase of Kleenup. In part, Monsanto agreed to sell the chemical formulation and the trademark for Kleenup by September 1994 and to maintain the marketability of the Kleenup assets until the divestiture was complete.³ The consent decree further required that for a period of ten years, Monsanto would not acquire any interest in the residential non-selective [\[**8\]](#) herbicide market.

The plaintiffs further allege that following Monsanto's termination of Florida Seed's distributorship agreement with Ortho, Florida Seed was forced to withdraw from National Prime Source. As stated by the plaintiffs, National Prime Source is a joint venture among fifteen wholesale distributors of lawn and garden products that Florida Seed helped organize in 1992. According to the plaintiffs, National Prime Source "enabled its members to compete for multi-regional and national mass merchandising accounts which generally preferred to do business with distributors offering centralized bidding and administrative functions." [\[**9\]](#) *Id.* at P 22. The plaintiffs also aver that Florida Seed has sustained substantial damages from its inability to sell to retail chain store accounts.

The plaintiffs seek treble damages under the federal antitrust laws, compensatory damages and attorneys fees. The plaintiffs also request a declaratory judgment that any amount due and payable from Florida Seed to Monsanto under the "Guaranty" are offset by the damages owed to Florida Seed by Monsanto and that Frit is not liable under the "Guaranty" for any debts of Florida Seed to Monsanto.

DISCUSSION

I. Antitrust Standing

A. Standard of Review

[HN1](#)[↑] Whether a plaintiff has antitrust standing to bring suit is a question of law, [*Municipal Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1498 \(11th Cir. 1991\)*](#), and may be raised by a motion to dismiss. See generally [*Austin v. Blue Cross & Blue Shield of Alabama, 903 F.2d 1385 \(11th Cir. 1990\)*](#). [HN2](#)[↑] In ruling on a motion to dismiss for lack of standing, the court must assume that the factual allegations in the complaint are true. [*SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 40 \(1st Cir. 1995\)*](#); [*Fed. R. Civ. P. 12\(b\)\(6\)*](#). Dismissal is warranted [\[**10\]](#) only "if it is clear that no relief could be granted" under any set of facts that could be proved consistent with the allegations. [*Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 \(1984\)*](#). The court further stresses that "the threshold of sufficiency that a complaint must meet to survive a motion to

³ When the complaint was filed in this case, the purchasing company of the Kleenup assets had not yet been determined. The court's independent research reveals that the FTC approved the divestiture of the Kleenup trade name and other related assets to Platte Chemical Co., a subsidiary of ConAgra, Inc. See Federal Trade Commission (News Release), 1995 WL 507355, Sept. 14, 1995.

dismiss for failure to state a claim is exceedingly low." *Quality Foods v. Latin Am. Agribusiness Dev.*, 711 F.2d 989, 995 (11th Cir. 1983).

B. The Antitrust Laws and General Principles of Antitrust Standing

Monsanto does not challenge the merits of the federal antitrust claims but asserts that the plaintiffs lack standing under § 2 of the Sherman Act and § 7 of the Clayton Act. The plaintiffs have raised several theories that allegedly confer standing, each of which the court will address after setting forth the applicable antitrust statutes and the general principles of **antitrust law**.

HN3 Section Two of the Sherman Act provides sanctions for "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or [*1172] persons, to monopolize any part of the trade or commerce. . ." [15 U.S.C. § 2](#). **HN4** Section 7 of the [**11] Clayton Act provides, in part, as follows:

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 and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

[15 U.S.C. § 18](#).

HN5 Section 4 of the Clayton Act, in turn, provides a damages remedy for violations of all federal antitrust laws, including § 2 of the Sherman Act and § 7 of the Clayton Act. Namely, when a private party claims monetary relief under the antitrust laws, as here, § 4 of the Clayton Act permits recovery by any person "injured in his [or her] business or property by reason of anything forbidden in the antitrust laws." [15 U.S.C. § 15](#) (brackets supplied).

HN6 Despite the broad language of § 4, the courts have limited a private party's right to bring [**12] an antitrust action through restrictions on standing. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972) (stating 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 Eleventh Circuit traditionally has employed the two-pronged target area test to determine if a plaintiff has antitrust standing.⁴ *Municipal Utils. Bd. of Albertville*, 934 F.2d at 1499. The first step is to determine whether the plaintiff has suffered antitrust injury. *Id.* The Supreme Court has defined "antitrust injury" as an

injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anti competitive 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."

⁴ In *Associated Gen. Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 536-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983), the Supreme Court of the United States set forth a flexible, case-by-case standard for resolving an antitrust standing issue and emphasized that courts should consider the following factors: (1) a causal connection between an antitrust violation and harm to the plaintiff, (2) an intent by the defendants to cause the harm, (3) the existence of an antitrust injury, (4) the directness of a causal link between the injury and the market restraint, (5) the speculative nature of the damages, and (6) the risk of duplicate recoveries or complex apportionment of damages.

Subsequently, in *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1496 (11th Cir. 1985), cert. denied, 475 U.S. 1107, 89 L. Ed. 2d 912, 106 S. Ct. 1513 (1986), the Eleventh Circuit held that the target area test "does not produce results materially different from the results obtained in" Associated Gen. Contractors. *Id.* at 1520; See also *Mr. Furniture v. Barclays Am./Commercial, Inc.*, 919 F.2d 1517, 1520 n.1 (11th Cir. 1990), cert. denied, 502 U.S. 815, 116 L. Ed. 2d 43, 112 S. Ct. 68 (1991). Accordingly, the court will proceed under the target area test and also will bear in mind the factors set out by the Supreme Court.

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Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (citations omitted). While the Supreme Court's definition is somewhat obscure [**13] in application, it is clear that a plaintiff "must prove more than injury causally linked to an illegal presence in the market." *Id.*

[**14] [HN7](#) [↑]

The second prong of the Eleventh Circuit's standing test is to determine whether the plaintiff is an efficient enforcer of the antitrust laws. *Municipal Utils. Rd. of Albertville*, 934 F.2d at 1499. In other words, a plaintiff must "prove that he [or she] is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry" and "be the target against which anticompetitive activity is directed." *National Ind. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 608 (11th Cir. 1984), cert. denied, 474 U.S. 1013, 88 L. Ed. 2d 473, 106 S. Ct. 544 (1985) (brackets supplied).

[*1173] In sum, the primary purpose of the standing requirements is to assure that the injuries alleged are not "merely indirect, secondary, or remote." *Construction Aggregate Transport, Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752, 764 (11th Cir. 1983) (Citation omitted). That is, standing "safely limit(s) the class of potential plaintiffs to those persons who will most adequately vindicate the purposes of the antitrust laws." *Id. at 762-63* (citation omitted); see also *Greater Rockford Energy & Technology Corp. v. Shell Oil* [**15] *Co.*, 998 F.2d 391, 394 (11th Cir. 1993) ("Given the potential scope of antitrust violations and the availability of treble damages, an overbroad reading of § 4 could result in 'overdeterrence,' imposing ruinous costs on antitrust defendants, severely burdening the judicial system, and possibly chilling economically efficient behavior."), cert. denied, ___ U.S. ___, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994).

3. Analysis

To paraphrase, Count I asserts that Monsanto's acquisition of Ortho and subsequent termination of Florida Seed's distributorship agreement was part of a scheme to "preserve or expand" Monsanto's monopoly in the residential non-selective herbicide market by destroying the marketability of its competitor product, Kleenup, all in violation of § 2 of the Sherman Act. Pl.s' Compl. at P 34. According to the plaintiffs, Monsanto illegally took advantage of its short-term control of both Roundup and Kleenup and commenced anticompetitive actions to impair Kleenup's marketability by stifling the distribution channels for that product. The termination of Florida Seed's distributorship agreement was a monopolistic act aimed directly at Florida Seed because, [**16] according to the plaintiffs, the best way to squelch the distribution channels of Kleenup was to terminate effective distributors, such as Florida Seed.

The plaintiffs also allege that under § 2 of the Sherman Act, Monsanto's conduct constitutes monopoly leveraging, which involves "using a monopoly in one market to gain a competitive advantage in a second, where the purpose is not to monopolize or attempt to monopolize the second market." *Multistate Legal Studies v. Harcourt Brace Publ.*, 63 F.3d 1540, 1551 n.8 (11th Cir. 1995).⁵ The allegations contained in Count II are as follows:

Monsanto's acquisition of Ortho has had and will have the effect of substantially lessening competition or tending to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act. . . . But for the illegal acquisition, Florida Seed would not have been terminated as a distributor of Ortho products including Kleenup, and Florida Seed would have retained its ability to sell lawn and garden products to large retail chain accounts and to continue to participate in [National] Prime Source.

Id. at P 36 (brackets supplied).

⁵ There is a split among the circuits as to whether monopoly leveraging is illegal and, thus, whether such a claim can be asserted as a cause of action under § 2 of the Sherman Act. See *Multistate Legal Studies*, 63 F.3d at 1551 n.8; *Advanced Health-Care Serv. v. Radford Corp. Hosp.*, 919 F.2d 139, 149 (4th Cir. 1990); *Return on Investment Systems v. Translogic Corp.*, 702 F. Supp. 677 (N.D. Ill. 1988). The court need not confront this issue, however, because as discussed, *infra*, the plaintiffs lack standing to bring a claim under the federal antitrust laws.

[**17] In determining whether the plaintiffs have antitrust standing, the court must assume that Monsanto has violated [§ 2](#) of the Sherman Act and [§ 7](#) of the Clayton Act. See *Mr. Furniture*, 919 F.2d at 1520 n.2. The primary argument raised by Monsanto is that Florida Seed does not have standing to challenge an alleged illegal acquisition at the manufacturing level because Florida Seed is neither a competitor or consumer in the relevant market, which according to Monsanto is limited to the manufacture of residential non-selective herbicides. [HN8](#) [↑] Generally, but not always, a plaintiff must be either a consumer or competitor in the relevant market, or the injury likely will be too remote from the alleged violation. see *Associated Gen. Contractors*, 459 U.S. at 539.

Monsanto correctly points out by way of numerous case citations that [HN9](#) [↑] distributors terminated after illegal mergers of manufacturers usually lack standing to sue under the antitrust laws. For example, Monsanto relies [*1174] on *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977). There, the defendant, Olympia, acquired Hamm's brewing and terminated Hamm's distributors, including the plaintiff, Lenore. Lenore sued [**18] Olympia, alleging that the acquisition violated [§ 7](#) of Clayton Act because it substantially lessened competition. The district court granted summary judgment in favor of Olympia, and the Ninth Circuit affirmed. The Ninth Circuit looked to *Brunswick, supra*, and held that Lenore did not have standing to sue because it had not suffered antitrust injury:

Even though Lenore's injury may have ". . . occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisition unlawful." The terminations were an incidental matter which the merger may have made possible, but certainly did not cause." All Lenore really alleges is that because Olympia purchased the Hamm's brand, Lenore was replaced in favor of other distributors. This is insufficient to make out a case under [§ 7](#) which is concerned with competition, not competitors.

[550 F.2d at 500](#) (internal citations omitted). In sum, the court determined that the acquisition of Hamm violated the antitrust laws, if at all, because competition was reduced in the manufacture of beer, a market in which Lenore was neither a competitor or consumer.

In a similar case relied upon by Monsanto, [*19] *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2nd Cir. 1995), cert. denied, 133 L. Ed. 2d 304, 116 S. Ct. 381, 1995 WL 555505 (Oct. 30, 1995), the Second Circuit analyzed terminated distributors' ability to obtain standing under [§ 2](#) of the Sherman Act. The plaintiffs were a group of former soft drink distributors for Seven-Up Brooklyn. They brought antitrust claims against several defendants, including Honickman, the latter of whom sought to acquire Seven-Up Brooklyn. Honickman and Seven-Up Brooklyn were two of the three soft drink bottling companies in New York City. Without including the Seven-Up brands, Honickman controlled more than one-half of the soft drink sales to retailers in New York City.

Honickman provided financing to its various affiliates for the purchase of Seven-Up Brooklyn, a transaction that gave rise to an FTC investigation. When the FTC disallowed the acquisition asserting antitrust violations, the plaintiffs claimed that Honickman and the other defendants conspired to cause Seven-Up Brooklyn to file for bankruptcy. If Seven-up Brooklyn filed for bankruptcy, then according to the plaintiffs, Honickman could reacquire it under the failing company [*20] defense and avoid repercussions under the federal antitrust laws. This is in fact what happened.

The Second Circuit held that the plaintiffs' injuries were derivative only and failed to rise to a level of antitrust injury sufficient to confer standing:

If Seven-Up Brooklyn, before its bankruptcy, had canceled its distribution agreements and hired delivery drivers as employees, the distributors would not have been able to assert an antitrust violation. Lacking such a claim against Seven-Up Brooklyn, the distributors also lack a claim against Honickman [and the other defendants] who, having taken over Seven-Up Brooklyn's business, have not hired the plaintiffs as distributors.

Although the distributors undoubtedly suffered injury as a result of the alleged antitrust violation, the injury suffered by the distributors is derivative of the injury suffered by Seven-Up Brooklyn. Thus, accepting the antitrust allegations as true, it was not the distributors that suffered direct antitrust injury, but Seven-Up Brooklyn. Therefore, the proper party to bring the antitrust action on these facts was Seven-Up Brooklyn, or, after its bankruptcy, the estate's trustee.

Id. at 767; **[**21]** see also *Universal Brands, Inc. v. Philip Morris, Inc.*, 546 F.2d 30 (5th Cir. 1977) (denying sub-distributor standing to enjoin a merger when its exclusive distributor was replaced after a merger).

The court finds that the same result is required in this case. While Florida Seed's injuries undoubtedly resulted from the termination of its distributorship agreement for Kleenup, the court finds that the injury sustained is too remote. If Ortho, **[*1175]** prior to Monsanto's acquisition, had terminated Florida Seed, Florida Seed could not have attacked as illegal Ortho's decision. The same would be true if after divesture of the Kleenup assets, the purchasing company had not retained Florida Seed as a distributor.

In making its finding, the court further assumes that Monsanto's goal was to gain control of the non-selective herbicide market and that Florida Seed was an effective distributor. However, even assuming such, the court finds that the damages claimed by the plaintiffs (loss of competition at the distributor level) are not the type of anticompetitive injury that the antitrust laws were intended to remedy. The court finds that if the merger is illegal, the illegality stems from decreased **[**22]** competition in the manufacture of residential non-selective herbicides.

The court, after carefully examining the law, cannot find any cases, nor have the plaintiffs cited any, that would warrant a contrary finding. In fact, the cases relied on by the plaintiffs are inapposite. For example, the plaintiffs rely on *Delong v. Washington Mills Electro Min.*, 990 F.2d 1186 (11th Cir.), cert. denied, U.S. __, 126 L. Ed. 2d 569, 114 S. Ct. 604 (1993), for the proposition that a manufacturer's short-term control over intrabrand competition gives a terminated dealer standing. The Delong court, however, held that a distributor had standing where the manufacturer terminated the distributorship because the distributor objected to a price-fixing conspiracy directed towards the consumer. Quite a different fact scenario is present here.

The difficulties that a terminated distributor may face in obtaining standing to contest an illegal merger are explained in P. Areeda & H. Hovenkamp, *Antitrust Law* § 381 (rev. ed. 1995) (internal footnotes omitted) (brackets supplied):

Many mergers have been challenged by suppliers (including dealers, franchisees, and employees providing the merging **[**23]** firms with distribution and other services) displaced as a result of the merger. Injury-in-fact may be doubtful when equivalent opportunities are available elsewhere. If other opportunities do not exist [as alleged by Florida Seed], displaced suppliers made redundant by a merger suffer actual losses but not antitrust injury, for the rationale for condemning a merger lies in its potential for supracompetitive pricing, not in its potential for cost savings and other efficiencies. A merger that actually brings about supracompetitive prices and diminished output reduces the need for inputs and can therefore injure suppliers. Although such an injury connects more closely with the rationale for finding a violation, it is still not antitrust injury because it is neither the means by which output is restricted nor the direct concern of antitrust rules protecting product market competition.

The plaintiffs, on the other hand, argue that as a wholesale distributor to retail consumers, Florida Seed competes with manufacturers, such as Monsanto, which also engage in direct sales to retail consumers. Hence, according to the plaintiffs, the relevant market encompasses the marketing and selling **[**24]** of residential non-selective herbicides, in addition to manufacturing. The court agrees with the plaintiffs that at this stage of the litigation, the factual allegations with respect to the relevant markets must be accepted as true. See *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982); see also *Construction Aggregate Transport, Inc.*, 710 F.2d at 764 (recognizing that more than one "sector of the market may be the target for a particular anticompetitive act"). Nonetheless, the court is not persuaded by the plaintiffs' argument. In Honickman, the Second Circuit rejected this "distribution monopoly" argument:

The distributors attempt to recharacterize their antitrust claims by arguing that they suffered antitrust injury in the elimination of competition in retail distribution between themselves and Honickman. However, the so-called "distribution monopoly" is derived entirely from Honickman's share of the bottling market. Honickman's "distribution monopoly" thus involves only his product. Moreover, a vertically structured monopoly can take only one monopoly profit. See *Lamotte Valley R.R. v. ICE*, 229 U.S. App. D.C. 17, 711 F.2d 295, 318 (D.C. Cir. 1983); see also **[*1176]** Robert H. Bark, **[**25]** The Antitrust Paradox 229 (2d ed. 1993); 3 Philip Areeda & Donald F. Turner, *Antitrust Law* 21 725b (1978).

55 F.3d at 767.

In the alternative, Florida Seed argues that, at the very least, it is a potential competitor in the manufacturing arena. The court is not persuaded by this argument either. The court recognizes that [HN10](#) a plaintiff who was never in a market, here the manufacturing market, sometimes can succeed on a claim that he or she would have entered if had the defendant's antitrust violation not kept him or her out. To state such a claim, the plaintiff must show a financial ability to enter the market, the appropriate background and experience that makes success possible and steps evidencing an intent to enter the market. See [In re Dual Deck Video Cassette Antitrust Litigation, 11 F.3d 1460, 1465 \(9th Cir. 1993\)](#); [Great Western Directories, Inc. v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1389 \(5th Cir. 1995\)](#).

Admittedly, Florida Seed's inability to manufacture residential non-selective herbicides is directly attributable to the prohibitive contractual clauses contained in its distributorship agreements with Monsanto and Ortho. Florida Seed, however, has [**26](#) not pointed to any authority indicating that such a restriction is illegal in an antitrust sense or that the factors recited in [Dual Deck Video Cassette](#) need not be proven when such a clause has prohibited market entry. In fact, it appears that Florida Seed would not have complained of its inability to enter the market if its distributorship agreements had not been terminated.

Florida Seed continues by arguing that its assertion that it is a potential competitor, in and of itself, is sufficient to confer standing because at this stage all factual assertions must be taken as true. The court, however, need not and should not adopt in totum conclusory allegations. In other words, [HN11](#) a motion to dismiss cannot be defeated with "conclusory allegations . . . if not supported by facts constituting a legitimate claim for relief. . . ." [Municipal Utilities Bd. of Albertville, 934 F.2d at 1495](#); see also [Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 \(11th Cir. 1985\)](#). Here, the plaintiffs have not alleged the existence of any of the [Dual Deck Video Cassette](#) factors, which the court must examine to assess a company's preparedness to enter a market. The complaint is devoid [**27](#) of any facts that Florida Seed had a genuine intent to enter the market and a preparedness to do so. In other words, the court finds that there is no set of facts by which Florida Seed can show that it is a potential competitor.

Even if the court were to find that Florida Seed suffered antitrust injury, this finding alone cannot confer standing, because "[HN12](#) only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under § 4." [In re Industrial Gas Antitrust Litigation, 681 F.2d 514, 516 \(7th Cir. 1982\)](#), cert. denied, 460 U.S. 1016, 75 L. Ed. 2d 487, 103 S. Ct. 1261 (1983). The court finds that other more direct victims exist. If Monsanto is in fact squelching the marketability of its competitor products, the company who acquired the Kleenup assets or another manufacturing company in the same market would be a more appropriate plaintiff. Likewise, consumers of residential non-selective herbicides could maintain an action if Monsanto's action stifled competition allowing Monsanto to engage in monopoly pricing in retail stores. See generally [SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39 \(1st Cir. 1995\)](#). In other [**28](#) words, a finding that Florida Seed has standing to bring an antitrust lawsuit could potentially open the litigation floodgates to all distributors terminated as a result of the alleged illegal merger. The focus of the litigation would then be on the individual injuries and not the damages suffered by the public as a whole.

The discussion, thus far, has focused on whether Florida Seed has standing to assert antitrust claims. Frit likewise cannot bring this action, because [HN13](#) stockholders do not have standing to bring an action on behalf of their subsidiary. [Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710 \(11th Cir. 1984\)](#); [Harris v. Shell Oil Co., 371 F. Supp. 376, 377 \(M.D.Ala. 1974\)](#) ("The fact [[*1177](#)] that the sole stockholder may not recover damages under the antitrust laws for losses of his [or her] corporation had long ago been decided in this jurisdiction. . . .") In [Harris](#), the court explained the reasoning for denying standing to stockholders and related entities:

The theory is that, if each creditor, shareholder or other person with some damage derived or reflecting from the damage to the corporation initially injured by the antitrust violations, [**29](#) had standing to assert treble-damages claims for such injuries, the court would be flooded with a multiplicity of suits, and the defendant would be subject to multiple liability for the same alleged wrongs.

Id. at 379.

The plaintiffs, however, argue that Frit does not seek a double recovery or independent standing in its capacity as a shareholder but rather joins with Florida Seed in vindicating the alleged violations of the antitrust laws. The plaintiffs have not cited any authority for allowing Frit to unite with Florida Seed, nor has the court found any. Under the antitrust laws, Florida Seed is capable, in and of itself, of bringing an antitrust action, assuming of course that the standing requirements are satisfied. To the extent Frit seeks to join forces with Florida Seed, the court finds that the addition of Frit is merely duplicative. Therefore, Frit is not a proper party to the federal antitrust claims. Accordingly, Monsanto's motion to dismiss for lack of standing as to the plaintiffs' claims under [§ 2](#) of the Sherman Act and [§ 7](#) of the Clayton Act is due to be granted.

II. State Law Claims

In granting Monsanto's motion to dismiss, the only claims now [\[*30\]](#) remaining are those brought pursuant to state law. Because diversity-of-citizenship jurisdiction is present in this case, the court will retain jurisdiction over the remaining causes of action.

ORDER

For the reasons stated herein, it is CONSIDERED and ORDERED that defendant Monsanto Company's motion to dismiss the federal antitrust claims under [§ 2](#) of the Sherman Act (Count I) and [§ 7](#) of the Clayton Act (Count II) be and the same is hereby GRANTED. The action will continue as to the state-law claims asserted in Counts III, IV, and V of the complaint.

Done this 9th day of November 1995.

Ira DeMent

UNITED STATES DISTRICT JUDGE

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Sportswear Design v. Canstar Sports USA

United States Court of Appeals for the Sixth Circuit

November 9, 1995, FILED

Nos. 93-2242, 93-2294

Reporter

1995 U.S. App. LEXIS 35556 *; 1995-2 Trade Cas. (CCH) P71,211

SPORTSWEAR DESIGN, INC., Plaintiff-Appellant, Cross-Appellee. -v- CANSTAR SPORTS USA, INC., Defendant-Appellee, Cross-Appellant, and BOB REID, an Individual, Defendant-Appellee.

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Reported in Table Case Format at: 70 F.3d 116, 1995 U.S. App. LEXIS 37585.

Prior History: On Appeal from the United States District Court for the Eastern District of Michigan.

Disposition: AFFIRMED in part, REVERSED in part, and REMANDED.

Core Terms

summary judgment, warranty, defamation claim, antitrust violation, counterclaim, antitrust, account stated, matter of law, genuine

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[Summary Judgment, Motions for Summary Judgment

A motion for summary judgment must be rendered where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, [Fed. R. Civ. P. 56\(c\)](#), with all reasonable inferences in favor of the non-moving party.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN2 [down] **Antitrust & Trade Law, Sherman Act**

To establish an antitrust violation, a plaintiff must show a contract, combination or conspiracy that affects interstate commerce and unreasonably restrains trade. To show an unreasonable restraint of trade, a plaintiff must show that the conspiracy has the potential to produce adverse anti-competitive effects within relevant product and geographic markets. This may be shown through proof of a per se antitrust violation, where proof of certain actions by defendants is sufficient to establish a violation, or through a rule of reason analysis, where, in addition to proving actions by defendants, plaintiff must offer sufficient evidence for a trier of fact to be able to conclude that the actions had an unreasonably anti-competitive effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN3 [down] **Cartels & Horizontal Restraints, Price Fixing**

Horizontal price-fixing is a per se antitrust violation. A plaintiff must prove more than parallel business behavior to defeat a motion for summary judgment. Plaintiff must come forward with significant probative evidence supporting its theory that the defendants engaged in (1) conscious parallel action, (2) which is contrary to their economic self-interest so as not to amount to a good faith business judgment.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN4 [down] **Standards of Review, Abuse of Discretion**

While an appellate court reviews a grant of summary judgment under a de novo standard, appellate review of a denial of summary judgment is governed by an abuse of discretion standard.

Judges: BEFORE: KENNEDY and MOORE, Circuit Judges; and POTTER, * Senior District Judge.

Opinion

PER CURIAM. Plaintiff Sportswear Design, Inc. ("Sportswear") appeals the order of the District Court granting summary judgment in favor of defendants Canstar Sports USA, Inc. ("Canstar"), Bob Reid ("Reid") and Cooper of Canada, Ltd. ("Cooper") on antitrust claims and certain contract claims. Defendant Canstar appeals the dismissal without prejudice of Sportswear's defamation claim and breach of warranty claim and appeals the District Court's denial of summary judgment on its account stated counterclaim. [*2] For the following reasons, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the District Court.¹

I.

Defendant Canstar is a distributor for Canstar Sports, Inc., a Canadian public company that manufactures and distributes major brands of hockey equipment. In 1981, Canstar hired Defendant Reid as a sales representative of several product lines for Michigan and Ohio.

Plaintiff Sportswear began as a retailer of hockey equipment in the early 1980's. In 1985, Canstar approved a \$4,000 credit line for Canstar's Micron skates to Sportswear. Within three months, Sportswear was delinquent on its debt. Problems continued through the year and Sportswear's line of credit was reduced. By March 10, 1987, Sportswear [*3] was delinquent in the amount of \$ 4,778.

In early March of 1987, Canstar and Sportswear tried to negotiate a payment plan but Canstar would not accept Sportswear's condition that Canstar open an account for Sportswear to carry Canstar's Bauer line of skates. On March 17, 1987, Sportswear asserted for the first time that Canstar breached a contract by refusing to honor warranties on Micron skates for which payment had come due in January. Canstar made several unsuccessful attempts to negotiate a settlement of the dispute, but ultimately suspended further dealing with Sportswear. In 1990, when Canstar purchased the assets of Cooper and discovered that Sportswear was a Cooper customer, Canstar chose not to sell Sportswear any Cooper products.

In November of 1990, Sportswear filed a nine-count complaint alleging antitrust, contract, and business tort claims against Canstar, Cooper, and sales representative Bob Reid. The District Court granted summary judgment to the defendants on the antitrust claims and on all but one of the breach of contract claims, which, together with a defamation claim, the District Court dismissed without prejudice.

II.

We affirm the District Court's [*4] grant of summary judgment in favor of the defendants on the antitrust claims under the Sherman Act, [15 U.S.C. § 1 et seq.](#), the Clayton Act, [15 U.S.C. § 13 et seq.](#), and under Michigan **antitrust law**, [M.C.L.A. § 445.771 et seq.](#).² [HN1](#) A motion for summary judgment must be rendered where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, [F.R.C.P. 56\(c\)](#), with all reasonable inferences in favor of the non-moving party. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#).

* Honorable John W. Potter, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

¹ In light of the fact that defendant Cooper of Canada, Ltd. had a default judgment entered against it, J.A. at 4 (docket entry 8/5/91), the grant of summary judgment in its favor, J.A. at 67, would seem to have been an oversight. Therefore, summary judgment for Cooper must be vacated.

² All three claims collapse into one for the purposes of summary judgment in this case. Under the facts presented, there can be no liability under the Clayton Act if the Sherman Act has not been violated, and Michigan law explicitly tracks federal **antitrust law**. [M.C.L.A. § 445.784\(2\)](#).

HN2[

To establish an antitrust violation, a plaintiff must show a contract, combination or conspiracy that affects interstate commerce and unreasonably restrains [*5] trade. [Lie v. St. Joseph Hosp. of Mount Clemens, Mich., 964 F.2d 567, 568 \(6th Cir. 1992\)](#). To show an unreasonable restraint of trade, a plaintiff must show that the conspiracy has the potential to produce adverse anti-competitive effects within relevant product and geographic markets. This may be shown through proof of a *per se* antitrust violation, where proof of certain actions by defendants is sufficient to establish a violation, or through a rule of reason analysis, where, in addition to proving actions by defendants, plaintiff must offer sufficient evidence for a trier of fact to be able to conclude that the actions had an unreasonably anti-competitive effect. See e.g., [Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296-97, 86 L. Ed. 2d 202, 105 S. Ct. 2613 \(1985\)](#).

Sportswear claims that Canstar's refusal to do business with it was not, as Canstar alleges, on account of Sportswear's poor credit history but because Sportswear was a discounter. Even if this were so, and the record does not support such a theory, the actions allegedly taken by Canstar would not constitute a *per se* antitrust violation. [Business Elec. \[*6\] Corp. v. Sharp Elec. Corp., 485 U.S. 717, 726-27, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1987\)](#). Therefore the rule of reason standard applies. Plaintiff failed to allege facts sufficient for a trier of fact to conclude that the actions had any anti-competitive effect. In fact, plaintiff's own officer conceded that the market was "very competitive."

Sportswear further claims that defendants conspired with several Detroit area retailers in a horizontal price-fixing scheme to keep prices above a minimum level. [HN3](#)[] Horizontal price-fixing is a *per se* antitrust violation. At most in this case, however, Sportswear has shown merely that several businesses would not deal with it. Plaintiff must prove more than parallel business behavior to defeat a motion for summary judgment. Plaintiff "must come forward with significant probative evidence supporting its theory that the defendants engaged in (1) conscious parallel action, (2) which is contrary to their economic self-interest so as not to amount to a good faith business judgment." [Amey, Inc. v. Gulf Abstract & Title Inc., 758 F.2d 1486 \(5th Cir. 1985\)](#), cert. denied, 475 U.S. 1107, 89 L. Ed. 2d 912, 106 S. Ct. 1513 (1986). Although [*7] Sportswear has made general allegations of horizontal price-fixing, it has failed to offer significant probative evidence to suggest that decisions made by defendants were not the result of good faith business judgments. Summary judgment on this issue was thus appropriate.

Finally, Sportswear argues that defendant engaged in vertical non-price restraint by trying to control and enforce the final destination of its products. Such actions are not *per se* antitrust violations; the rule of reason standard is applied. [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). As stated above, plaintiff has failed to establish facts from which a trier of fact could conclude that Canstar's actions were unreasonably restrictive of competitive conditions. Therefore, as a matter of law, defendants' actions with regard to this accusation do not constitute antitrust violations. The District Court properly dismissed the antitrust claims.

III.

The District Court denied summary judgment for Canstar with regard to the Sportswear's breach of contract and defamation claims as well as Canstar's state law counterclaim for account stated. [HN4](#)[] [*8] While we review a grant of summary judgment under a *de novo* standard, appellate review of a denial of summary judgment is governed by an abuse of discretion standard. [Pinney Dock & Transp. v. Penn Cent. Corp., 838 F.2d 1445, 1472 \(6th Cir.\), cert. denied, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 \(1988\); Southward v. South Cent. Ready Mix Supply Corp., 7 F.3d 487, 492 \(6th Cir. 1993\)](#).

A. The Defamation Claim

The District Court dismissed Sportswear's defamation claim in order to allow plaintiff additional time to amend its complaint with respect to that claim. Plaintiff, however, had already been granted leave to amend but failed to do so satisfactorily. Nor has it indicated what amendment would be forthcoming. In its reply brief, plaintiff points to four affidavits in support of its defamation claim. Appellant's Reply Brief at 48. Taken as true, nothing in the affidavits

constitutes competent evidence of defamation.³ Thus, given ample opportunity of lengthy discovery, plaintiff failed to point to a genuine issue of material fact and defendants are entitled to judgment as a matter of law. We therefore find the District Court to have abused its discretion by denying summary judgment to the [*9] defendants and remand for summary judgment for the defendant on the defamation claim. See *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) (discussing when a grant of leave to amend is inappropriate).

B. The Warranty Claim

Undisputed facts establish that in August of 1986 Sportswear submitted purchase orders to Canstar for Micron product which Canstar then delivered. According to Sportswear officer Bekkala's own deposition testimony, the product was sold "as is." Because the defendant offered evidence of the plaintiff conceding that the purchase [*10] of fitting stock was "as is," and plaintiff pointed to nothing specific to show otherwise, the District Court erred in not granting summary judgment to the defendant on the breach of warranty claim.

The District Court appears to have concluded erroneously that notes allegedly taken by a Sportswear officer created a genuine issue of material fact on the warranty claim. The note simply said, "Understanding of no return at any point unless warranty is involved." This is not proof of the existence of a warranty. Furthermore, our own independent review of the record uncovered no competent evidence of warranty. Therefore, we find that the District Court abused its discretion with regard to plaintiff's warranty claim and defendant is entitled to judgment as a matter of law.

C. The Account Stated Counterclaim

Canstar filed a counterclaim for an action for account stated under Michigan law, *MCL 600.2145*, MSA 27A.2145, because of Sportswear's account delinquency. Undisputed facts establish that Canstar delivered product to Sportswear pursuant to a Sportswear purchase order and that Sportswear never paid for the product. In fact, Sportswear had agreed to a payment plan to extinguish the [*11] debt and had gone so far as to prepare a check for the first installment but never sent it on advice of counsel.

The District Court found a genuine issue with regard to the warranty claim and thus never reached Canstar's counterclaim. But, as discussed above, Sportswear has failed to show a genuine issue of material fact on the warranty issue -- the product was sold "as is" -- therefore, Sportswear cannot argue that a breach of warranty excused its failure to settle its account. Thus, defendant has provided unrefuted evidence of an account stated and is entitled to judgment as a matter of law. See *Roberts Consol. Indus., Inc. v. Superior Carpet Supply, Inc.*, No. 91-CV-73128-DT, 1992 U.S. Dist. LEXIS 21518, 1992 WL 350617 (E.D. Mich. Sept. 28, 1992).

IV.

For the reasons stated, we AFFIRM in part, REVERSE in part, and REMAND to the District Court for dismissal of the warranty and defamation claims with prejudice, for entry of judgment on the counterclaim, and for vacation of the judgment of dismissal on the complaint as to Cooper of Canada, Ltd. as to which a default judgment has already been entered.

End of Document

³ Two of the affidavits consist of sworn statements of Sportswear officers, Gale and Bekkala, who attest to having been told by fellow retailers that they could not sell any Canstar products to Sportswear and two affidavits of Joseph Domenick, an employee at another sporting goods store, are to the same effect. This testimony, if true, does not allege the making of any false statement and thus cannot be considered as evidence of defamation.



Khan v. State Oil Co.

United States District Court for the Northern District of Illinois, Eastern Division

November 13, 1995, Decided

No. 94 C 35

Reporter

907 F. Supp. 1202 *; 1995 U.S. Dist. LEXIS 17068 **

BARKAT U. KHAN and KHAN & ASSOCIATES, INC., an Illinois corporation, Plaintiffs, v. STATE OIL COMPANY, a corporation, Defendant.

Core Terms

prices, antitrust, termination, receiver, recommended, notice, gasoline, retail, Station, sales, summary judgment, franchisee, pump, provisions, appointment, alleges, anti trust law, Sherman Act, franchise, covenant, defective notice, relevant market, franchisor, profits, contractual relationship, material fact, matter of law, good faith, contractual, damages

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Judgments > 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

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1 [down arrow] Entitlement as Matter of Law, Appropriateness

Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). The court evaluates all evidence in the light most favorable to the non-movants. To withstand summary judgment, disputed facts in a case must be those that might affect the outcome of the suit. Summary judgment is not a discretionary remedy and must be granted when the movant is entitled to it as a matter of law.

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing

Energy & Utilities Law > ... > Gasoline Fuels > Petroleum Marketing Practices Act > General Overview

Trademark Law > Conveyances > General Overview

HN2 [down arrow] **Conveyances, Franchises**

The Petroleum Marketing Practices Act (PMPA), [15 U.S.C.S. § 2801\(4\)](#), offers protections only to a "franchisee," which is defined as a retailer or a distributor who is authorized under a franchise to use a trademark in connection with the sale or distribution of motor fuel. The PMPA defines a "franchise" only in terms of a contractual relationship. [15 U.S.C.S. § 2801\(1\)\(B\)](#).

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN3 [down arrow] **Private Actions, Remedies**

Because **antitrust law** is designed to prevent many types of injuries, rather than simply contractual injury, courts should generally focus on antitrust injury requirements, rather than traditional contractual standing requirements, when deciding antitrust cases.

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing > Franchise Nonrenewal & Termination

Labor & Employment Law > Wrongful Termination > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing

Energy & Utilities Law > ... > Gasoline Fuels > Petroleum Marketing Practices Act > General Overview

HN4 [down arrow] **Franchising & Marketing, Franchise Nonrenewal & Termination**

The Petroleum Marketing Practices Act (PMPA), [15 U.S.C.S. § 2805](#), provides franchisees the right to pursue equitable and legal actions against franchisers who fail to comply with the PMPA's notice provisions in terminating franchisees. The preliminary issue in a PMPA wrongful termination action is whether there was a termination. This issue arises from the requirement that a court's jurisdiction be secured by a justiciable case or controversy. The PMPA vests jurisdiction in federal district courts over matters involving the violation of [15 U.S.C.S. § 2802\(a\)](#), which

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states that no franchisor engaged in the sale or distribution of motor fuel in commerce may: (1) terminate any franchise prior to the conclusion of the term, or the expiration date, stated in the franchise; or (2) fail to renew any franchise relationship. [15 U.S.C.S. § 2802\(a\)](#).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Energy & Utilities Law > ... > Gasoline Fuels > Petroleum Marketing Practices Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

[HN5](#) [+] Entitlement as Matter of Law, Genuine Disputes

A mere defective notice, without more, does not form a sufficient basis for an action under the Petroleum Marketing Practices Act (PMPA), [15 U.S.C.S. § 2801 et seq.](#)

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

[HN6](#) [+] Antitrust & Trade Law, Sherman Act

[Section 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#), bans every contract in restraint of trade or commerce. [Section 1](#) determinations proceed under one of two methods: "per se" or "rule of reason" analysis.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

[HN7](#) [+] Private Actions, Standing

To have standing in federal court pursuant to U.S. Const. art. III, plaintiffs must demonstrate the existence of a case or controversy. In the antitrust context, a core component of the case or controversy demonstration is the requirement of an antitrust injury. An antitrust injury is an injury of the type the antitrust laws were intended to prevent and an injury flowing from that which makes defendants' acts unlawful. The alleged injury must be palpable and distinct, rather than abstract, conjectural, or hypothetical. In considering the injury requirements of antitrust cases, although the court must draw all inferences from the underlying facts in the light most favorable to the non-movants, [antitrust law](#) limits the range of permissible inferences from ambiguous evidence.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

[**HN8**](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order to prove an agreement in restraint of trade, a plaintiff must show that the defendant's conduct actually had an adverse effect on all of competition in a relevant market. Proof of harm to single competitor is insufficient. The plaintiff has the burden of demonstrating the relevant geographic market. That market is the geographic area in which a buyer may practically proceed to other sellers for goods or services, should the defendant seller seek to raise its prices. Furthermore, rule of reason analysis includes the general requirement that antitrust plaintiffs establish that the defendants had market power. That is, there must be a showing that defendants possessed the power to raise prices significantly above the competitive level without losing all of one's business. Plaintiffs cannot meet their burden of showing an antitrust injury simply by alleging that they could have made more money by pricing products differently than they chose to. Instead, they must make some showing that the pricing provision caused them to lose money by forcing them to set prices which were artificial.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

[**HN9**](#) Private Actions, Standing

Before receiving antitrust relief, plaintiffs must meet their burden of demonstrating the applicability of antitrust law to their dispute.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[**HN10**](#) Regulated Practices, Trade Practices & Unfair Competition

Antitrust plaintiffs have the burden of showing a violation by a party with market power and that the violation had a negative effect on competition in the entire relevant market, not just to an individual competitor.

Counsel: **[**1]** FOR BARKAT U KHAN, KHAN & ASSOCIATES, INC., an Illinois corporation, plaintiffs: David C. Bogan, Champ W. Davis, Jr., Denise Michael Kaplan, Davis, Mannix & McGrath, Chicago, IL. Gregory James Ellis, Law Offices of Gregory J. Ellis, Esq., Oak Brook, IL.

FOR STATE OIL COMPANY, a corporation, defendant: Paul T. Kalinich, Kalinich, McCluskey & Sullivan, P.C., Glen Ellyn, IL. John C. Baumgartner, Churchill, Baumgartner & Phillips, Ltd, Grayslake, IL.

Judges: CHARLES RONALD NORGL, SR., Judge, United States District Court

Opinion by: CHARLES RONALD NORGL, SR.

Opinion

[*1205] OPINION AND ORDER

CHARLES R. NORGL, SR., District Judge:

Before the court are the parties' cross-motions for summary judgment on Count II, and Defendant State Oil Company's ("State Oil") motion for summary judgment on Counts I and IV. Also before the court are State Oil's

motion to strike Plaintiff's expert report, its motion to bar that expert's testimony, and its motion in limine regarding that expert's testimony. Plaintiff has indicated that he will voluntarily dismiss Count III.

I. BACKGROUND

Plaintiffs Barkat U. Kahn ("Kahn") and Kahn & Associates, Inc. ("K&A") (collectively "Plaintiffs") bring this action **[**2]** against State Oil claiming damages for violations of the Petroleum Marketing Practices Act ("PMPA"), [15 U.S.C. §§ 2801-41](#) (Count I), the Sherman Antitrust Act ("Sherman Act"), [15 U.S.C. § 1](#) (Count II), and for breach of contract (Count IV). The court exercises jurisdiction over the PMPA and Sherman Act claims pursuant to [28 U.S.C. § 1331](#), and over the contract claim under its supplemental jurisdiction pursuant to [28 U.S.C. § 1337](#).

On January 20, 1992, Khan and State Oil entered a written lease and supply agreement ("Agreement") regarding a gasoline service station (the "Station"). In relevant part, paragraph 31 of the Agreement provides:

In order to assist in maintaining the competitive position of both Landlord and Tenant, The [sic] Landlord will from time to time establish a recommended retail pump price for each type of gasoline sold at the location. The Landlord shall charge the Tenant for each transport of gasoline at the recommended retail pump price less margin and sales tax. The Tenant's margin will be \$ 0.0325 (three and 1/4 cents) per gallon. In the event the Tenant elects to sell at retail at a price in excess of the recommended retail pump price established **[**3]** by the Landlord, the Tenant shall pay the Landlord a sum equal to the difference between the retail pump price at which the gasoline in question has been sold, and the recommended retail pump price established by the Landlord multiplied by the number of gallons sold. In the event the Tenant elects to sell at a retail pump price below the recommended retail pump price established by the Landlord, the Tenant shall not be entitled to a reduction in price to cover the difference.

The Agreement also provides for rent in the amount of \$ 7,500 per month in 1992, \$ 8,000 per month in 1993, and \$ 8,500 per month in 1994.

After execution of the agreement, Khan took possession of the Station and remained in possession from January 1992 to February 1993. During that time, pursuant to the Agreement, Plaintiffs purchased from State Oil and resold various grades of gasoline. Both parties agree that Khan was a franchisee and State Oil was a franchisor under the definitional provisions of the PMPA.

On January 27, 1993, State Oil issued a Notice of Termination, giving Plaintiffs five-days notice of State Oil's intent to terminate the Agreement as of February 2, 1993. **[*1206]** State Oil explains that **[**4]** this notice was issued for non-payment of amounts owed. On February 8, 1993, State Oil brought a forcible entry and detainer action in DuPage County and a separate action to collect on the debt. The Circuit Court of the Eighteenth Judicial Circuit of Illinois appointed a receiver to operate the Station.

Khan removed State Oil's action to federal court, arguing that the PMPA applied. On May 12, 1993, the court denied State Oil's motion for summary judgment, because the court had not determined that, as a matter of law, State Oil's January 27, 1993 notice was reasonable. The court found that it did not have jurisdiction over State Oil as a plaintiff franchisor under the PMPA because the PMPA grants jurisdiction only over franchisee actions. [State Oil Co. v. Khan, 839 F. Supp. 543 \(N.D. Ill. 1993\)](#). By order of December 3, 1993, this court remanded the action back to DuPage County. In addition to the instant case in federal court, Khan filed state counterclaims and a third-party complaint in the remanded state collection action.

After the state court appointment of the receiver, State Oil issued a second notice of termination on May 29, 1993, providing for termination effective September **[**5]** 3, 1993. The receiver ran the Station from February until November 1993.

II. DISCUSSION

HN1  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\(c\)](#); [Transportation](#)

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Communications Int'l Union v. CSX Transp., Inc., 30 F.3d 903, 904 (7th Cir. 1994). The court evaluates all evidence in the light most favorable to the non-movants. *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 1995 WL 567135, at * 3 (1995). To withstand summary judgment, disputed facts in a case must be those that might affect the outcome of the suit. *Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994). Summary judgment is not a discretionary remedy and must be granted when the movant is entitled to it as a matter of law. *Anderson v. P. A. Radocy & Sons, Inc.*, 67 F.3d 619, 1995 WL 572914, at *2 (7th Cir. 1995). In the instant case, considering all facts in the light most favorable to the non-movants, there are no [**6] genuine issues of material fact which would allow this case to withstand summary judgment.

A. K&A as a Party

As a preliminary matter, State Oil contends that K&A is not a proper plaintiff in this action because the Complaint alleges a contractual relationship only between Khan and State Oil. [HN2](#)[] The PMPA offers protections only to a "franchisee," which is defined as "a retailer or a distributor . . . who is authorized . . . under a franchise . . . to use a trademark in connection with the sale . . . or distribution of motor fuel." [15 U.S.C. § 2801\(4\)](#). The PMPA defines a "franchise" only in terms of a contractual relationship. [15 U.S.C. § 2801\(1\)\(B\)](#). Khan was the only "retailer or distributor" in a contractual relationship with State Oil. Because K&A was not engaged in a contractual relationship with State Oil, it is not a protected "franchisee" under the PMPA. Thus, it is not a proper plaintiff under Count I of the Complaint.

Count II of the Complaint alleges a violation of **antitrust law**. State Oil contends that K&A does not have standing to bring this count because there was no contractual relationship between State Oil and K&A. [HN3](#)[] Because **antitrust law** is designed to prevent many [**7] types of injuries, rather than simply contractual injury, courts should generally focus on antitrust injury requirements, rather than traditional contractual standing requirements, when deciding antitrust cases. See *Southwest Suburban Bd. of Realtors v. Beverly Area Planning Assoc.*, 830 F.2d 1374, 1377 n.1 (7th Cir. 1987). Because K&A may have been in a position to suffer potential antitrust injury, the court will not dismiss K&A's Count II, and will consider that count as it applies to both Khan and K&A.

[*1207] Count IV alleges a state law contract claim. Again, because State Oil incurred no contractual duties to K&A under the facts presented, K&A does not have standing to bring this contractual claim against State Oil. See *White Hen Pantry, Inc. v. Cha*, 214 Ill. App. 3d 627, 158 Ill. Dec. 310, 574 N.E.2d 104 (1991).

In sum, K&A does not have standing to bring Counts I and IV. As such, the court considers Counts I and IV as if they were brought by Khan individually.

B. Petroleum Marketing Practices Act

Khan alleges that State Oil violated the PMPA by its defective January 27, 1993, notice of intent to terminate the Agreement and by its action to appoint the receiver.¹ The [**8] court need not decide whether the January 27 notice was faulty for purposes of this order.²

¹ Citing *Winks v. Feeney Oil Co.*, 731 F. Supp. 322, 327 (C.D. Ill. 1990), Khan asserts that State Oil has already conceded that its first notice was defective by issuing the second notice. The court respectfully disagrees with the *Winks* court. The court will not imply that a franchisor concedes a defective first notice when it issues a complying second notice. By punishing the issuance of a correct notice, the incentive for franchisors' to correct possibly defective notices would be removed.

² Khan's response to State Oil's motion states:

In the action before Judge Norgle prior to its remand, State Oil moved for summary judgment, which was denied by Order dated May 12, 1993. Judge Norgle found that the January 27, 1993 Notice of Termination . . . was not reasonable nor justified under the circumstances.

(Pls.' Mem. In Opp'n to Summ. J. at 4.) Khan seems to ignore the court's later opinion and order remanding the case to the Circuit Court of DuPage County, which explains:

[**9] [HN4](#)

The PMPA provides franchisees the right to pursue equitable and legal actions against franchisors who fail to comply with the PMPA's notice provisions in terminating franchisees. [15 U.S.C. § 2805](#). The preliminary issue in a PMPA wrongful termination action is whether there was a termination. This issue arises from the requirement that a court's jurisdiction be secured by a justiciable case or controversy. [Naso v. Sun Ref. & Mktg. Co., 582 F. Supp. 1566 \(N.D. Ohio 1983\)](#) (citing [Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384 \(1945\)](#)). The PMPA vests jurisdiction in federal district courts over matters involving the violation of [15 U.S.C. § 2802\(a\)](#), which states:

No franchisor engaged in the sale . . . or distribution of motor fuel in commerce may - (1) terminate any franchise . . . prior to the conclusion of the term, or the expiration date, stated in the franchise; or . . . (2) fail to renew any franchise relationship.

[15 U.S.C. § 2802\(a\)](#).

Khan alleges that the appointment of the receiver was a termination by State Oil pursuant to the January 27 notice. This court has already determined, in its minute order of [\[*10\]](#) September 11, 1995, that it will not construe the appointment of a receiver by the state court as a termination by State Oil under the PMPA.³ The appointment was an [\[*1208\]](#) action of the state court, rather than an action of State Oil. As such, that appointment cannot be viewed as a termination by State Oil flowing from its arguably-defective January 27 notice. Khan has not alleged any other act which could constitute a termination by State Oil in violation of the PMPA. Khan's failure to meet this jurisdictional requirement raises a serious doubt about the existence of a justiciable case or controversy. See [Halder v. Standard Oil Co., 642 F.2d 107 \(5th Cir. 1981\)](#) (franchisee's fear of termination did not confer jurisdiction on the district court).

[\[*11\]](#) Alternatively, Khan argues that he did not need to wait for State Oil to actually terminate his franchise before bringing a PMPA action against State Oil. Khan cites several cases where franchisees brought actions based on defective notices prior to actual termination. See, e.g., [Winks v. Feeney Oil Co., Inc., 731 F. Supp. 322 \(C.D. Ill.](#)

The court has *not* already made a finding that State Oil's original notice of termination was defective or unreasonable. The court in its May 12, 1993 minute order on State Oil's motion for summary judgment found only that State Oil failed to convince the court that providing ninety-days notice would not have been reasonable as a matter of law. The court did not conclude the opposite: that ninety-days notice would not have been unreasonable, or that the five-day notice was itself unreasonable. That issue may thus be revisited.

[State Oil v. Khan, 839 F. Supp. 543, 544 n.1 \(N.D. Ill. 1993\)](#) (Norgle, J.) (emphasis added).

³ In part, the court's order states as follows:

As a matter of law, the mere appointment of a receiver by the Circuit Court for the 18th Judicial Circuit did not constitute a termination of the contract between the parties. Generally, appointment of a receiver does not determine the rights of the parties. Rather, a receiver acts as an officer of the court, managing the property for the benefit of both parties. [First Nat'l Bank of Vandalia v. Trail Ridge Farm, 143 Ill. App. 3d 244, 251, 97 Ill. Dec. 371, 492 N.E.2d 1030 \(5th Dist. 1986\)](#); see also [People ex rel. Scott v. Pintozzi, 50 Ill. 2d 115, 277 N.E.2d 844 \(1971\)](#); [In re marriage of Pick, 167 Ill. App. 3d 294, 299, 118 Ill. Dec. 53, 521 N.E.2d 121 \(2d Dist. 1988\)](#) (purpose of receivership is to prevent injury and avoid injustice).

The decision to appoint a receiver lies within the discretion of the court. [Asset Guar. Reinsurance Co. v. American Nat'l Bank & Trust Co. of Chicago, 254 Ill. App. 3d 713, 627 N.E.2d 179, 194 Ill. Dec. 63 \(Ill. App. 1st Dist. 1993\)](#). State Oil's mere petition for a receiver could not have served as a termination of the agreement. Rather, it was the court's discretionary decision that placed Plaintiff's property in receivership. The court's appointment of a receiver was not a termination of the franchise agreement by State Oil.

1990); *Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380 (10th Cir. 1981). However, these cases involve franchisees who were, unlike Khan, seeking injunctions against termination.

Nevertheless, Khan's argument is that the January 27 notice alone is enough to entitle him to damages. He contends that courts must not allow franchisors, like State Oil, to escape liability for harm caused by defective notices by later withdrawing those notices. Khan cites no authority for this proposition.

Furthermore, Khan does not allege that he was harmed by the January 27 notice. He alleges none of the injuries which PMPA plaintiffs in other cases have alleged. For example, as discussed above, he can not claim that an actual termination resulted from that notice. Also, because he did not bring a claim for injunctive relief, he cannot claim attorneys fees [\[**12\]](#) for seeking an injunction like the plaintiffs in *Winks* and *Lyons v. Mobil Oil Corp.*, 554 F. Supp. 199 (D. Conn. 1982). He does not claim resulting lost profits like the plaintiff in *Lippo v. Mobil Oil Corp.*, 776 F.2d 706 (7th Cir. 1985). Indeed, Khan claims in Count II that the receiver increased revenue and profits while operating Khan's franchise after the time of the defective notice.

In essence, Khan's argument amounts to an assertion that the issuance of any defective notice is a *per se* violation of the PMPA entitling a franchisee to trial and damages. Neither case law nor the PMPA recognize a *per se* violation of the PMPA by franchisors entitling franchisees to recovery. This court is unwilling to create such a violation of the PMPA based on allegations of a defective notice. [HN5](#) A mere defective notice, without more, does not form a sufficient basis for an action under the PMPA.⁴ Even viewing the facts in the light most favorable to Khan, there is no genuine issue of material fact which would allow Count I (PMPA) to survive summary judgment.

[\[**13\]](#) C. Antitrust

Both sides have moved for summary judgment on Count II.⁵ [\[**14\]](#) Plaintiffs state that the pricing provisions in the Agreement (set-forth above) constituted vertical price-fixing, in that the Agreement prohibited [\[*1209\]](#) Plaintiffs from increasing income by raising or lowering State Oil's recommended retail price.⁶ Plaintiffs claim that, absent the Agreement's price constraints, Plaintiffs could have increased income by raising the price of premium grade gasoline and lowering the price of regular grades.

As proof of these assertions, Plaintiffs offer the report of Gustavo E. Bamberger ("Bamberger"). Plaintiffs aver that the receiver did not follow State Oil's recommended retail price and, therefore, that the receiver increased sales of gasoline. Plaintiffs also state that increased sales of gasoline would have resulted in a similar increase in ancillary sales.

⁴ The PMPA specifically provides that the court, rather than a jury, shall determine whether exemplary damages or attorney fees should be awarded. 15 U.S.C. § 2805(d)(2)-(3). No case or statute recognizes a mere defective notice, without alleged injury, as a violation entitling a plaintiff to fees or exemplary damages. Accordingly, Khan has set forth no facts which could give rise to such an award.

⁵ As a precursor to its antitrust discussion, the court notes the ambiguity of much of the current antitrust case law:

The courts . . . [have] . . . spawned an enormous body of interpretations and judgements without great uniformity or consistency. Almost any term in a contract that was alleged in one decisions to be . . . "anticompetitive," and thus illegal, has been found in another decision to be legal.

Armen A. Alchian & William R. Allen, *Exchange and Production: Competition, Coordination & Control* 272 (3d ed. 1983). The standards of summary judgment loom heavily in the face of this ambiguity. The court acknowledges the challenge of demonstrating a genuine issue of material fact under such circumstances.

⁶ Vertical price-fixing involves an agreement to set retail prices between a retailer and a wholesaler, as opposed to an agreement between two wholesalers or two retailers (horizontal price-fixing). See *Black's Law Dictionary* 1400 (5th ed. 1979).

In response, State Oil states that competition, rather than State Oil, prevented Plaintiffs from raising prices. State Oil notes that Plaintiffs were free to set any price they wished for the gasoline, although profits would be effected by setting a price different from the recommended price. State Oil also argues that Plaintiffs and their expert are merely speculating about the receiver's pricing method and success, and that any success that the receiver may have had is not an indicator [**15] that Plaintiffs could have performed similarly. In addition, State Oil asserts that Plaintiffs' reasoning regarding the relationship between ancillary sales and gasoline sales is faulty.

Plaintiffs respond that State Oil's recommended prices were not competitive. Plaintiffs draw this conclusion from a series of documented phone calls, in which Khan called-in the pump prices of his competitors. For each of these phone calls, Khan's recommended prices were higher than his competition's. In response, State Oil claims that Khan only called-in prices when he wished to request a wholesale price-reduction, and that Khan's documented prices are not generally representative of the relationship between Khan's prices and those of his competition.

HN6[] Section One of the Sherman Act bans "every contract . . . in restraint of trade or commerce." [15 U.S.C. § 1](#). Section One determinations proceed under one of two methods: "per se" or "rule of reason" analysis. The court already ruled, on September 12, 1995 (Doc. # 73), that the alleged violation must be considered under "rule of reason," and not "per se," analysis. That is, the court will weigh all circumstances of the case when determining whether [**16] the pricing provision is illegal for imposing an unreasonable restraint on trade. See [Continental T.V., Inc. v. GTE Sylvania Inc.](#), [433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#).⁷

HN7[]

To have standing in federal court pursuant to Article III of the Constitution, plaintiffs must demonstrate the existence of a case or controversy. [Slowiak v. Land O'Lakes, Inc.](#), [987 F.2d 1293, 1296 \(7th Cir. 1993\)](#). In the antitrust context, a core component of the case or controversy demonstration is the requirement of an antitrust injury. [Serfecz v. Jewel Food Stores](#), [67 F.3d 591, 1995 WL 567135 \(7th Cir. 1995\)](#). An antitrust injury is an "injury of the type the antitrust laws were intended [**17] to prevent and . . . [an injury flowing]. . . from that which makes defendants' acts unlawful." [Indiana Grocery, Inc. v. Super Valu Stores, Inc.](#), [864 F.2d 1409, 1419 \(7th Cir. 1989\)](#) (quoting [NCAA v. Bd. of Regents for the Univ. of Okla.](#), [468 U.S. 85, 103, 104 S. Ct. 2948, 82 L. Ed. 2d 70 \(1984\)](#)). The alleged injury must be palpable and distinct, rather than abstract, conjectural, or hypothetical. [Slowiak](#), [987 F.2d at 1296](#). In considering the injury requirements of [§ 1](#) antitrust cases, although the court must draw all inferences from the underlying facts in the light most favorable to the non-movants, "[antitrust law](#) limits the range of permissible inferences from ambiguous evidence in a [§ 1](#) case." [Valley Liquors, Inc. v. Renfield Importers, Ltd.](#), [822 F.2d 656, 660 \(1987\)](#) (quoting [Matsushita Elec. Industrial](#) [[*1210](#)] [Co. v. Zenith Radio Corp.](#), [475 U.S. 574, 106 S. Ct. 1348, 1357, 89 L. Ed. 2d 538 \(1986\)](#)).

It is well-established that, **HN8**[] in order to prove an agreement in restraint of trade, a plaintiff must show that the defendant's conduct actually had an adverse effect on all of competition in a relevant market. [Bunker Ramo Corp. v. United Bus. Forms, Inc.](#), [713 F.2d 1272, 1283 \(7th Cir. 1983\)](#). [**18] Proof of harm to single competitor is insufficient. [Oksanen v. Page Mem. Hosp.](#), [945 F.2d 696, 708 \(4th Cir. 1991\)](#).

The plaintiff has the burden of demonstrating the relevant geographic market. [Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.](#), [1995 U.S. Dist. LEXIS 12153](#), No. 93 C 5578, 1995 WL 529601, at *31 (N.D. Ill. Aug. 8, 1995). That market is the geographic area in which a buyer may practically proceed to other sellers for goods or services, should the defendant seller seek to raise its prices. [Cogan v. Harford Mem. Hosp.](#), [843 F. Supp. 1013 \(D. Md. 1994\)](#).

Furthermore, Rule of Reason analysis includes the general requirement that antitrust plaintiffs establish that the defendants had market power. [Valley Liquor](#), [822 F.2d at 665 \(7th Cir. 1987\)](#). That is, there must be a showing that

⁷ Under the "per se" analysis, a violative provision is one which makes "the likelihood of anti-competitive conduct so great as to render unjustified further examination of the alleged conduct." [Business Elecs. Cop. v. Sharp Elecs. Corp.](#), [485 U.S. 717, 724, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1988\)](#) (citation omitted).

defendants possessed the "power to raise prices significantly above the competitive level without losing all of one's business." *Id.*

Plaintiffs cannot meet their burden of showing an antitrust injury simply by alleging that they could have made more money by pricing products differently than they chose to. See [Slowiak, 987 F.2d 1293 at 1297 at 1297-98](#). Instead, they must make some showing that the pricing [**19] provision caused them to lose money by forcing them to set prices which were artificial. [Slowiak 987 F.2d 1293 at 1297](#).

Courts must not trivialize the power of the Sherman Act by bestowing an aura of federal antitrust significance upon minor business disputes. [HN9](#) Before receiving antitrust relief, plaintiffs must meet their burden of demonstrating the applicability of **antitrust law** to their dispute. Plaintiffs here have failed to demonstrate antitrust injury, harm to competition, a relevant market for analysis and market power. Accordingly, as a matter of law, Plaintiffs' allegations do not command the forces of the Sherman Act.

Plaintiffs have not even shown that they could prove that a difference in pricing would have increased their sales. Plaintiffs present the court with Bamberger's report as support for their allegations that the pricing provisions of the Agreement caused the loss of the Station. Bamberger concludes that Plaintiffs would have increased their gross dollar margin if they had not followed State Oil's recommended retail price. He bases this conclusion on the undocumented assumption that the receiver did not follow the pricing provisions of the Agreement. State [**20] Oil denies that assumption. Bamberger states that the receiver showed an increase in profits and sales, which State Oil also denies. Bamberger's report also relies on a series of mathematical equations which rest on undocumented factual assumptions.

In addition, in drawing his conclusions, Bamberger notes, "The difference in . . . sales also may reflect, in part, changes in general economic conditions," although Bamberger states that he was able to isolate the effects of such changes from his calculations. (Rept. of Gustavo E. Bamberger at 3.) He states that he isolated these effects by "assuming that absent the change in pricing policy, gallon sales at Plaintiffs' former location would have changed by the same percentage amount as total gasoline sales" in all of DuPage County. [Rept. of Gustavo E. Bamberger at 4.] Bamberger's report makes no mention of why DuPage County is a relevant market for the analysis of Plaintiff's potential sales.

Moreover, Bamberger's report works on the unstated and unexplained assumption that five-months of the receiver's experience at a single station is a legitimate basis for analyzing Plaintiffs' experience at the same station prior to the receiver's [**21] appointment. He assumes that the receiver operated the Station in the same manner and competitive conditions as Plaintiffs. As an example of how the receiver operated the Station in the same manner as Plaintiffs, Bamberger mentions only that the receiver and Plaintiffs followed the same hours of operation.

[*1211] In an antitrust trial, the court would not admit Bamberger's report as evidence of antitrust injury. The report turns entirely on the experience of one receiver who operated one gas station over a five-month period which occurred after the alleged antitrust violation. The court would expect an expert to also consider trustworthy data reflecting the experience of other, similarly situated stations in a demonstrably relevant market. Bamberger has not done so.

From the assumption that the receiver made money while not following the pricing provisions, Bamberger draws the conclusion that Plaintiffs lost money while following the pricing provisions because of those provisions. The receiver's experience is not a sufficient basis for proving antitrust damages simply because the receiver's experience followed Plaintiffs'. See [Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1165 \(7th Cir. 1987\)](#) (when antitrust plaintiff attempted to prove lost profits by comparing profits for years before and after alleged unlawful activity, the court explained that *post hoc ergo propter hoc* is an invalid methodology for calculating damages, especially where other causal factors may have been at work); See also [Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 415 \(7th Cir. 1992\)](#).

Furthermore, [HN10](#) antitrust plaintiffs have the burden of showing a violation by a party with market power, [Valley Liquor, 822 F.2d at 665](#), and that the violation had a negative effect on competition in the entire relevant

market, not just to an individual competitor. *Tunis Bros. Co. Inc. v. Ford Motor Corp.*, 952 F.2d 715 (3d Cir. 1991); see also *GTE Sylvania*, 433 U.S. at 52. To hold otherwise would transform ordinary business disputes into antitrust claims. See *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986). In the instant case, Plaintiffs have not even attempted to demonstrate that State Oil had market power, or to demonstrate the effect of the pricing provisions on competition in a relevant market. Plaintiffs have, at most, shown [**23] a contractual injury to single competitor in an undefined market.

Bamberger's report does not even demonstrate that Plaintiffs would not have suffered but for the alleged antitrust violation, much less that the injury was of the sort of harm that antitrust laws were intended to prohibit. See *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 707 (7th Cir. 1984) (holding that, even if a manufacturer engaged in price-fixing, its dealer, alleging only its own lost sales, could not bring an action for antitrust damages because antitrust laws were intended to prohibit damage to market competition rather than in individual business relationships). Thus, Plaintiffs have not submitted evidence of an antitrust injury.

Accordingly, Plaintiffs fail to meet the standing requirements of Sherman Act and lack antitrust standing. As a matter of law, considering all facts in favor of Plaintiffs, there is no genuine issue of material fact for trial.

D. State Law Contract

Finally, Khan argues that State Oil breached a covenant of good faith and fair dealing, which arose from the Agreement, because Khan was unable to change gasoline prices at will while State Oil did not set its [**24] prices fairly to allow Khan to make a profit. Khan states that State Oil's wholesale gasoline prices were not competitive, in violation of the covenant of good faith.

For purposes of this motion, State Oil concedes that it did have an obligation under the Agreement to set a competitive recommended pump price. Therefore, State Oil agrees with Khan that State Oil would be in violation of that obligation if it set a recommended pump price (which was linked to the wholesale price) which was too high to be competitive. However, State Oil notes that, a low, and thus competitive, recommended pump price (linked to a low wholesale price) would not be in violation of its obligation. The court agrees. See *Atlantic Richfield*, 495 U.S. 328, 339, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (low, non-predatory, prices are not anti-competitive). Khan can therefore only recover for breach of the covenant if he can present facts indicating that State's prices were too high to be competitive.

State Oil argues that Khan has presented no such facts. State Oil asserts that Bamberger's [*1212] report consists of mere speculation, without supporting economic analysis.

Khan asserts that he need not establish that State Oil's prices were too high. Rather, [**25] he believes that he need only prove that State Oil breached its covenant of good faith. According to Khan,

[The breach] . . . is amply shown by the fact that the Agreement itself is *per se* illegal under . . . the Sherman Act. The Agreement was thus void *ab initio*, and it necessarily follows that State Oil, by drafting, entering into, and enforcing the illegal pricing provisions, breached its covenant of good faith to Khan.

(Pls.' Mem.' in Opp. to Summ. J. at 20.) In sum, Khan argues that State Oil is liable for a breach of a void, unenforceable covenant.

In addition to this circular argument, Khan proceeds to defend Bamberger's report, arguing that it does demonstrate the anti-competitive nature of State's Oil's pricing scheme. As discussed above, the court finds that the report rests on undocumented and unexplained assumptions which fail to demonstrate any anti-competitive injury. Consequently, Khan has offered no facts to support his legal conclusion that State Oil set its prices at anti-competitive levels. Khan has raised no genuine issue of material fact as to a breach of a covenant of good faith and fair dealing.

III. CONCLUSION

907 F. Supp. 1202, *1212 1995 U.S. Dist. LEXIS 17068, **25

Accordingly, Defendant's [**26] motion for summary judgment is granted as to Counts I, II, and IV and Plaintiff's motion for summary judgment as to Count II is denied. Defendant's motion to strike the expert report, its motion to bar, and its motion in limine are denied as moot.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, SR., Judge

United States District Court

DATED: 11/13/95

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Hydranautics v. FilmTec Corp.

United States Court of Appeals for the Ninth Circuit

March 9, 1995, Argued and Submitted, Pasadena, California ; November 15, 1995, Filed

No. 93-56426

Reporter

70 F.3d 533 *; 1995 U.S. App. LEXIS 31981 **; 36 U.S.P.Q.2D (BNA) 1773 ***; 1995-2 Trade Cas. (CCH) P71,176; 95 Cal. Daily Op. Service 8730; 95 Daily Journal DAR 15150; 33 Fed. R. Serv. 3d (Callaghan) 44

HYDRANAUTICS, Plaintiff-Appellant, v. FILMTEC CORPORATION, Defendant-Appellee.

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of California. D.C. No. CV-93-00476-GT. Gordon Thompson, Jr., District Judge, Presiding.

Core Terms

patent, antitrust, patent infringement, counterclaim, district court, infringement, federal circuit, nonprofit, antitrust claim, membranes, lawsuit, invention, fraudulently, predatory, immunity, osmosis, compulsory counterclaim, conceived, baseless, appeals

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 Counterclaims, Compulsory Counterclaims

The appellate court reviews a [Fed. R. Civ. P. 12\(b\)\(6\)](#) dismissal de novo. 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 > ... > Pleadings > Counterclaims > Permissive Counterclaims

Patent Law > Preclusion > Res Judicata

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

70 F.3d 533, *533 1995 U.S. App. LEXIS 31981, **1 36 U.S.P.Q.2D (BNA) 1773, ***1773

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN2 [down] Counterclaims, Permissive Counterclaims

The fact that an antitrust counterclaim for damages might have been asserted in the prior suit does not mean that the failure to do so renders the prior judgment res judicata as respects it. A claim that patent infringement litigation violated an antitrust statute is a permissive, not a mandatory, counterclaim in a patent infringement case, and is not barred in a subsequent suit by failure to raise it in the infringement suit.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN3 [down] Pleadings, Crossclaims

See [Fed. R. Civ. P. 13](#).

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > Permissive Counterclaims

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN4 [down] Counterclaims, Compulsory Counterclaims

If a party has a counterclaim which is compulsory and fails to plead it, it is lost, and cannot be asserted in a second, separate action after conclusion of the first.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN5 [down] Pleadings, Crossclaims

The court determines whether a claim arises out of the same transaction or occurrence by analyzing whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

70 F.3d 533, *533 1995 U.S. App. LEXIS 31981, **1 36 U.S.P.Q.2D (BNA) 1773, ***1773

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Governments > Legislation > Interpretation

[HN6](#) [] Counterclaims, Compulsory Counterclaims

Appeals from patent infringement decisions now go to the Federal Circuit, but appeals from antitrust decisions go to the regional circuit in which the district court sits. If the antitrust counterclaim were treated as compulsory, then any appeal of the antitrust decision would go to the Federal Circuit, not the regional circuit. This may generate a difference between the [antitrust law](#) generally applicable within each regional circuit, and [antitrust law](#) in predatory patent infringement cases. That Congress has provided for regional courts of appeals to decide antitrust appeals, and for the federal circuit to decide patent appeals, suggests that Congress perceived a distinction between the kinds of facts giving rise to one or the other.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

[HN7](#) [] Pleadings, Crossclaims

A malicious prosecution claim cannot be asserted as a counterclaim to the original suit which furnishes its predicate.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

[HN8](#) [] Bad Faith, Fraud & Nonuse, Fraud

If an appellate court reverses and vacates a judgment, the party which prevails on appeal is generally not bound by adverse trial court rulings on other issues. This difference in which facts control shows why there may be a significant difference between the facts which control a patent infringement claim and the facts which control an antitrust claim.

70 F.3d 533, *533 1995 U.S. App. LEXIS 31981, **1 36 U.S.P.Q.2D (BNA) 1773, ***1773

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9 [down arrow] Exemptions & Immunities, Noerr-Pennington Doctrine

No violation of the Sherman Act, [15 U.S.C.S. § 2](#), may be predicated upon a defendant's attempts to influence the passage or enforcement of laws. This principle was expanded to include access to courts and administrative agencies.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10 [down arrow] Exemptions & Immunities, Noerr-Pennington Doctrine

Litigation cannot be deprived of its antitrust immunity as a sham unless it is objectively baseless, regardless of whether the subjective intent of the litigation is to interfere with competition. Unless a lawsuit is objectively baseless, whether an antitrust defendant was indifferent to the outcome on the merits of the suit, or had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process is immaterial.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

HN11 [down arrow] Bad Faith, Fraud & Nonuse, Fraud

In a case involving a fraudulently obtained patent, that which immunized the predatory behavior from antitrust liability (the patent) is, in effect, a nullity because of the underlying intentional fraud.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Reversal of Prior Judgments

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN12 [down arrow] Grounds for Relief from Final Judgment, Order or Proceeding, Reversal of Prior Judgments

"Probable cause" to institute legal proceedings, in the sense in which the phrase is used in tort suits for malicious prosecution of civil claims, establishes that the litigation is not "objectively baseless." At common law, a reversed judgment for the plaintiff in the first action usually is not conclusive as to probable cause in the malicious prosecution action, where the judgment was obtained by fraud.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

HN13 [blue] Inequitable Conduct, Anticompetitive Conduct

If a patent was obtained by intentional fraud, and not merely "technical fraud," then a reversed judgment based upon that fraud, where the plaintiff obtained the patent by intentional fraud or was an assignee who knew of the patent's infirmity, would not demonstrate probable cause for a patent infringement suit.

Counsel: Carl W. Schwarz, McDermott, Will & Emery, Washington, D.C., for the plaintiff-appellant.

James R. Martin, Gibson, Dunn & Crutcher, Los Angeles, California, for the defendant-appellee.

Judges: Before: Mary M. Schroeder and Andrew J. Kleinfeld, Circuit Judges, and Samuel P. King, District Judge. *
Opinion by Judge Kleinfeld.

Opinion by: ANDREW J. KLEINFELD

Opinion

[***1774] [*534] OPINION

KLEINFELD, Circuit Judge:

We must decide whether an antitrust claim is a compulsory counterclaim in a prior patent infringement suit. We conclude that it is not, and reverse the district court's dismissal of the complaint.

I. Facts.

Under the Saline Water Conversion Act of 1971, the government was to contract for water desalination research. Title to any inventions resulting from the research was to vest in the United States, and any patents were to be issued to the United States, in order to make discoveries available to the general [**2] public. *FilmTec v. Hydranautics*, 982 F.2d 1546, 1547-48 (Fed. Cir. 1992). The government would pay scientists to do research, and the benefits were to go to the general public, not just to the researchers.

A scientist named John Cadotte was employed by a nonprofit institution to perform desalination research under a research contract with the government made pursuant to the Saline Water Conversion Act. *Id. at 1548*. While so employed, he conceived of three new types of membranes for reverse osmosis desalination. *Id. at 1548-49*. The nonprofit research institution did not report Mr. Cadotte's findings to the government. *Id.* Mr. Cadotte and others at the nonprofit formed a for-profit corporation, FilmTec, and left the nonprofit. *Id.* Mr. Cadotte then essentially duplicated at his new for-profit corporation the experiments he had carried out at the nonprofit, with a slight refinement. He obtained a patent, assigned to FilmTec, on the reverse osmosis membranes so developed. *Id.*

Hydranautics subsequently began manufacturing similar membranes. FilmTec sued [*535] Hydranautics for patent infringement, and won in district court. *Id.* The district court held that FilmTec's [**3] patent was valid, and [***1775] that Hydranautics had willfully infringed it. *Id.* The district court issued a permanent injunction for the statutory term of FilmTec's patent prohibiting Hydranautics from making or selling the patented films.

* The Honorable Samuel P. King, Senior United States District Judge, for the District of Hawaii, sitting by designation.

The Federal Circuit reversed. [*Id. at 1550-54*](#). The basis for the reversal was that the 1971 Saline Water Conversion Act required that any "patents . . . resulting from such research developed by Government expenditure will . . . be available to the general public." [*Id. at 1550*](#) (alteration in original)(quoting Saline Water Conversion Act of 1971, Pub.L. No. 92-60, 85 Stat. 159 (1971)). The Federal Circuit held that "Congress intended that inventions made under the Contract be available to the 'general public,' of which Hydranautics is a member." [*Id. at 1551*](#). The Federal Circuit concluded as a matter of law that the patented invention was conceived while Mr. Cadotte was employed on the government research contract at the nonprofit research institution. [*Id. at 1551-54*](#).

Mr. Cadotte had testified that he was not particularly encouraged by his November experiments, while he was at the nonprofit, and did not even remember them when he reacted [**4] the same substances in the same manner, in the same proportions, for the same amount of time, but with a reduced drying temperature, three months later, in February. [*Id. at 1553*](#). The Federal Circuit did not reach the question of fact regarding intentional fraud, "difficult as it is for us to understand how February experiments on the same compositions were not a direct sequel to the experiments three months earlier." *Id.* Review of this factual determination was not necessary to the holding, because "when the invention was conceived by Mr. Cadotte, title to that invention immediately vested in the United States by operation of law." [*Id. at 1553*](#).

After winning a reversal of the patent infringement judgment, Hydranautics sued FilmTec in a separate lawsuit in district court, for antitrust violations. The complaint in this second lawsuit is the one before us. It was filed under the Clayton and Sherman Acts, [15 U.S.C. §§ 15, 26](#) and [15 U.S.C. § 2](#), alleging that FilmTec had engaged in "predatory" patent litigation. The district court dismissed it as failing to state a claim upon which relief could be granted, under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

The complaint, filed [**5] in March of 1993, alleges that until September 1991, Hydranautics made reverse osmosis membranes of the patented type, but from the time the permanent injunction in the infringement suit issued, in September 1991, until the mandate was spread from the Federal Circuit decision in April 1993, it had been prevented from doing so. Another company, Allied-Signal, had also made such membranes, and had been enjoined from continuing to do so in 1990. FilmTec had sued Allied-Signal as well as Hydranautics for infringement. [FilmTec, 982 F.2d at 1549](#) & n.2.

Hydranautics' complaint alleges that FilmTec engaged in predatory acts. The alleged predatory acts were that: (1) FilmTec had applied for a patent on the reverse osmosis membrane when it knew that the United States owned the patent; (2) FilmTec falsely told the government that the invention had first been conceived after Mr. Cadotte left the non-profit and joined FilmTec; (3) FilmTec sued Hydranautics for patent infringement, and obtained injunctions to drive it out of the reverse osmosis membrane market, in bad faith, without any reasonable belief that it owned the patent.

The district court dismissed Hydranautics' complaint, holding [**6] that it was barred because it should have been raised as a compulsory counterclaim in the patent infringement action.

II. Analysis.

HN1 [↑] We review a 12(b)(6) dismissal *de novo*. [*Everest and Jennings v. American Motorists Ins. Co., 23 F.3d 226, 228 \(9th Cir. 1994\)*](#). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. [*Id. at 229*](#). A complaint should not be dismissed unless it appears beyond doubt that plaintiff [**536] can prove no set of facts in support of his claim which would entitle him to relief. *Id.*

A. Compulsory Counterclaim

It was permissible for Hydranautics to delay suing FilmTec for predatory patent litigation until it had succeeded in defeating the infringement case. The Supreme Court in [*Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 88 L. Ed. 376, 64 S. Ct. 268 \(1944\)*](#), said that "the **HN2** [↑] fact that [an antitrust counterclaim for damages] might have been asserted . . . in the prior suit . . . does not mean that the failure to do so renders the prior judgment

70 F.3d 533, *536 1995 U.S. App. LEXIS 31981, **6 36 U.S.P.Q.2D (BNA) 1773, ***1775

res judicata as respects it." [*Mercoid, 320 U.S. at 671*](#). A claim that patent infringement litigation violated an antitrust statute is a permissive, [\[**7\]](#) not a mandatory, counterclaim in a patent infringement case, and is not barred in a subsequent suit by failure to raise it in the infringement suit. See [*Id. at 669-71*](#). [\[***1776\]](#)

[**HN3**](#) An answer must state as a counterclaim a claim which "arises out of the same transaction or occurrence" as the plaintiff's claim:

(a) *Compulsory counterclaims*. A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim

(b) *Permissive counterclaims*. A pleading *may* state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

[*Fed. R. Civ. P. 13*](#). [**HN4**](#) If a party has a counterclaim which is compulsory and fails to plead it, it is lost, and cannot be asserted in a second, separate action after conclusion of the first. [*Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 854 \(9th Cir. 1981\)*](#).

[**HN5**](#) We determine whether a claim arises out of the same transaction or occurrence by analyzing [\[**8\]](#) "whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." [*Pochiro v. Prudential Ins. Co. of America, 827 F.2d 1246, 1249 \(9th Cir. 1987\)*](#)(quoting [*Harris v. Steinem, 571 F.2d 119, 123 \(2d Cir. 1978\)*](#)).

While there may be cases where resolving both issues at once is preferable, *Mercoid* leaves open the possibility of raising antitrust claims as permissive counterclaims in an infringement action, or in a separate and subsequent action.

In many cases even if the antitrust counterclaim were asserted by counterclaim, the court would sever the issues and resolve the infringement case first. The evidence for patent infringement and antitrust damages may differ considerably, depending on the particulars of the case. If the plaintiff wins the patent infringement suit, then the antitrust counterclaim may ordinarily be disposed of expeditiously on motion, instead of by a time consuming and expensive trial.

The distinctiveness between the facts giving rise to the patent and those giving rise to the antitrust claims is suggested by the different appellate [\[**9\]](#) paths Congress has provided for those two kinds of claims. [**HN6**](#) Appeals from patent infringement decisions now go to the Federal Circuit, but appeals from antitrust decisions go to the regional circuit in which the district court sits. See [*28 U.S.C.S. §§ 1291-1295; 15 U.S.C.S. § 15\(a\)*](#). If the antitrust counterclaim were treated as compulsory, then any appeal of the antitrust decision would go to the Federal Circuit, not the regional circuit. This may generate a difference between the [**antitrust law**](#) generally applicable within each regional circuit, and [**antitrust law**](#) in predatory patent infringement cases. That Congress has provided for regional courts of appeals to decide antitrust appeals, and for the federal circuit to decide patent appeals, suggests that Congress perceived a distinction between the kinds of facts giving rise to one or the other.

The antitrust claim attacks the patent infringement lawsuit itself as the wrong which furnishes the basis for antitrust damages. This is somewhat analogous to a civil claim for malicious prosecution. It is usually held [\[*537\]](#) that [**HN7**](#) a malicious prosecution claim cannot be asserted as a counterclaim to the original suit which furnishes its predicate. [\[**10\]](#) 1 Harper, James & Gray, The Law of Torts § 4.8 (2d ed. 1986). *Mercoid* is consistent with this approach, and we see no reason to distinguish *Mercoid* from the case at bar.

In this case, Hydranautics claims that FilmTec was not entitled to a patent, fraudulently obtained one, and used it to run competition out of the market. The issue of whether FilmTec owned the patent was resolved in the infringement case, and is logically a part of both cases. That identity of issues, by itself, suggests compulsory counterclaim classification.

But there was not much point in litigating Hydranautics' antitrust claims until FilmTec's infringement case was resolved. The Federal Circuit held that the government owned the patent on the reverse osmosis membrane, not FilmTec, because Mr. Cadotte had conceived the invention while working for the non-profit on the government contract. Thus the patent infringement judgment was vacated on the ground that FilmTec did not own the patent, without a determination whether FilmTec had fraudulently obtained the patent. Because the Federal Circuit did not decide whether FilmTec obtained its patent fraudulently, the district court will now begin the antitrust [**11] case with a blank slate on the fraud issue. [HN8](#)[] If an appellate court reverses and vacates a judgment, the party which prevails on appeal is generally not bound by adverse trial court rulings on other issues. [United States v. Cheung Kin Ping, 555 F.2d 1069, 1077 \(2d Cir. 1977\)](#). This difference in which facts control shows why there may be a significant difference, and there is a significant difference in this case, between the facts which control the patent infringement claim and the facts which control the antitrust claim.

B. Noerr-Pennington Immunity [***1777]

Both parties agree that we may also affirm the dismissal of Hydranautics' complaint if we conclude that FilmTec is immune from this antitrust action under the rationale of [Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#). Accord [United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#). In *Noerr*, the Supreme Court held that [HN9](#)[] no violation of the Sherman Act may be predicated upon the defendant's attempts to influence the passage or enforcement of laws. [Noerr, 365 U.S. at 135](#). That principle was expanded to include access to courts and administrative agencies in California [**12] [Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#).

FilmTec claims that it is immunized from an antitrust lawsuit by the *Noerr-Pennington* doctrine. Hydranautics disagrees. The district court did not reach this issue, but FilmTec urges us to affirm the district court dismissal on this ground, on the theory that if the issue of *Noerr-Pennington* immunity had been reached, it would have to have been decided on the pleadings in favor of FilmTec. We conclude that this disagreement could not properly be resolved against Hydranautics on the basis of the pleadings. The outcome will depend on evidence. We therefore cannot affirm on this ground.

Application of the *Noerr-Pennington* doctrine to antitrust claims has recently been clarified by [Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 123 L. Ed. 2d 611, 113 S. Ct. 1920 \(1993\)](#) and our application of that decision in [Liberty Lake Investments, Inc. v. Magnuson, 12 F.3d 155 \(9th Cir. 1993\)](#). *Columbia Pictures* holds that [HN10](#)[] litigation cannot be deprived of its antitrust immunity as a sham unless it is objectively baseless, regardless of whether the subjective intent of the litigation is to interfere [**13] with competition. "Unless a lawsuit is objectively baseless, whether an antitrust defendant 'was indifferent to the outcome on the merits' of the suit, or 'had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process' is immaterial." [Liberty Lake, 12 F.3d at 159](#).

FilmTec's theory is that its patent infringement lawsuit could not have been "objectively baseless," because FilmTec won in district court. FilmTec argues that its initial victory requires dismissal of antitrust claims [*538] based upon FilmTec's ultimately unsuccessful patent infringement lawsuits, regardless of whether it obtained the patents fraudulently. The holdings in *Columbia Pictures* and *Liberty Lake* leave open the question of whether an infringement action based on a fraudulently obtained patent is "objectively baseless." Footnote six in *Columbia Pictures* says the court does "not decide here whether, and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." [113 S. Ct. at 1929, n.6](#).

Columbia Pictures cites [Walker Process Equip., Inc. v. Food Machinery and Chem. Corp., 382 U.S. \[**14\] 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 \(1965\)](#) in footnote 6. In *Walker Process*, the Court held that proof of the claim that the patent holder obtained its patent by knowingly and willfully misrepresenting facts to the Patent Office "would be sufficient to strip [the patent holder] of its exemption from the antitrust laws." [Walker Process, 382 U.S. at 177](#). It further held that "enforcement of a patent procured by fraud on the Patent Office may be violative" of the Sherman

Act and subject the defendant to treble damages under the Clayton Act. *Id. at 174*. See also *California Motor Transport*, 404 U.S. at 513-14 ("Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws . . .").

We said in dictum in *Liberty Lake* that "in [HN11](#)[] a case involving a fraudulently obtained patent, that which immunized the predatory behavior from antitrust liability (the patent) is, in effect, a nullity because of the underlying fraud." *Liberty Lake*, [12 F.3d at 159](#). We now are faced with deciding whether the dictum in *Liberty Lake* is good law, and we conclude that it is, at least where the fraud is intentional, not "technical fraud." See Justice Harlan's [**15] concurrence in [Walker Process](#), [382 U.S. at 179](#), cited in footnote 6 of *Columbia Pictures*.

Columbia Pictures explains that [HN12](#)[] "probable cause" to institute legal proceedings, in the sense in which the phrase is used in tort suits for malicious prosecution of civil claims, establishes that the litigation is not "objectively baseless." At common law, a reversed judgment for the plaintiff in the first action usually is not conclusive as to probable cause in the malicious prosecution action, where the judgment was obtained by fraud. See 1 Harper, James & Gray, The Law of Torts § 4.8 (2d ed. 1986); W. Page Keeton et al., Prosser & Keeton on Torts 894 (5th ed. 1984). [HN13](#)[] If the patent was obtained by "intentional fraud," and not merely "technical fraud," see [Walker Process](#), [382 U.S. at 176, 179](#), then a reversed judgment based upon that fraud, where the plaintiff obtained the patent by intentional fraud or was an assignee who knew of the patent's infirmity, [***1778] would not demonstrate probable cause for a patent infringement suit. See [Walker Process](#), [382 U.S. at 177](#).¹

[**16] Hydranautics asserts facts in its complaint that, if true, would prove that FilmTec obtained its patent by fraud. Its complaint [*539] therefore cannot be dismissed short of summary judgment or trial.

REVERSED and REMANDED.

End of Document

¹ While we were considering this opinion, we learned that the Federal Circuit decided a parallel case, [FilmTec Corp. v. Hydranautics](#), [67 F.3d 931, 1995 U.S. App. LEXIS 28215, 1995 WL 599982](#), (Fed. Cir. 1995) (petition for rehearing pending). In that case, the district court had denied Hydranautics' motion for leave to amend its answer to the patent infringement case to assert an antitrust counterclaim, because the motion came too late. The case had gone through judgment, appeal, and spreading of the appellate mandate, before the motion to amend was filed. The Federal Circuit held that the delay was excusable, because until Hydranautics defeated the patent claim, it had good reason not to file the antitrust claim. The Federal Circuit nevertheless affirmed the denial of leave to amend, because the antitrust claim would have been futile under the *Noerr-Pennington* doctrine.

We do not decide whether the case at bar is distinguishable, on the ground that FilmTec's alleged fraud would render FilmTec's patent infringement claim objectively baseless. The Federal Circuit held that as a matter of law, FilmTec's case was not objectively baseless, but said "there is no dispute over the facts." In the procedural posture of the case before us, it would not be correct to say that there is no dispute as to the facts. Hydranautics alleges fraud, and FilmTec denies it. We must assume for the purposes of [Rule 12\(b\)\(6\)](#) that Hydranautics could prove that FilmTec obtained the patent fraudulently. Nor do we decide whether the issue of objective baselessness is *res judicata*, on account of the Federal Circuit case. These questions should, if raised on remand, be decided in the first instance by the district court.



Scioto County Regional Water Dist. No. 1 v. Scioto Water

United States District Court for the Southern District of Ohio, Western Division

November 15, 1995, Decided

C-1-95-204

Reporter

916 F. Supp. 692 *; 1995 U.S. Dist. LEXIS 20794 **

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY, Plaintiff, v. SCIOTO WATER, INC., et al., Defendants.

Core Terms

injunction, summary judgment motion, reply, sham, preliminary injunction, memorandum, definite statement, Sherman Act, antitrust, motion to strike, irreparable, customers, agencies, contends, courts, merits, lines, entitled to summary judgment, tortious interference, redress of grievance, declaratory relief, right of petition, moving party, petitioning, baseless, parties, moves

LexisNexis® Headnotes

Energy & Utilities Law > Utility Companies > General Overview

[HN1](#) [down arrow] Energy & Utilities Law, Utility Companies

[7 U.S.C.S. § 1926\(b\)](#) states, in pertinent part, that the service provided by a water facility shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

[HN2](#) [down arrow] Injunctions, Preliminary & Temporary Injunctions

In determining whether to grant a preliminary injunction, the court must consider: (1) whether, absent the injunction, the moving party would suffer irreparable injury; (2) whether the moving party has demonstrated a substantial likelihood of success on the merits; (3) whether the injunction would have a harmful effect on third parties; and (4) whether the public interest would be served by the injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3 [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

In order to obtain a preliminary injunction, the harm that would result in the absence of the injunction must be irreparable, not merely substantial. Irreparable injury must include more than a determinable monetary loss. The possibility that adequate relief will be available at a later point in the litigation weighs heavily against a claim of irreparable harm.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4 [down arrow] **Summary Judgment, Evidentiary Considerations**

The court's function for purposes of summary judgment is not to weigh evidence and determine truth of the matter, but to determine whether there is a genuine issue as to any material fact and whether moving party is entitled to judgment as a matter of law. The moving party has initial burden of showing absence of genuine issue of material fact as to an essential element of non-movant's case. If moving party meets this burden, then non-moving party must set forth specific facts showing there is a genuine issue for trial. The evidence of nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Conclusory allegations, however, are not sufficient to defeat a motion for summary judgment.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN5 [down arrow] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Noerr-Pennington doctrine holds that business interests may combine and lobby to influence the various branches of the government or administrative agencies without violating the antitrust laws since such activities are protected by *U.S. Const. amend. I* right to petition the government for redress of grievances. Thus, a cause of action under the Sherman Act, 15 U.S.C.S. § 1 and § 2, cannot arise from conduct by a competitor to lawfully influence government decision-making.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

[**HN6**](#) [down] Bill of Rights, Fundamental Freedoms

The right to petition authorities to take official action is generally protected regardless of the motives of the petitioners. This is true even where the petitioning activity has the intent or effect of depriving another of property interests. The right to petition the government for redress of grievances includes the right to seek relief from the courts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Civil Procedure > Sanctions > Baseless Filings > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

[**HN7**](#) [down] Noerr-Pennington Doctrine, Sham Exception

There is no right under [U.S. Const. amend. I](#) to pursue baseless litigation. A pattern of baseless, repetitive claims may establish the sham nature of the petitioning activity and result in the loss of any privilege under [U.S. Const. amend. I](#).

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

[**HN8**](#) [down] Antitrust & Trade Law, Sherman Act

Litigation is "sham" if it satisfies a two-part test. First, the lawsuit must be objectively baseless in that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, an antitrust claim premised on the sham exception must fail. The existence of probable cause to institute legal proceedings precludes a finding that the litigation was sham. Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate petitioning activity into a sham.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Torts > Public Entity Liability > Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Sherman Act > General Overview

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Liability > General Overview

[**HN9**](#) [down] Bill of Rights, Fundamental Freedoms

The Noerr-Pennington doctrine immunizes certain actions to influence the government from liability under state law for tortious interference with business, subject to the sham exception.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN10**](#) [L] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine is not limited in application to antitrust claims. The doctrine is grounded on the [First Amendment](#) principle that an individual or entity has the right to pursue legitimate efforts to influence government decision-making and to approach the courts in order to obtain redress of grievances. This principle applies whether those efforts are challenged under federal [antitrust law](#) or under state law.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN11**](#) [L] Exemptions & Immunities, Noerr-Pennington Doctrine

Whether applying the Noerr-Pennington doctrine as an antitrust doctrine or invoking it in other contexts, evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.

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Judges: Sandra S. Beckwith, Judge, United States District Court. Magistrate Judge Jack Sherman

Opinion by: Sandra S. Beckwith

Opinion

[*696] ORDER

This matter is before the Court upon the following motions: (1) Defendant and Counterclaimant Scioto Water, Inc.'s **[**2]** (SWI) Application for Preliminary Injunction, Permanent Injunction, and Declaratory Judgment (Doc. no. 36), Plaintiff Scioto County Regional Water District No. 1, Authority's (Water 1) opposing memorandum and motion for summary judgment (Doc. no. 49), SWI's reply memorandum and memorandum in opposition to Water 1's motion for summary judgment (Doc. no. 54)¹, and Water 1's reply in support of its motion for summary judgment (Doc. no. 73); (2) Rural Economic and Community Development Service's (RECDS) Motion for a More Definite Statement and Counterclaim² (Doc. no. 42); (3) Water 1's Motion for a More Definite Statement pursuant to Fed. R. Civ. P. 12(e), Alternatively, Motion to Strike Pursuant to Fed. R. Civ. P. 12(f) (Doc. no. 46); and (4) SWI's Motion to Strike and Motion for Leave to Supplement Memoranda in Response to Water 1's Reply (Doc. no. 74).

[3] I. RECDS's Motion for a More Definite Statement**

RECDS moves the Court to strike SWI's cross-claim for indemnification. Because the Court has dismissed all of Water 1's claims against SWI, RECDS's motion is DENIED as moot.

II. SWI's Motion to Strike

SWI moves the Court to strike Water 1's reply memorandum in support of its motion for summary judgment. SWI contends that the reply violates the federal rules because it raises new issues, cites additional case law, and exceeds the scope of a proper reply. In the event the Court declines to strike the reply, SWI requests leave to respond to the new issues raised in the reply.

The reply brief submitted by Water 1 addresses many of the same issues raised in its motion for summary judgment. Although Water 1 has raised a new issue in its reply regarding the applicability of the Parker Governmental Immunity Doctrine, the Court deems it unnecessary to address that issue in order to rule on the summary judgment motion. Because the reply brief does not otherwise exceed the scope of the issues raised in Water 1's motion for summary judgment, the motion to strike is hereby DENIED. Further, because the Court will consider only those issues **[**4]** which the parties have had an opportunity to address, SWI's request for leave to respond to new issues raised in the reply is DENIED.

III. Water 1's Motion to Strike SWI's Response

Water 1 moves the Court to strike SWI's response to its motion for summary **[*697]** judgment as untimely. Water 1 filed its response to SWI's application for injunctive and declaratory relief and its motion for summary judgment on July 10, 1995. On July 18, 1995, SWI filed a reply memorandum in support of its application for injunctive and declaratory relief. On August 23, 1995, SWI moved the Court to treat the reply memorandum as its response to Water 1's motion for summary judgment. The Court granted SWI's request on September 7, 1995. Nonetheless, Water 1 claims that the Court should not consider the response because it is untimely and SWI has not demonstrated excusable neglect for the delay. Water 1 claims that the Court should consider its claims to be undisputed in light of SWI's failure to file a timely response and should grant summary judgment in Water 1's favor.

The Court declines to strike SWI'S response. SWI responded to Water 1's opposing memorandum in a timely manner, but captioned it only as **[**5]** a reply memorandum in support of its application for injunctive and declaratory relief rather than as both a reply memorandum and a memorandum in opposition to Water 1's motion for summary judgment. SWI's omission does not warrant treating Water 1's claims as undisputed and granting summary judgment in Water 1's favor. Accordingly, Water 1's request to strike SWI's response to its motion for summary judgment is DENIED.

IV. Motion for a More Definite Statement

¹The Court granted SWI's request that its reply memorandum be treated as its response to Water 1's motion for summary judgment by Order dated September 7, 1995 (Doc. no. 70).

²The "counterclaim" is actually a cross-claim against Defendant SWI.

Water 1 moves the Court to require SWI to provide a more definite statement of its counterclaims. In support of its motion, Water 1 alleges that the actions which SWI challenges as violative of 7 U.S.C. § 1926(b) are privileged and protected methods of seeking redress.³ Water 1 further contends that SWI has not alleged any facts which give Water 1 adequate notice as to the basis of its alleged liability for the Sherman Act violations asserted in Count II.

[**6] Count I provides adequate notice of SWI's claims under § 1926(b) and the basis for them. Water 1's contention that its actions are privileged and cannot give rise to a claim under § 1926(b) goes to the merits of SWI's claims and is not an appropriate basis for striking same.

As to Count II, the Court agrees that SWI has failed to give Water 1 adequate notice of the basis for its claims under the Sherman Act, 15 U.S.C. § 1 and § 2. Count II simply incorporates the allegations of the complaint and states that Water 1 "has engaged in anti-competitive and monopolistic conduct in direct violation of 15 U.S.C. § 1 and § 2." However, because the Court finds as a matter of law that SWI cannot establish a Sherman Act violation, to require SWI to provide a more definite statement of its claims would be futile.⁴ Accordingly, Water 1's motion for a more definite statement is DENIED. The Court will dispose of the claims on their merits.

V. SWI's Application for Injunctive and [**7] Declaratory Relief

Defendant/Counterclaimant SWI moves for injunctive and declaratory relief on two grounds. First, SWI claims that Water 1 has violated 7 U.S.C. § 1926(b) by filing the complaint and the applications for a temporary restraining order and a preliminary injunction. Second, SWI contends that Water 1 has violated § 1926(b) by extending its transmission lines and expanding its service into SWI's service area. SWI asserts that Water 1 has consequently impaired its ability to repay its existing FmHA indebtedness. SWI further alleges that Water 1 has acted to interfere with SWI's construction of its own wellfield and water treatment plant by corresponding with FmHA officials, state clearing house officials, township trustees, other governmental agencies, state and federal legislators, and the EPA, and by filing appeals to the EPA, Ohio Valley Regional Development Commission, Environmental Board of Review, and the Franklin County, Ohio, Court of Appeals. SWI claims that [*698] Water 1 has acted with the intent to impair SWI's ability to serve its customers and to reduce its water rates for current customers and projected future customers.

SWI further asserts that Water 1 has [**8] engaged in anti-competitive and monopolistic conduct in direct violation of 15 U.S.C. § 1 and § 2. SWI also claims that Water 1 has maliciously and tortiously interfered with the contractual relationship between SWI and the FmHA. In support of the latter claim, SWI contends that Water 1 has directed correspondence to various agencies, including the United States Department of Agriculture, seeking the withholding of committed funds for SWI's construction project.

SWI seeks a declaration that it is indebted to the FmHA; that it is entitled to the protections afforded under § 1926(b); and that it has the right to provide water service to new customers which are not currently served by any other water entity and which are included within the Farmers Home Administration (FmHA) and Ohio Environmental Protection Agency (EPA) plans for Phase I and Phase II of SWI's water distribution project. SWI also requests an injunction enjoining Water 1 from interfering with the operation of the wellfield and treatment plant constructed by SWI, from interfering with any contract between SWI and FmHA, and from providing water outside of Water 1's court-created water district.⁵ Finally, SWI seeks [**9] an order requiring Water 1 to transfer its transmission lines

³ HN1 [↑] Section 1926(b) states, in pertinent part, that the service provided by a water facility "shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan . . .

⁴ See Section V(B)(3) below.

⁵ In support of its request for injunctive relief, SWI refers the Court to its response to Water 1's application for injunctive relief (Doc. no. 17), its motion to dismiss and supporting memorandum (Doc. no. 16), and its counterclaim filed against Water 1 (Doc. no. 32).

and properties located within the Townships of Porter, Vernon and Blume in Scioto County, Ohio, to SWI since such lines lie outside of Water 1's court-created water district.

A. Preliminary Injunction

SWI claims that the requirements for a preliminary injunction are satisfied in that Water has clearly violated [§ 1926\(b\)](#), SWI has demonstrated its likelihood of success on the merits, SWI will suffer irreparable harm if an injunction is not granted, other remedies are inadequate, and no harm will result to third parties if a preliminary injunction is issued since SWI does not serve, and does not intend to serve, current customers of Water 1.

HN2 [↑] In determining whether to grant a [**10] preliminary injunction, the court must consider: (1) whether, absent the injunction, the moving party would suffer irreparable injury; (2) whether the moving party has demonstrated a substantial likelihood of success on the merits; (3) whether the injunction would have a harmful effect on third parties; and (4) whether the public interest would be served by the injunction. [USACO Coal Company v. Carboomin Energy, Inc., 689 F.2d 94, 98 \(6th Cir. 1982\)](#); [Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 102 \(6th Cir. 1982\)](#).

HN3 [↑] In order to obtain a preliminary injunction, the harm that would result in the absence of the injunction must be irreparable, not merely substantial. [Sampson v. Murray, 415 U.S. 61, 39 L. Ed. 2d 166, 94 S. Ct. 937 \(1974\)](#). Irreparable injury must include more than a determinable monetary loss. *Id.* The possibility that adequate relief will be available at a later point in the litigation weighs heavily against a claim of irreparable harm. [Id. at 90](#) (citation omitted).

SWI has failed to demonstrate that it will suffer irreparable harm if a preliminary injunction is not granted. SWI alleges only that it will be irreparably harmed if it [**11] is enjoined from completing Phase II of its project, in which event it will be unable to pay its indebtedness to the FmHA on the completed Phase I of the project, i.e., construction of the wellfield and water treatment plant, which will in turn lead to SWI's financial ruin. However, the Court has denied Water 1's request for injunctive relief and has dismissed all of Water 1's claims against SWI. Accordingly, SWI is in no danger of having this Court issue an injunction against it.

Furthermore, SWI has not demonstrated a substantial likelihood of success on the merits of the sole claim on which the Court finds that it is entitled to proceed, i.e., that Water [*699] 1 has violated [§ 1926\(b\)](#) by extending its lines into, and serving customers within, SWI's service area. Although SWI is clearly an indebted association under [§ 1926\(b\)](#) and is entitled to the protections afforded by the statute, the Court is unable to conclude at this point that there is a substantial likelihood that SWI will ultimately prevail on its claim that Water 1 has infringed its rights under the statute.⁶

[**12] Finally, it appears that water customers in the disputed areas will be served by one of the parties whether or not an injunction is issued. Therefore, although third parties would not be harmed by issuance of an injunction, neither would the public interest be served thereby. For these reasons, SWI's request for a preliminary injunction is hereby DENIED.

B. Water 1's Motion for Summary Judgment

1 . Standard of Review

HN4 [↑] The summary judgment procedure under [Fed. R. Civ. P. 56](#) is designed to secure a just, speedy and inexpensive determination of any action. [Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). The court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is 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 moving party has the initial burden of showing the absence

⁶ Because SWI will not suffer irreparable harm if the Court denies its request for a preliminary injunction, the Court finds that a hearing on the merits of the claim in order to determine the likelihood of success is not warranted.

of a genuine issue of material fact as to an essential element of the non-movant's case. *Celotex, 477 U.S. at 321; Guarino v. Brookfield Township Trustees, 980 F.2d 399, 405 (6th Cir. 1992); Street v. I**131 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*. The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (citing *Adickes v. S. H. Kress & Co., 398 U.S. 144, 158, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*). There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson, 477 U.S. at 248*. 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)*.

2. § 1926(b)

SWI claims that Water 1 has instituted legal and other proceedings in violation of § 1926(b) in order to halt completion of SWI's water project. Water 1 does not dispute the fact that it has sought administrative, legislative and judicial remedies for the purpose of halting SWI's [**14] project. However, Water 1 claims that its actions are lawful and are constitutionally protected under the *First Amendment to the United States Constitution*, which guarantees the right to petition the government for a redress of grievances. Water 1 contends that because its actions are protected under the *First Amendment*, it is entitled to summary judgment on SWI's claim that it has violated § 1926(b) by seeking redress from courts and governmental agencies.

Water 1 is entitled to summary judgment on SWI's claim that it has violated § 1926(b) by petitioning administrative and judicial bodies for legal redress. Although the cases cited by SWI in support of its claim set forth the principle that § 1926(b) prohibits the curtailment of water services provided by an association indebted to the FmHA during the term of such indebtedness, none of these cases support the proposition that the institution of administrative or legal proceedings by a competing water association can constitute curtailment of water services in violation of § 1926(b). See *City of Madison v. Bear Creek Water Ass'n., 816 F.2d 1057 (5th Cir. I*700 1987); Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311 I**151 (7th Cir. 1989); CSL Utilities v. Jennings Water, Inc., 807 F. Supp. 490 (S.D. Ind. 1992); Glenpool Utility Services v. Water Dist. No. 2, 861 F.2d 1211 (10th Cir. 1988)*. The Court is unaware of any authorities which suggest that one's *First Amendment* right to petition the courts for redress of grievances is circumscribed to any extent by § 1926(b). In the absence of any such legal authorities, and based on the undisputed facts before the Court, Water 1 is entitled to summary judgment on SWI's claim that it has violated § 1926(b) by petitioning administrative agencies and the courts for relief.

As to SWI's claim that Water 1 has violated § 1926(b) by extending its water lines and expanding its service into SWI's service area, the facts and evidence before the Court are insufficient to enable the Court to determine whether Water 1 has curtailed SWI's provision of services in violation of § 1926(b) by undertaking such alleged actions. Therefore, this claim will be preserved for trial.

3. Sherman Act

Water 1 also claims that it is entitled to summary judgment on SWI's claims under the Sherman Act, 15 U.S.C. § 1 and § 2. Water 1 contends that its lawful petitioning [**16] for relief is protected activity under the Noerr-Pennington doctrine. SWI concedes that while legitimate advocacy to the government may be protected under the Noerr-Pennington doctrine, frivolous or sham attempts to interfere directly with the business of a competitor are illegal under the antitrust laws. SWI submits that discovery will reveal direct interference with the business of SWI by Water 1 and a pattern of baseless and repetitive proceedings brought for the sole purpose of injuring SWI's business.

HN5 The Noerr-Pennington doctrine holds that business interests may combine and lobby to influence the various branches of the government or administrative agencies without violating the antitrust laws since such activities are protected by the *First Amendment* right to petition the government for redress of grievances. *Eaton v. Newport Bd. of Educ., 975 F.2d 292, 297-299 (6th Cir. 1992)*, cert. denied, 508 U.S. 957, 113 S. Ct. 2459, 124 L. Ed. 2d 674 (1993). Thus, a cause of action under the Sherman Act cannot arise from conduct by a competitor to

lawfully influence government decision-making. *Barton's Disposal Service, Inc. v. Tiger Corp.*, 886 F.2d 1430 (5th Cir. 1989). [**17]

HN6 [↑] The right to petition authorities to take official action is generally protected regardless of the motives of the petitioners. *Eaton*, 975 F.2d at 298 (citing *Video Int'l. Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988), cert. denied, 491 U.S. 906, 105 L. Ed. 2d 697, 109 S. Ct. 3189 (1989)). This is true even where the petitioning activity has the intent or effect of depriving another of property interests. *Id.* The right to petition the government for redress of grievances includes the right to seek relief from the courts. *Nestle Ice Cream Go. v. N.L.R.B.*, 46 F.3d 578, 585 (6th Cir. 1995) (citing *California Motor Transport Co. v. Trucking, Untd.*, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)).

The United States Supreme Court has carved out a narrow "sham" exception to the Noerr-Pennington doctrine. The exception covers cases where the defendant intended to use the petitioning process merely to harass the plaintiff. *Eaton*, 975 F.2d at 298. **HN7** [↑] There is no *First Amendment* right to pursue baseless litigation. *Nestle Ice Cream*, 46 F.3d at 585. A pattern of baseless, repetitive claims may establish the [**18] sham nature of the petitioning activity and result in the loss of any privilege under the *First Amendment*. *California Motor*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609.

HN8 [↑] Litigation is "sham" if it satisfies a two-part test. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611 (1993). First, the lawsuit must be objectively baseless in that no reasonable litigant could realistically expect success on the merits. *Id.* If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, an antitrust claim premised on the [*701] sham exception must fail. *Id.* The existence of probable cause to institute legal proceedings precludes a finding that the litigation was sham. *Id.*

Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. *Id.* Evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate petitioning activity into a sham. *Id.*

The Court may determine whether there was probable cause for Water 1 to bring its claims as a matter of law. See *Columbia Pictures*, 113 S. Ct. at 1930. The [**19] Court finds that there was probable cause for Water 1 to pursue its claims. Water 1's claims, which have been dismissed by the Court, were not objectively baseless in the sense that no reasonable litigant could have realistically expected success on the merits of such claims. Water 1 brought claims under § 1926(b) on the theory that it was a protected association under the terms of the statute. In its opinion dismissing Water 1's claims, the Court noted that the question of whether an entity in Water 1's position qualifies as an indebted association entitled to the protections of § 1926(b) is unsettled. (Doc. no. 59) The Court found that § 1926(b) did not define pertinent terms and that it was necessary to look beyond the statutory language in order to construe the meaning thereof. Although the Court acknowledged that one state court had construed the pertinent statutory provisions in the manner advocated by Water 1, the Court rejected that interpretation. However, the fact that the Court rejected Water 1's position does not mean that its position was frivolous or unreasonable. Rather, in light of the unsettled nature of the law, its action was arguably warranted by existing law [**20] or by a reasonable argument for the extension of existing law. Thus, the objective prong of the test for determining whether litigation is sham is not satisfied with regard to this lawsuit.

The same is true of those activities which Water 1 directed toward other governmental bodies and administrative agencies. As an arguably covered association under § 1926(b), Water 1 had an objectively reasonable basis for attempting to halt SWI's project by pursuing relief through administrative and legislative channels.

The Court need not consider SWI's contention that discovery will disclose the existence of sham activities by Water 1. Since the Court has found that Water 1 had probable cause to bring its claims, Water 1's intent in pursuing such

claims is immaterial.⁷ **[**21]** As a matter of law, the sham exception does not apply, and Water 1 is entitled to immunity from antitrust liability for SWI's claims under the Sherman Act.⁸

4. Tortious Interference

Although Ohio recognizes a cause of action for tortious interference, (*See Juhasz v. Quik Shops, Inc.*, *55 Ohio App. 2d 51, 379 N.E.2d 235 (1977)*), Water 1 contends that is immune from liability under the applicable law. It has been held that **HN9**[↑] the Noerr-Pennington doctrine immunizes certain actions to influence the government from liability under state law for tortious interference with business, subject to the sham exception set forth above. See, e.g., *In re IBP Confidential Business Documents Litigation*, *755 F.2d 1300, 1309 (8th Cir. 1985)*, cert. denied, *479 U.S. 1088, 94 L. Ed. 2d 150, 107 S. Ct. 1293 (1987)* (citing *NAACP v. Claiborne Hardware Co.*, *458 U.S. 886, 915, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982)*); *Suburban Restoration Co., Inc. v. Acmat Corp.*, *700 F.2d 98 (2nd Cir. 1983)*). The Court in *Suburban Restoration* reasoned that the federal courts have strongly suggested that imposing liability for filing a "non-sham lawsuit" under **[*702]** state law would pose serious constitutional questions. *Id. at 102*.

This Court agrees that **HN10**[↑] the Noerr-Pennington doctrine is not limited in application to antitrust claims. The doctrine is grounded on the *First Amendment* principle that an individual or entity has the right to pursue legitimate efforts to influence government decision-making and to approach the courts in order to obtain redress of grievances. This principle applies whether those efforts are challenged under federal **antitrust law** or under state law.

Furthermore, the United States Supreme Court in *Columbia Pictures* suggested that the Noerr-Pennington doctrine applies to claims other than those brought under the antitrust laws. The Court stated as follows:

HN11[↑] Whether applying Noerr as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. . . .

Because Water 1 had an objectively **[**23]** reasonable basis for attempting to stop SWI's projects, the Noerr-Pennington doctrine immunizes Water 1 from liability for its petitioning activities. Water 1 is therefore entitled to summary judgment on SWI's tortious interference claim.

VI. Conclusion

The Court hereby DENIES Defendant RECD's Motion for a More Definite Statement (Doc. no. 42), Plaintiff Water 1's Motion for a More Definite Statement or, Alternatively, Motion to Strike (Doc. no. 46), Defendant SWI's Motion to Strike and Motion for Leave to Supplement Memoranda (Doc. no. 74), and Defendant SWI's Application for preliminary Injunction, Permanent Injunction, and Declaratory Judgment (Doc. no. 36).

The Court hereby GRANTS Water 1's Motion for Summary Judgment (Doc. no. 49) with respect to SWI's claims that (1) Water 1 has violated **§ 1926(b)** by petitioning government agencies and courts for legal redress for alleged wrongs by SWI, (2) Water 1 has violated the Sherman Act, and (3) Water 1 is liable for tortious interference with SWI's business.

Water 1's motion for summary judgment (Doc. no. 49) is DENIED with respect to SWI's claim that Water 1 has violated **§ 1926(b)** by extending its lines and expanding its service **[**24]** into SWI's service area.

⁷ Even if the Court were required to examine evidence of subjective intent, SWI has not alleged any facts which demonstrate that Water 1's actions have merely been a ruse and that Water 1 has not truly sought favorable government action. This is despite the fact that SWI has had several months to conduct discovery.

⁸ In addition, to the extent SWI wishes to pursue a claim under **Section 1** of the Sherman Act, Water 1 is entitled to summary judgment on the ground that there can be no conspiracy by a single entity acting on its own behalf. *Greenwood Utilities Comm'n. v. Mississippi Power Co.*, *751 F.2d 1484, 1497 (5th Cir. 1985)*.

916 F. Supp. 692, *702 1995 U.S. Dist. LEXIS 20794, **24

IT IS SO ORDERED.

Sandra S. Beckwith, Judge

United States District Court

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State ex rel. Ieyoub v. Brunswick Bowling & Billiards Dover

Court of Appeal of Louisiana, Fifth Circuit

November 15, 1995, Decided

No. 95-CA-797

Reporter

665 So. 2d 520 *; 1995 La. App. LEXIS 3278 **; 1996-1 Trade Cas. (CCH) P71,419; 95-797 (La.App. 5 Cir. 11/15/95);

STATE OF LOUISIANA, EX REL. RICHARD P. IEYOUNG, ATTORNEY GENERAL VERSUS BRUNSWICK BOWLING AND BILLIARDS DOVER, INC., ET AL.

Subsequent History: [**1] Released for Publication January 17, 1996.

Prior History: APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, NO. 472-888, DIVISION "D", HONORABLE WALTER E. KOLLIN, JUDGE

Disposition: ORDER VACATED AND CASE REMANDED

Core Terms

discovery, discovery procedure, trial court, antitrust, unfair trade practice, specialized, provisions, desired

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > ... > Methods of Discovery > Depositions > Oral Depositions

HN1 **Regulated Practices, Trade Practices & Unfair Competition**

See [La. Rev. Stat. Ann. § 13:5081](#).

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

HN2 **Magistrates, Pretrial Referrals**

See [La. Rev. Stat. Ann. § 13:5085A](#).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Legislation > Types of Statutes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3 Regulated Practices, Trade Practices & Unfair Competition

Louisiana's antitrust and unfair trade practices laws are *sui generis* statutes regulating monopolies and restraints of trade or commerce in this state. Certain specialized procedures are embodied in these *sui generis* statutes.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

HN4 Public Enforcement, State Civil Actions

The trial court's authority to issue a protective order under [La. Code Civ. Proc. Ann. art. 1426](#) cannot be used to circumvent discovery procedures the Louisiana legislature specifically granted to the attorney general, regardless of how burdensome the trial court may find those discovery procedures.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Discovery & Disclosure > General Overview

HN5 Regulated Practices, Trade Practices & Unfair Competition

[La. Rev. Stat. Ann. § 13:5081-5090](#) remain effective as statutes and provide the Attorney General with specialized discovery procedures for use in antitrust and unfair trade practices suits.

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Judges: (Panel composed of Judges Fred S. Bowes, Edward A. Dufresne, Jr. And James L. Cannella)

Opinion by: EDWARD A. DUFRESNE, JR.

Opinion

Pg 1

[**2] [*521] The trial court in this antitrust and unfair trade practices suit issued an order directing that the Louisiana Code of Civil Procedure govern discovery in the case rather than [La. R.S. 13:5081, et seq.](#), on grounds that the more recent discovery articles of the Code better serve judicial economy and expeditious handling of the case as opposed to the older, more burdensome statutory discovery provisions. The State of Louisiana, through the Attorney General, filed this expedited pretrial appeal of the order, as authorized by [La. R.S. 51:135](#). Because we find that the provisions of [La. R.S. 13:5081, et seq.](#), remain in effect and are available to the Attorney General for discovery in this case, we vacate the order of the trial court and remand for further proceedings.

This action was commenced by the State of Louisiana, through the Attorney General by petition alleging that the named defendants [Pg 2] have violated and continue to violate Louisiana's monopoly laws, [La. R.S. 51:121, et seq.](#), and its unfair trade practices laws, [La. R.S. 51:1401, et seq.](#). Following commencement of the action, the Attorney General moved to take testimony from the defendants under [La. R.S. 13:5081](#), which provides:

HN1 [↑] The Attorney General, or any district attorney, acting under the direction of the former, or of the governor, shall begin any action to enforce the laws respecting monopolies, combinations or conspiracies in restraint of trade, commerce or business. The prosecuting officer either in preparation for or upon the trial of the case may take testimony of an officer, director, agent or employee of any foreign or domestic corporation, joint stock association, or of any member of any copartnership, or of any individual or individuals against whom proceedings are brought. If the person or persons whose testimony is desired, resides within or outside the state, the prosecuting officer shall file in court where the action is brought, at any time, or with any special commissioner appointed in accordance with [R.S. 13:5085](#) by the court to take testimony, a written statement setting for the following:

- (1) What the state expects to prove;
- (2) The name or names and residences of the persons whose testimony he desires to take;
- (3) All books, papers or documents specifically designated he desires produced;

- (4) The time and place, either within [*4] or outside the state he desires the person to [*522] appear and testify, or to produce the books, papers and documents.

Thereupon the judge, or the commissioner, as the case may be, before whom the testimony is being or shall be taken, shall issue immediately a notice in writing, directed to the attorney of record or to the defendant or defendants themselves in the cause, notifying said person that the testimony of the person or persons, named in the notice is desired, and requiring him to whom the notice is delivered, or served, to notify and have the witness or witnesses whose testimony or evidence it is desired to take to comply with the requirements set forth in the written statement.

[Pg 3] If the taking of such evidence is not concluded on the day and date specified in the notice, the court or the commissioner, as the case may be, may continue the taking of such evidence from day to day, or adjourn from day to day, at the same place, until the taking of such evidence has been concluded.

Acting on authority of [La. R.S. 13:5085](#),¹ the trial court fixed a rule to show cause why a special commissioner should not be appointed to take the testimony requested in the [*5] Attorney General's motion. The parties appeared for argument on the rule, and the trial court took the matter under advisement. On September 11, 1995, the trial court issued an order that [Articles 1420 through 1474 of the Louisiana Code of Civil Procedure](#) would govern discovery in the case rather than [La. R.S. 13:5081, et seq.](#). In written reasons for the order, the court stated

¹ As it pertains to this case, [La. R.S. 13:5085A](#) provides:

HN2 [↑] Any court, or presiding judge thereof, in which any proceeding as provided in [R.S. 13:5081 through 13:5090](#) is pending at any time, upon application therefor, made by the Attorney General, or district attorney, shall appoint some well qualified disinterested person as special commissioner, to take testimony, or in any such case, at any point either within or outside the state, as designated in such application, or where requested by either party to the cause of action, upon the issues joined in the cause.

its finding that discovery under the codal articles rather than under the "burdensome and archaic" provisions of [La. R.S. 13:5081, et seq.](#) would better serve the interest of judicial economy and promote expeditious movement of the case. The Attorney General then took the present appeal.

[**6] The trial court's reasoning, while certainly supported by policy considerations favoring judicial economy and efficient case [Pg 4] management, nonetheless contains legal error. The provisions for taking testimony under [La. R.S. 13:5081, et seq.](#), although seldom used since their enactment in 1914, remain in effect and provide the Attorney General with discovery methods as an alternative to those established by the Louisiana Code of Civil Procedure. However, those alternative discovery methods are only available in an action instituted by the Attorney General "to enforce the laws respecting monopolies, combinations or conspiracies in restraint of trade, commerce or business." [La. R.S. 13:5081](#).

The Attorney General has procedural capacity to bring suit alleging violation of the state's antitrust and unfair trade practices laws. [La. R.S. 51:128](#), 138, 1407, 1408. [HN3](#)¹ Louisiana's antitrust and unfair trade practices laws are *sui generis* statutes regulating monopolies and restraints of trade or commerce in this state. *State ex rel. Guste v. Pickering*, 365 So. 2d 943, 945 (La.App. 4 Cir. 1978), writ denied, 366 So. 2d 556 (La. 1978). Certain specialized procedures are embodied [**7] in these *sui generis* statutes. The present pretrial appeal of this interlocutory judgment, as authorized by [La. R.S. 51:135](#), is one such specialized procedure. See also [Daily Advertiser v. Trans-La](#), 612 So. 2d 7, 14-15 (La. 1993).

In 1914, the Louisiana Legislature enacted [La. R.S. 13:5081-5090](#) to provide the Attorney General with specialized procedures for obtaining pretrial testimony and production of documents in antitrust and unfair trade practices litigation. La. Acts 1914, No. 288. The application of these specialized pretrial discovery procedures is [Pg 5] expressly limited to antitrust and unfair trade practices suits instituted by the Attorney General or a district attorney acting on the direction of the Attorney General or the Governor. La. R.S. [*523] 51:5081. As noted by the trial court in this case, the discovery procedures authorized by [La. R.S. 13:5081, et seq.](#), are burdensome to implement. More important to this analysis, however, is the fact that the Louisiana Legislature, despite enacting numerous other provisions governing discovery in judicial proceedings, has not seen fit to repeal or amend [La. R.S. 13:5081, et seq.](#), since the 1914 enactment of those [**8] statutes.

In their brief to this court, defendants review the legislative development of discovery procedures in Louisiana and argue that the Louisiana Code of Civil Procedure, in particular Article 1426², grants authority for the discovery order issued by the trial court in this case. Alternatively, defendants contend that the order was properly issued because the provisions of [La. R.S. 13:5081, et seq.](#), were repealed by the subsequent enactment of the Code of Civil Procedure. Defendants urge that the special discovery procedures for antitrust cases in La. R.S. Title 13 are not identified as discovery methods available under [La.C.C.P. art. 1421](#) and have therefore been repealed as being in conflict or inconsistent with the Code of Civil Procedure. See La. Acts 1976, No. 574, Sec. 3.

[**9] [Pg 6] We find neither of defendants' arguments persuasive. [HN4](#)¹ The trial court's authority to issue a protective order under [Article 1426 of the Code of Civil Procedure](#) cannot be used to circumvent discovery procedures the Louisiana Legislature specifically granted to the Attorney General, regardless of how burdensome the trial court may find those discovery procedures. Moreover, our comparison of the specialized discovery procedures established by [La. R.S. 13:5081, et seq.](#), with the discovery procedures contained in the Code of Civil Procedure reveals no conflicts or inconsistencies of a magnitude sufficient to result in repeal of the special antitrust discovery procedures. Rather, the specialized discovery procedures for antitrust cases exist as an alternative or supplement to the discovery procedures found in the Code of Civil Procedure. We find that [La. R.S. 13:5081-5090](#) [HN5](#)¹ remain effective as statutes and provide the Attorney General with specialized discovery procedures for

² [La. C.C.P. art. 1426](#) authorizes the trial court to issue protective orders in discovery matters. As quoted by defendants in brief to this court, Article 1426(3) grants the trial court authority to "... make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including ...that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery."

665 So. 2d 520, *523 1995 La. App. LEXIS 3278, **9

use in this antitrust and unfair trade practices suit. The trial court therefore committed error by issuing an order which denied the Attorney General's request for discovery in this case under [La. R.S. I**10\] 13:5081, et seq.](#)

For the foregoing reasons, the order of the district court that discovery in this case shall be governed by [Louisiana Code of Civil Procedure Articles 1420 through 1474](#) rather than the provisions of [La. R.S. 13:5081, et seq.](#), is hereby vacated, and the case is remanded for further proceedings.

ORDER VACATED AND CASE REMANDED

End of Document

Slimp v. Dep't of Liquor Control

Superior Court of Connecticut, Judicial District of Hartford - New Britain, At Hartford

November 27, 1995, Decided ; November 30, 1995, FILED

NO. CV 95-705810

Reporter

1995 Conn. Super. LEXIS 3331 *; 1995-2 Trade Cas. (CCH) P71,200

JOHN R. SLIMP, PERMITTEE, ET AL v. STATE OF CONNECTICUT, DEPARTMENT OF LIQUOR CONTROL, ET AL.

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Disposition: The appeal is dismissed.

Core Terms

regulation, wholesalers, rebates, discounts, posting, shipper, posted price, prices, Sherman Act, permittee, funds, liquor, provisions, promotion, violates, retail, sales, out-of-state, distributed, allowances, customers, purchases, beer, imposition of a penalty, enforcement action, reduced price, state statute, antitrust, products, Alcohol

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

HN1[] Standards of Review, Arbitrary & Capricious Standard of Review

A court reviewing the action of an administrative agency may revise or modify the agency's decision only if the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: 1) In violation of constitutional or statutory provisions; 2) in excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) affected by other error of law; 5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or 6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, Conn. Gen. Stat. § 4-183(i). A court reviewing the factual and discretionary determinations of an administrative agency must accord such findings considerable weight. On the other hand, it is the function of courts to expound and apply governing principles of law.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN2 **Judicial Review, Standards of Review**

While deference is appropriately given to an administrative agency's interpretation of a law that is charged with enforcing, it is for the court, and not for administrative agencies to expound and apply governing principles of law when there are two equally plausible interpretations of the statutory language.

Administrative Law > Judicial Review > Standards of Review > General Overview

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

HN3 **Judicial Review, Standards of Review**

In reviewing the determinations of the Liquor Control Commission, the court can do no more than decide whether upon the facts before it the commission has mistaken the law, or whether it has reached a conclusion untenable in the light of logic and reason.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Trademark Law > Conveyances > General Overview

Constitutional Law > Prohibition

Trademark Law > Special Marks > Trade Names > General Overview

HN4 **Contracts, Sales of Goods**

Conn. Gen. Stat. § 30-63(b) provides: No manufacturer, wholesaler, or out-of-state shipper permittee shall discriminate in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size, and quality, nor shall he allow in any form any discount, rebate, free goods, allowance, or other inducement for the purpose of making sales or purchases.

Constitutional Law > Prohibition

HN5 **Constitutional Law, Prohibition**

Conn. Agencies Regs. § 30-6-A29(a) provides that: (a) No permittee in transactions with another permittee shall directly or indirectly offer, furnish any discounts cash return or special prices with the sale of alcoholic liquors.

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

Constitutional Law > Prohibition

HN6 [down arrow] **Commercial Drivers & Vehicles, Rates & Tariffs**

Conn. Agencies Regs. § 30-6-A29(f) provides that: (f) Notwithstanding any provisions of this section to the contrary, an out-of-state shipper or manufacturer licensee may offer to wholesale licensees funds to be used for product promotion as permitted by federal law and in accordance with the following: (1) There shall be no restrictions or obligations on the use of such funds, except that such funds shall be used for promotion of the product(s) identified. (2) Funds shall be offered without discrimination in any manner among wholesalers authorized to distribute the products to be promoted, except that funds may be pro-rated among such wholesalers based upon population of their authorized geographic territory for the product(s) involved; as determined by the most recently completed decennial census; or based upon any other formula not prohibited by *Conn. Gen. Stat. § 30-63* or *Conn. Gen. Stat. § 30-94* of the general statutes.

Constitutional Law > Prohibition

HN7 [down arrow] **Constitutional Law, Prohibition**

Conn. Agencies Regs. § 30-6-A29(f)(3) provides that: Out of state shippers and manufacturers shall file with the Department at least thirty days before the distribution of funds, written notice listing the following: (A) The total amount of funds to be distributed and the proposed date of distribution; (B) The product(s) to be promoted and the wholesalers authorized to distribute such products; (C) If funds are distributed based on population served, the population is the geographic territories of each wholesaler, and the eligible share of funds expressed as a percentage; (D) If any other formula is used, a detailed exposition of such formula used; and (E) The amount of promotional funds each is to receive. (4) No promotional funds shall be distributed to any wholesaler without approval of the Department.

Governments > Legislation > Interpretation

HN8 [down arrow] **Legislation, Interpretation**

An administrative regulation is not valid if it is inconsistent with or beyond the authorizing statute.

Antitrust & Trade Law > Sherman Act > Penalties

Constitutional Law > Prohibition

HN9 [down arrow] **Sherman Act, Penalties**

Conn. Gen. Stat. § 30-63(c) provides for posting by each manufacturer, wholesaler or out-of-state shipper permittee of its prices for each month and provides that the posted price when so posted shall be the controlling price for such manufacturer, wholesaler, or out-of-state permittee for the month following such posting.

Business & Corporate Compliance > ... > Sales of Goods > Performance > Delivery & Shipment by Seller

Constitutional Law > Prohibition

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rebates

[HN10](#)[] Performance, Delivery & Shipment by Seller

[Conn. Gen. Stat. § 3-63\(b\)](#) provides that price discounts may be given to a wholesaler or shipper's customers so long as the seller does not discriminate between customers in the discounts and provided that the wholesaler or shipper shall not offer in any form any discount, rebate, free goods, allowance, or other inducement for the purpose of making sales or purchases.

Administrative Law > Judicial Review > Reviewability > Preservation for Review

Administrative Law > Judicial Review > Reviewability > Standing

[HN11](#)[] Reviewability, Preservation for Review

A person who is aggrieved by the decision of an administrative agency may, on appeal, raise any issue relevant to the question whether the agency has acted illegally.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Prohibition

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > False Charges & Rebates

[HN12](#)[] Interstate Commerce, State Powers

The [Twenty-First Amendment of the U.S. Constitution](#) does not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause, but that a pragmatic effort must be made to harmonize state and federal powers. The test is whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-First Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Real Property Law > Zoning > Judicial Review

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

[HN13](#)[] Standards of Review, Abuse of Discretion

It is well settled that a reviewing court should not substitute its own judgment for that of a regulatory agency as to the proper penalty for violation of a regulation absent a showing of abuse of discretion. A court may not judicially notice a result nor find an effect without a sufficient evidentiary record.

Judges: Beverly J. Hodgson, Judge of the Superior Court

Opinion by: Beverly J. Hodgson

Opinion

MEMORANDUM OF DECISION

The plaintiffs in this administrative appeal challenge the constitutionality and validity under the Sherman Act of certain state regulations concerning the wholesale pricing of alcoholic beverages. The plaintiffs, John R. Slimp, permittee, and Gambrinos Importing Co., Inc., a Texas-based seller of beer to Connecticut liquor distributors, also challenge both the finding that they violated Connecticut's Liquor Control Act and the severity of the penalty imposed. The defendants are the State Department of Liquor Control, its chairman, William W. Sullivan, and Commissioner William Devine (collectively, "agency").

History of the Proceedings

By a citation dated June 16, 1994, the permittee was required to appear before the agency on charges that he had paid cash returns, rebates, quantity prices or discounts to wholesalers for the sale of malt beverage [*2] products, specifically, Corona beer. The agency claimed that such payments, which it alleged had been made on twenty-four occasions to various distributors in 1992, violated [General Statutes §§ 30-94](#) and -63(b) and Regulation 30-6-A29(a). After a hearing the agency issued a memorandum of decision dated March 14, 1995 in which it found that the alleged violations had been proven. It imposed a suspension of the permittee's out-of-state shipper's permit for four hundred days or, in lieu of suspension, a fine in the amount of \$ 30,000.00.

The plaintiffs filed a timely appeal from the agency's ruling and have obtained a stay of its execution pending the resolution of this appeal.

Aggrievement

The court finds that the plaintiffs are aggrieved by the ruling of the agency, having been subject to loss of their authorization to do business in Connecticut or a fine. The plaintiffs have demonstrated a specific personal and legal interest in the subject matter of the decision and an adverse effect on that interest. [State Medical Society v. Board of Examiners in Podiatry, 203 Conn. 295, 299-300, 524 A.2d 636 \(1987\)](#).

Facts

While the parties assume differing positions with [*3] regard to the legal interpretation of the facts and the legality of the agency's enforcement action, they do not dispute the underlying facts found by the agency, and, in fact, they stipulated to most of them at the administrative hearing. (Tr. 8-10.) The relevant facts are as follows. The plaintiffs, who are out-of-state shippers, were engaged in 1992 in selling Corona beer to various liquor wholesalers in Connecticut. During 1992, the plaintiffs paid some wholesalers various sums of money calculated on the basis of the amount of monthly sales by each distributor of beer bought from the plaintiffs. In the forms they sent to the wholesalers, the plaintiffs characterized these payments as a "price promotion" program. The wholesalers were required to return to the plaintiffs a promotional tracking form and depletion report disclosing beginning inventory, receipts, ending inventory and retail sales for each month in which the distributor sought such payment. Payments were made by the plaintiffs based on the retail sales reported for the month. The payments were unrestricted as to use, that is, wholesalers were not required to use the money for any particular purpose, such as advertising [*4] or displays.

At the administrative hearing, the plaintiffs characterized their program as the furnishing of "promotion allowances" or "depletion allowances" and asserted, as they do on appeal, that such payments are authorized by 12 CFR 10.13 and by existing policy of the Federal Bureau of Alcohol, Tobacco and Firearms. The state agency found the program to constitute a program of "cash returns", "rebates" and "discounts" in violation of [General Statutes §§ 30-94](#), -63(b) and Regulation 30-6-A29(a), because the payments were made on the basis of the quantity of the plaintiffs' product sold, to induce more purchases of beer by wholesalers from the plaintiffs at prices effectively reduced below the price posted with the agency because of the post-sale payments.

Pursuant to statute, each out-of-state shipper of beer is required annually to file or "post" its prices for the products it ships to Connecticut wholesalers. A posted price can be changed by filing by the sixth of the month an amended posting to be in effect for the following month. [General Statutes § 30-63\(c\)](#) requires the posted price to be the "controlling price" charged by the shipper for the month of its posting.

Such [*5] postings and supplemental postings are filed by the agency and open to inspection by other out-of-state shippers or by wholesalers. The agency takes no part in determining the prices posted. (Tr. 104-5.)

Issues

The plaintiffs make the following claims:

1. The agency erred in finding that their depletion allowances violated Regulation 30-6-A29(f) and [General Statutes §§ 30-63\(b\)](#) and -94.
2. That the agency erred in interpreting the cited state statutes in a way that violates the Sherman Anti-Trust Act, [15 U.S.C. § 1 et. seq.](#)
3. That the agency's ruling violates the [Commerce Clause of the Constitution of the United States](#).
4. That the penalty imposed is excessive.

The parties agree that all of these grounds concern the construction, interpretation, and validity of statutes rather than the factual determinations of the agency.

Standard of Review

HN1 [↑] A court reviewing the action of an administrative agency may revise or modify the agency's decision only if the "substantial rights of the...[appellant] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: 1) In violation of constitutional or statutory [*6] provisions; 2) in excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) affected by other error of law; 5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or 6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." [General Statutes § 4-183\(j\)](#).

A court reviewing the factual and discretionary determinations of an administrative agency must accord such findings considerable weight. [Connecticut Hospital Ass'n., Inc. v. Commission on Hospitals & Health Care](#), 200 Conn. 133, 140, 509 A.2d 1050 (1986). "On the other hand, it is the function of courts to expound and apply governing principles of law." [Lieberman v. State Board of Labor Relations](#), 216 Conn. 253, 262, 579 A.2d 505 (1990), citing [N.L.R.B. v. Brown](#), 380 U.S. 278, 291, 85 S. Ct. 980, 13 L. Ed. 2d 839 (1965); [International Brotherhood of Electrical Workers v. N.L.R.B.](#), 159 U.S. App. D.C. 272, 487 F.2d 1143, 1170-71 (D.C. Cir. 1973), aff'd sub nom. [Florida Power & Light Co. v. International Brotherhood of Electrical Workers](#), 417 U.S. 790, 94 S. Ct. 2737, 41 L. Ed. 2d [*7] 477 (1974); [State Medical Society v. Board of Examiners in Podiatry](#), 208 Conn. 709, 717-

18, 546 A.2d 830 (1988); Connecticut Hospital Ass'n., Inc. v. Commission on Hospitals & Health Care, supra; Real Estate Listing Service, Inc. v. Real Estate Commission, 179 Conn. 128 at 128-138, 425 A.2d 581 at 581-39 (1979).

In Perkins v. Freedom of Information Commission, 228 Conn. 158, 165, 635 A.2d 783 (1994), the Supreme Court affirmed "the well-established practice of this court to accord great deference to the construction given a statute by the agency charged with its enforcement" except where the statute "has not previously been subjected to judicial scrutiny or time-tested agency interpretation." West Hartford Interfaith Coalition, Inc. v. Town Council, 228 Conn. 498, 507, 636 A.2d 1342 (1994).

The Supreme Court has recently noted that HN2[ while deference is appropriately given to an administrative agency's interpretation of a law that is charged with enforcing, "it is for the court, and not for administrative agencies to expound and apply governing principles of law" when there are two equally plausible interpretations of the statutory language. Bridgeport [*8] Hospital v. Commission on Human Rights and Opportunities, 232 Conn. 91, 109, 653 A.2d 782 (1995).

In the specific context of regulation of the sale and distribution of alcoholic beverages, the Supreme Court has likewise ruled that HN3[ in reviewing the determinations of the Liquor Control Commission, "the court can do no more than decide whether upon the facts before it the commission has mistaken the law, or whether it has reached a conclusion untenable in the light of logic and reason. Greenwich v. Liquor Control Commission, 191 Conn. 528, 534, 469 A.2d 382 (1983); Aminti v. Liquor Control Commission, 144 Conn. 550, 553, 135 A.2d 595 (1957).

I. Violations of Liquor Control Act

The plaintiffs' first ground for appeal is that the agency erroneously interpreted the Liquor Control Act when it decided that their payments to wholesalers violated General Statutes §§ 30-94 and -63(b).

General Statutes § 30-94 provides in relevant part that "No permittee...licensed under the provisions of this chapter in transaction with another permittee...shall directly or indirectly offer, furnish or receive any...cash returns,...discounts...with the sale of alcoholic beverages [*9] or liquors."

General Statutes § 30-63(b) HN4[ provides that:

No manufacturer, wholesaler or out-of-state shipper permittee shall discriminate in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size and quality, nor shall he allow in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases.

The regulations enacted by the agency deal more explicitly with the issue of payments by shippers to Connecticut wholesalers.

Regulation § 30-6-A29(a) HN5[ provides that:

(a) No permittee in transactions with another permittee shall directly or indirectly offer, furnish...any discounts...cash return...or special prices...with the sale of alcoholic liquors.

Regulation § 30-6-A29(f) HN6[ provides that:

(f) Notwithstanding any provisions of this section to the contrary, an out-of-state shipper or manufacturer licensee may offer to wholesale licensees funds to be used for product promotion as permitted by federal law and in accordance with the following:

(1) There shall be no restrictions or obligations [*10] on the use of such funds, except that such funds shall be used for promotion of the product(s) identified.

(2) Funds shall be offered without discrimination in any manner among wholesalers authorized to distribute the products to be promoted, except that funds may be pro-rated among such wholesalers based upon population of their authorized geographic territory for the product(s) involved; as determined by the most

recently completed decennial census; or based upon any other formula not prohibited by [sections 30-63](#) or [30-94](#) of the general statutes; [HN7](#) [↑] (3) Out of state shippers and manufacturers shall file with the Department at least thirty days before the distribution of funds, written notice listing the following:

- (A) The total amount of funds to be distributed and the proposed date of distribution;
 - (B) The product(s) to be promoted and the wholesalers authorized to distribute such products;
 - (C) If funds are distributed based on population served, the population is the geographic territories of each wholesaler, and the eligible share of funds expressed as a percentage;
 - (D) If any other formula is used, a detailed exposition of such formula used; and
 - (E) [*11] The amount of promotional funds each is to receive.
- (4) No promotional funds shall be distributed to any wholesaler without approval of the Department.

It is undisputed that the wholesalers to whom the plaintiffs made the payments in dispute are "permittees" within the meaning of the statutes and regulations cited above.

The plaintiffs assert that Regulation § 30-6-A29(f) allows promotional allowances "as permitted by federal law" and they note that they presented at the hearing a letter from the Chief of the Market Compliance Branch of the Alcohol and Tobacco Division of the Federal Bureau of Alcohol, Tobacco and Firearms in which that official responded to their inquiry as to the legality under federal regulations of payment of "depletion allowances" to a customer based on its case sales for a specified period. Though the plaintiffs assert that the opinion provided was that such payments comport with federal regulations, in fact, the only conclusion stated was as follows:

Assuming such payments are in compliance with State law, adherence to [27 CFR 10.23](#) will enable your client to safely act within the purview of the Federal Alcohol Administration Act."

[*12] [emphasis supplied]

The cited regulation is included in regulations which provide, at [27 CFR § 10.1](#), the preface to the cited section, that "Nothing in this part shall exempt any person from the requirement of any State law or regulation."

The plaintiffs argue, in effect, that regulation § 30-6-A29(f) exempts from the operation of § 30-6-A29(a) any product promotion payments permitted by federal law, and that an absence of federal prohibition against rebates makes such rebates permissible. Were this court to adopt such a reading of regulation § 30-6-A29(f), that regulation would negate [General Statutes § 30-63\(b\)](#), which expressly prohibits the payment of rebates. [HN8](#) [↑] An administrative regulation is not valid if it is inconsistent with or beyond the authorizing statute. [Mass v. United States Fidelity & Guaranty Co., 222 Conn. 631, 649, 610 A.2d 1185 \(1992\)](#); [Travelers Insurance Co. v. Kulla, 216 Conn. 390, 399, 579 A.2d 525 \(1990\)](#). The agency was not free to abolish the prohibitions of [General Statutes § 30-63\(b\)](#) by enacting a contrary regulation. Accordingly, regulation § 30-6-A29(f) cannot be interpreted in a manner inconsistent with the substantive provisions [*13] of Title 30. A non-conflicting interpretation is certainly available; Regulation § 30-6-A29(f) authorizes only those promotional payments that are expressly authorized by federal law. The cited federal regulation refers back to state regulations, and therefore the prohibitions of § 30-6-A29(a) are unaffected by any federal provision and are applicable.

The agency did not act arbitrarily or capriciously in interpreting the payments at issue as rebates and in determining that the payment of such rebates is prohibited by [General Statutes § 30-63\(b\)](#), [§ 30-94](#) and Regulation § 30-6-A29(a). The agency was further warranted in finding a violation of Regulation § 30-6-A29(f) in that the rebates were not paid for promotional purposes "without discrimination in any manner among wholesalers authorized to distribute the products to be promoted" but were paid according to discriminations made on the basis of amount of product sold. While Regulation § 30-6-A29(f)(2) authorized differences in payments based on geographical distributions of population, it expressly prohibits discrimination based on a formula prohibited by [General Statutes §§ 30-63](#) or [30-94](#), that is, volume rebates or discounts.

[*14] **II. Unenforceability under the Sherman Act**

The plaintiffs claim that if the agency may enforce penalties for rebates that reduce a shipper's posted price of beer to the plaintiffs' customers, it is enforcing a pricing scheme, provided for in [§ 30-63\(c\)](#), that is invalid because it violates the Sherman Act, § [15 U.S.C. § 1 et seq.](#)

At oral argument, the agency objected that since it had not specifically invoked [§ 30-63\(c\)](#) when it sanctioned the plaintiffs, the applicability of the Sherman Act to the state's liquor price posting statute is not an issue that can be raised in this appeal. [General Statutes § 30-63\(c\) HN9](#)[¹⁵] provides for posting by each manufacturer, wholesaler or out-of-state shipper permittee of its prices for each month and provides that the posted price "when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting." In finding that the plaintiff gave rebates or discounts to its customers, the agency found that the consequence was that "funds were distributed based on what and how much was sold and thereby illegally inducing more sales and purchases of Gambrinos products at [*15] effectively reduced prices of goods." (Memorandum of Decision 3/14/95, page 3, emphasis supplied.) The plaintiffs urge that because enforcement of the prohibition on discounts and rebates set forth in [§ 30-63\(b\)](#) is clearly linked to the prohibition against selling at less than the posted prices, this court should review the validity of that prohibition under the federal anti-trust statute, as interpreted by the United States Supreme Court in [California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#) and by other courts subsequently. The plaintiffs further note that since the agency found that the rebates effectively reduced the prices charged, violation of [§ 30-63\(c\)](#) was therefore an explicit part of the violation claimed.

It is necessary to decide whether administrative enforcement of [§ 30-63\(b\)](#) is necessarily an enforcement of [§ 30-63\(c\)](#). This court finds that it is not. [General Statutes § 30-63\(b\) HN10](#)[¹⁵] provides that "price discounts" *may* be given to a wholesaler or shipper's customers so long as the seller does not "discriminate" between customers in the discounts and provided that the wholesaler or shipper [*16] shall not "offer in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases." Some discounts from the posted prices are therefore permitted, and regulation § 30-6-A29(b) defines permissible methods of providing non-discriminatory discounts in the form of promotional funds.

The enforcement action at issue in this appeal with regard to [General Statutes § 30-63\(b\)](#) is enforcement of the prohibition against discrimination in providing promotional discounts. The agency found that the amount of the discount claimed to be for promotion was not uniform among customers but varied, that is "discriminated", according to the amount of product sold.

The enforcement of [General Statutes § 30-94](#), which the agency found the plaintiffs had also violated, presents a different situation. That statute on its face prohibits the furnishing of "cash returns" or "discounts" by a permittee to another to induce purchases. The agency expressly found that the effect of providing rebates was to induce purchases at effectively "reduced prices." While the agency invoked [§ 30-94](#), its rationale for enforcement and its express finding was the consequential [*17] charging of less than the posted price through the operation of the volume rebate, a violation of [§ 30-63\(c\)](#). The agency's formulation of the charges without reference to the provisions of [§ 30-63\(c\)](#) does not change the substance of its enforcement effort, which was to sanction rebates that effectively reduced the sale price below the posted price. While the agency might be in the position of enforcing only [§ 30-94](#) if a shipper offered a gift or a prize to a customer, where the charge is the giving of a discount or rebate, and where, as here, the agency finds that the substance of the offense involved charging "reduced prices," then the issue of the price posting scheme is part of the enforcement proceeding and is fairly raised as an issue in the appeal.

This court does not agree with the agency that the validity of Connecticut's price-posting scheme can be raised only if the agency cites [§ 30-63\(c\)](#) in its enforcement action. The agency itself relied on the finding that the rebates "effectively reduced prices of goods." The plaintiffs gave the agency clear notice of their position that the instant enforcement action was an enforcement of the duty to adhere to posted prices and [*18] was unenforceable under federal law. (Record, Letter of Atty. Siegel dated November 30, 1994.) The Connecticut Supreme Court has stated that [HN11](#)[¹⁵] a person who is aggrieved by the decision of an administrative agency may, on appeal, raise any issue relevant to the question whether the agency has acted illegally. [Connecticut Fund for the Environment Inc. v. Stamford, 192 Conn. 247, 251 n.3, 470 A.2d 1214 \(1984\)](#).

The agency has taken the position that so long as it challenges price discounting by invoking only [§ 30-94](#) and not [§ 30-63\(c\)](#), a respondent in an enforcement action may not challenge the requirement not to sell below the price it has posted. In its brief, indicating that the paying of rebates violated [§§ 30-63\(b\)](#) and -94, the agency conceded that "the other prohibitions stated in the statutes could also apply," that is, the same conduct violates the prohibition against charging a price lower than the posted price, pursuant to [§ 30-63\(c\)](#). The Connecticut Supreme Court has recognized, in [Beckanstin v. Liquor Control Commission, 140 Conn. 185, 192, 99 A.2d 119 \(1953\)](#), that the prohibition against discounts is part of "the prohibition of the granting to any retailer by a [*19] wholesaler of any reduction of the established price of a given brand of liquor."

The agency's position cannot be accepted because to do so would be to hold that the agency can prevent court review of the price posting scheme and deprive respondents of grounds for appeal merely by characterizing a reduction of the posted price as a "discount" or "rebate", and never specifying [§ 30-63\(c\)](#) as the statute violated even where, as here, the agency's complaint is that the rebate resulted in "effectively reduced prices of goods."

Having been subjected to penalties for paying discounts that effectively reduced its announced prices, the plaintiffs are entitled to challenge the validity of the substance of the enforcement action, that is, the prohibition of offering such reduced prices through rebates or discounts.

Though this court finds that the issue of the validity of the enforcement of a system of posted prices is an issue to be decided, the court finds for the agency on the merits of that issue.

In [California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937](#), the United States Supreme Court found that the California price-posting [*20] system violated the Sherman Act. The California statute at issue provided that the wine producer set the price for its brand of wine and that all persons at various levels in the chain of distribution were forced to establish identical prices so fixed by the brand owner. The Court found that this statutory scheme operated in a way that authorized the wine producer to prevent price competition by dictating the prices charged by wholesalers, through a resale price maintenance scheme.

The Connecticut price-posting scheme gives no such control to the producer and does not control the price at which retail sellers may sell the product they buy from shippers.

Reviewing the Connecticut price posting scheme as to both wholesale and retail prices in [Serlin Wine & Spirit Merchants, Inc. v. Healy, 512 F. Supp. 936, 938 \(D.Conn. 1981\)](#), aff'd sub nom [Morgan v. Division of Liquor Control, 664 F.2d 353, 355 \(2d Cir. 1981\)](#), the federal courts found that *Midcal* was inapplicable because the Connecticut system required only individual actions by sellers, not concerted action.

The United States Supreme Court revisited the California liquor distribution system, but not the pricing features [*21] of that system, in [Rice v. Norman Williams Co., 458 U.S. 654, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 \(1982\)](#). The Court upheld a state statute that allowed only importers designated by the brand owner to accept delivery of a brand of distilled spirits in California. The Court reversed the state Appellate Court's finding of an anti-trust violation, stating that "[a] state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." [Rice v. Norman Williams Co., 458 U.S. 654, 659, 73 L. Ed. 2d 1042, 102 S. Ct. 3294](#); [New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 110-111, 58 L. Ed. 2d 361, 99 S. Ct. 403 \(1978\)](#), and that a state statute could be rendered unenforceable "only if the statute on its face irreconcilably conflicts with federal antitrust policy." *id.* The Court characterized its holding in *Midcal* as identifying a facial conflict with the Sherman Act because the state statute required concerted action by wholesalers. The Court contrasted the finding of facial conflict in the California law with its finding in [Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 1*221 39-40, 16 L. Ed. 2d 336, 86 S. Ct. 1254 \(1966\)](#), that a posting requirement did not impose "irresistible pressure" to violate the Sherman Act.

Reviewing the New York posting statute in [Battipaglia v. N. Y. State Liquor Authority, 745 F.2d 166 \(2nd Cir. 1984\)](#), the Second Circuit upheld the state law upon a finding that the requirement to post a monthly wholesale price did not require concerted action by shippers and did not constitute a facial violation of the Sherman Act.

The plaintiffs point out that the Ninth Circuit has invalidated the Oregon price posting regulation in [Miller v. Hedlund, 813 F.2d 1344 \(9th Cir. 1987\)](#), and that the appellate courts of Nebraska and California have invalidated their own state laws in [Louis Finocchiaro, Inc. v. Nebraska Liquor Control Commission, 217 Neb. 487, 351 N.W.2d 701 \(Neb. 1984\)](#); and [Lewis-Westco and Co. v. Alcoholic Beverage Control Appeals Board, 136 Cal. App. 3d 829, 186 Cal. Rptr. 552 \(Cal. App. 1982\)](#), respectively.

The Ninth Circuit's conclusion in [Miller v. Hedlund, 813 F.2d 1344](#), rests on its determination that Oregon's wholesale price posting *on its face* irreconcilably conflicts with federal antitrust [*23] policy. The Ninth Circuit reasoned that the state's requirements that each shipper post its price "facilitates the exchange of price information and require adherence to the publicly posted prices." [Miller v. Hedlund, 813 F.2d 1344 at 1349](#). That court then made the leap of logic that a statute that "facilitates" exchange of price information "compels activity that would otherwise be a per se violation of the Sherman Act." *id.* Because Connecticut's price posting system allows sellers to revise their prices downward for subsequent months, this court cannot so confidently conclude that that which facilitates also, *on its face*, compels concerted agreements to fix prices. In [Rice v. Norman Williams Co., 458 U.S. 654, 660-61, 73 L. Ed. 2d 1042, 102 S. Ct. 3294](#), the Supreme Court referred to the price posting statute at issue in [Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1254](#), as not having presented a statute that *on its face* violates the Sherman Act by imposing "irresistible economic pressure" to violate the Sherman Act on those who sought to comply with the state law. This analysis by the United States Supreme Court does not [*24] appear to support the Ninth Circuit's reasoning that facilitation of concerted action is the same thing as compulsion of it.

The plaintiffs urge that Connecticut courts should follow the Supreme Court of Nebraska, which found in [Louis Finocchiaro, Inc. v. Nebraska Liquor Control Commission, 217 Neb. 487, 351 N.W.2d 701 \(Neb. 1984\)](#), that a wholesale price posting law and prohibition of volume discounts served no rational relation to any state purpose. They also urge this court to follow the California Court of Appeals, which appears determined to invalidate its state's liquor laws on federal grounds not supported by the federal courts. See [Rice v. Norman Williams Co., supra](#).

Though the Connecticut Supreme Court has not had occasion recently to rule on the statutes prohibiting discounts or rebates from posted prices when it did so in [Beckanstin v. Liquor Control Commission, 140 Conn. 185, 192, 99 A.2d 119 \(1953\)](#), it upheld the constitutionality of such provisions based on preventing "the evil of the tied house which was rampant in preprohibition days."

This court finds that the plaintiffs have not established that the prohibition on giving discounts or rebates based [*25] *on volume* is *on its face* a violation of the Sherman Act even though it may, in combination with the posting requirements, have an anticompetitive effect. Accordingly, the plaintiffs have failed to make the showing required by *Rice v. Norman Williams Co.* as to a claim of facial validity. Having undertaken no proof that would allow the court to analyze the operation of the challenged statutes under the "rule of reason" approach, see [Rice v. Norman Williams, 458 U.S. 654, 658-59, 73 L. Ed. 2d 1042, 102 S. Ct. 3294](#), the plaintiffs cannot prevail on this claim.

III. Constitutionality of Anti-Rebate Provisions

The plaintiffs assert that Connecticut's statutes prohibiting rebates or discounts that effectively reduce the price charged below the posted price violate the [Commerce Clause of the United States Constitution](#) and are therefore invalid. The United States Supreme Court has ruled that [HN12](#) the Twenty-First Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause, but that a pragmatic effort must be made to harmonize state and federal powers. [Midcal, 445 U.S. 97, 109, 63 L. Ed. 2d 233, 100 S. Ct. 937](#); [*26] [Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275, 82 L. Ed. 2d 200, 104 S. Ct. 3049](#). The test is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-First Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." [Bacchus, 468 U.S. 263, 275-76, 82 L. Ed. 2d 200, 104 S. Ct. 3049](#); [Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714, 104 S. Ct. 2694, 2708, 81 L. Ed. 2d 580 \(1984\)](#).

The plaintiffs' constitutional attack on the state statutes at issue appears to be based almost entirely on its view that the statutes are on their face violative of the Sherman Act, and therefore burden commerce. There is, however, some suggestion in their brief that the statutes are unconstitutional because they bear no rational relation to the achievement of any state regulatory goal. The plaintiffs point out that in 1982 Connecticut repealed its minimum retail price statutes as to alcoholic beverages, and that the state therefore has no remaining interest in regulating wholesale prices through posting requirements. The agency asserts that the provisions [*27] of the Liquor Control Act serve to prevent wholesalers from favoring certain retailers over others (Brief, page 9), apparently based on the belief that small retailers will be forced out of business by larger retailers able to charge lower prices because they can get rebates based on volume of sales. This court is unable to characterize such a goal as not bearing a rational relationship to a valid state regulatory goal. Though the agency has not explicitly invoked the regulatory interests found by the Connecticut Supreme Court in *Beckanstin*, such goals may also be served. It is notable that at the time it abolished retail pricing controls, the General Assembly chose not to alter provisions concerning wholesale price posting. The preservation of these features of the law supports the agency's position that the legislature perceived a reason to retain this system of regulation at the wholesale level.

IV. Severity of the Penalty

The plaintiffs' final point is that the penalty imposed by the agency is so excessive that it should be considered to be arbitrary and capricious. [HN13](#)[] It is well settled that a reviewing court should not substitute its own judgment for that of [*28] a regulatory agency as to the proper penalty for violation of a regulation absent a showing of abuse of discretion. [*Sumara v. Liquor Control Commission, 165 Conn. 26, 32, 327 A.2d 549 \(1973\)*](#); [*Spadaro v. Liquor Control Commission, 150 Conn. 68, 186 A.2d 76 \(1962\)*](#); [*DeMeo v. Zoning Commission, 148 Conn. 68, 167 A.2d 454 \(1961\)*](#). The plaintiffs argue that the penalty imposed "effectively puts the plaintiff out of business in Connecticut" (Brief, page 32). The court has no factual record sufficient to support such a conclusion. The Connecticut Supreme Court specifically found in [*Spadaro v. Liquor Control Commission, 150 Conn. 68, 73, 186 A.2d 76*](#), that a court may not judicially notice such a result nor find such an effect without a sufficient evidentiary record. Absent such a factual showing, this court cannot find that the penalty imposed exceeds what is necessary to secure compliance with the Liquor Control Act. It would appear that the agency must arrive at penalties severe enough to deter violations and that it must use its expertise to avoid creating a situation in which violations are engaged in because the penalties imposed are a nontroublesome cost of doing business.

[*29] The plaintiffs have failed to establish that the sanctions imposed are arbitrary or capricious or constitute an abuse of discretion.

Conclusion

For the foregoing reasons, the appeal is dismissed.

Beverly J. Hodgson 11/27/95

Judge of the Superior Court



Moore Corp. v. Wallace Computer Servs.

United States District Court for the District of Delaware

December 4, 1995, Dated

Civil Action No. 95-472 MMS

Reporter

907 F. Supp. 1545 *; 1995 U.S. Dist. LEXIS 18882 **; 1996-1 Trade Cas. (CCH) P71,287

MOORE CORPORATION LIMITED and FRDK, INC., Plaintiffs, v. WALLACE COMPUTER SERVICES, INC., ROBERT J. CRONIN, THEODORE DIMITRIOU, FRED F. CANNING, WILLIAM N. LANE, III, NEELE E. STEARNS, JR., R. DARRELL EWERS, RICHARD F. DOYLE and WILLIAM E. OLSEN, Defendants.

Core Terms

customers, vendors, antitrust, shareholders, tender offer, merger, pill, target, poison, WIN, preliminary injunction, out-sourcing, projections, submarket, bid, technology, Clayton Act, acquisition, enhanced, counterclaim, argues, fiscal, prices, redeem, lessening, stock, business judgment rule, management services, injunction, takeover

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN1 [] **Subject Matter Jurisdiction, Federal Questions**

Jurisdiction is based on diversity of citizenship, [28 U.S.C.S. § 1332](#), and federal question jurisdiction, [28 U.S.C.S. §§ 1331, 1337\(a\)](#), and [15 U.S.C.S. § 26](#).

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN2 [] **Venue, Multiparty Litigation**

Venue is proper under [28 U.S.C.S. § 1391\(c\)](#) and [15 U.S.C.S. § 22](#).

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Securities Law > Postoffering & Secondary Distributions > Recordkeeping & Reporting Requirements > General Overview

HN3 [] **Mergers, Duties & Liabilities of Directors & Officers**

See [8 Del. C. § 203](#).

Administrative Law > Judicial Review > Standards of Review > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

HN4 [] **Judicial Review, Standards of Review**

A shareholder challenge to board actions usually entails one of the following standards of judicial review: the traditional business judgment rule, the Unocal standard of enhanced judicial scrutiny, or the entire fairness standard.

Administrative Law > Judicial Review > Standards of Review > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN5 [] **Judicial Review, Standards of Review**

Because the effect of the proper invocation of the business judgment rule is so powerful, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of the litigation.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN6 [] **Directors & Officers, Management Duties & Liabilities**

The business judgment rule and Unocal enhanced scrutiny will apply.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN7 [] **Fiduciary Duties, Business Judgment Rule**

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The business judgment rule is a judicially-created doctrine which gives recognition to the fundamental tenet of Delaware General Corporation Law that directors are charged with managing the business and affairs of the corporation. [8 Del. C. § 141](#).

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Evidence > Inferences & Presumptions > General Overview

[HN8](#)[] Directors & Officers, Management Duties & Liabilities

It is a presumption that in making a business decision, the directors of a corporation act on an informed basis, in good faith and honest belief that the action taken was in the best interests of the corporation.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

[HN9](#)[] Directors & Officers, Management Duties & Liabilities

The bedrock principle embodied in the business judgment rule is the court's reluctance to substitute its judgment for that of a board if the board's decision can be attributed to any rational business purpose.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

[HN10](#)[] Fiduciary Duties, Business Judgment Rule

The business judgment rule is a judicially-created doctrine which gives recognition to the fundamental tenet of Delaware General Corporation Law that directors are charged with managing the business and affairs of the corporation.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Evidence > Inferences & Presumptions > General Overview

[HN11](#)[] Directors & Officers, Management Duties & Liabilities

The plaintiff bears the initial burden and must establish facts sufficient to persuade the court that the presumption of the business judgment rule has been rebutted and therefore the court should substitute its own judgment for that of the board.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Securities Law > Postoffering & Secondary Distributions > Tender Offers > Factors & Tests

907 F. Supp. 1545, *1545 1995 U.S. Dist. LEXIS 18882, **18882

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Corporate Governance > Shareholders > General Overview

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Shareholders

HN12 [💡] **Fiduciary Duties, Business Judgment Rule**

When a board is confronted with a hostile tender offer, it has the obligation to determine whether the offer is in the best interests of the corporation and its shareholders. The board's duty to the shareholders in this context is no different from its duty in any other situation, and its decision should be entitled to the same deference it would receive in other matters. However, because directors might have some entrenchment motive, rather than those of the corporation and its shareholders, an "enhanced judicial scrutiny" is applicable to board decisions in the tender offer context. That standard must be satisfied before the board's actions are reviewed under the traditional business judgment rule. This enhanced test places the initial burden upon the board to demonstrate compliance therewith before the presumption of the business judgment rule may be invoked.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Evidence > Inferences & Presumptions > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Defenses > General Overview

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > General Overview

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > Discretion

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Directors & Officers

HN13 [💡] **Fiduciary Duties, Business Judgment Rule**

Under the enhanced judicial scrutiny test set forth in Unocal, the directors must show they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, a burden which is satisfied by showing good faith and reasonable investigation. This proof is materially enhanced where the board is comprised of a majority of outside independent directors who have complied with their duties of good faith and reasonable investigation. However, the board is not empowered with unbridled discretion to defeat any perceived threat by whatever draconian means available. A defensive measure may only survive enhanced judicial scrutiny and fall within the purview of the business judgment rule if it is reasonable in relation to the threat posed.

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Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Evidence > Inferences & Presumptions > General Overview

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

HN14 [blue icon] **Directors & Officers, Management Duties & Liabilities**

Once the directors meet their burden under Unocal of showing a threat and response proportional to that threat, their actions will be subjected to review under the traditional business judgment rule.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN15 [blue icon] **Directors & Officers, Management Duties & Liabilities**

The refusal to entertain an offer may comport with a valid exercise of the board's business judgment.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Criminal Law & Procedure > Preliminary Proceedings > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN16 [blue icon] **Fiduciary Duties, Business Judgment Rule**

In a preliminary injunction proceeding, plaintiff bears the burden of establishing (1) the likelihood of success on the merits, (2) the extent of irreparable injury from the conduct complained of, (3) the extent of irreparable harm to the defendants if the preliminary injunction issues, and (4) effect on the public interest if relief were granted. In effect, the board must defeat the plaintiff's ability to discharge this burden by demonstrating that even under Unocal's enhanced scrutiny, the board's actions merited the protection of the business judgment rule. Plaintiff's likelihood of success on the merits, therefore, is a function of the board's inability to discharge its Unocal burden.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Initial Appearances > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Shareholders

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Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN17 [blue icon] **Commencement of Criminal Proceedings, Initial Appearances**

A defensive measure taken by the board in response to some perceived threat to the corporation is the sine qua non triggering Unocal's enhanced judicial scrutiny. Whether board action is "defensive" can be determined from a variety of factual circumstances, such as the timing of consideration and implementation of the measure in relation to the initial appearance of the corporate threat. Proper determination of the defensive nature of the board's challenged actions is critical. If a particular measure taken by the board is not found to be defensive, the reviewing court must review the board's action under the business judgment rule.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN18 [blue icon] **Directors & Officers, Management Duties & Liabilities**

Poison pills are, by definition, defensive. Even when they are adopted prior to a takeover bid as a preventative measure, they become defensive when the board fails to redeem them after a hostile tender offer is commenced.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN19 [blue icon] **Directors & Officers, Management Duties & Liabilities**

Unocal's first inquiry focuses upon the existence and nature of the threat to the target company. Under this inquiry, the target board must demonstrate that after reasonable investigation, the board determined, in good faith, that the tender offer posed a threat to the corporation or its shareholders which warranted the adoption of a defensive measure.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN20 [blue icon] **Directors & Officers, Management Duties & Liabilities**

An affirmative and precise determination of a threat must be demonstrated before moving to the second inquiry under Unocal, as this first inquiry informs the second. The nature of the threat associated with a particular hostile offer sets the parameters for the range of permissible defensive tactics. The obvious requisite to determining the reasonableness of a defensive action is a clear identification of the nature of the threat.

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN21 [] **Mergers & Acquisitions Law, Takeovers & Tender Offers**

A "coercive" offer is a term of art used to describe an offer which has the effect of compelling shareholders to tender their shares out fear of being treated less favorably in the second stage. A "noncoercive" offer, on the other hand, is one, which does not create that compulsion.

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN22 [] **Mergers & Acquisitions Law, Takeovers & Tender Offers**

An inadequate, non-coercive tender offer may also pose a legally cognizable threat in two ways. First, the target corporation may be inclined to provide the shareholders with a more attractive alternative, but may need some additional time to formulate and present that option. During the interim, the threat is that shareholders might choose the inadequate tender offer only because the superior option has not yet been presented.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN23 [] **Mergers, Duties & Liabilities of Directors & Officers**

Board action may be necessary to protect stockholders from a "low ball" negotiating strategy, or to allow the board to make an important decision over the management of the corporation. There are no limited categories of threats posed by an unsolicited offer, but the board's perception of a threat must be reasonable.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN24 [] **Mergers, Duties & Liabilities of Directors & Officers**

Types of threats posed by an unsolicited offer include the following: (i) opportunity loss where a hostile offer might deprive target shareholders of the opportunity to select a superior alternative offered by target management or, offered by another bidder, (ii) structural coercion, the risk that disparate treatment of non-tendering shareholders might distort shareholders' tender decisions, and (iii) substantive coercion, the risk that shareholders will mistakenly accept an underpriced offer because they disbelieve management's representations of intrinsic value.

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Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Directors & Officers

HN25 [blue icon] **Mergers, Duties & Liabilities of Directors & Officers**

The target board's proof under Unocal is materially enhanced where board's approval was comprised of a majority of outside independent directors who exercised good faith and reasonable investigation.

Governments > Fiduciaries

Mergers & Acquisitions Law > Takeovers & Tender Offers

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

HN26 [blue icon] **Governments, Fiduciaries**

A claim for breach of fiduciary duty arising out of a board's failure to redeem a poison pill are reviewed under the enhanced scrutiny provided by Unocal.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Securities Law > Postoffering & Secondary Distributions > Tender Offers > Factors & Tests

Mergers & Acquisitions Law > Takeovers & Tender Offers

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN27 [blue icon] **Mergers, Duties & Liabilities of Directors & Officers**

Reasonableness of a board's defensive measures turns on an assessment by the directors of the nature of the tender offer and the effect such offer would have on the corporate enterprise. Factors relevant to this assessment include (1) inadequacy of the price offered, (2) nature and timing of the offer, (3) questions of illegality, (4) the impact on "constituencies" other than the shareholders, (5) the risk of nonconsummation, and (6) the qualities of the securities being offered in the exchange.

Governments > Local Governments > Administrative Boards

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Shareholders

Governments > Fiduciaries

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

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Mergers & Acquisitions Law > Takeovers & Tender Offers

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN28 [blue icon] Local Governments, Administrative Boards

Poison pills serve legitimate functions, which create no fiduciary duty issue. If a hostile tender offer is commenced at a share value which the board, in good faith and after reasonable investigation, determines to be "inadequate," the board may justifiably leave the pill in place for a period of time so as to enable it to take steps necessary to protect and advance shareholder interests. After the period in which such alternatives may be considered has ended, and the board has determined that such alternatives are not feasible or, at any rate, not better for the shareholders, the legitimate role of the poison pill has expired. At that point, the only function the pill serves is to prevent the shareholders from exercising their right to tender, as the poison pill, once activated, effectively forecloses the consummation of the tender offer.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Shareholders

HN29 [blue icon] Mergers, Duties & Liabilities of Directors & Officers

Failing to redeem a poison pill can be justified by considerations other than maximizing current share value. Absent a limited set of circumstances as defined under Revlon, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN30 [blue icon] Mergers, Duties & Liabilities of Directors & Officers

Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.

Governments > Local Governments > Administrative Boards

Mergers & Acquisitions Law > Takeovers & Tender Offers

Governments > Fiduciaries

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

HN31 [blue icon] Local Governments, Administrative Boards

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The failure to redeem a poison pill can constitute a fiduciary breach. In the setting of a noncoercive offer, absent unusual facts, there may come a time when a board's fiduciary duty will require it to redeem the rights and to permit the shareholders to choose.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN32 [blue icon] **Mergers, Duties & Liabilities of Directors & Officers**

While Unocal gave no direct guidance to courts applying the proportionality test, the court did expressly define the outer parameter of board action by condemning any action which is "draconian" as not reasonably proportionate to the perceived threat. Draconian measures have been described as measures which are coercive or preclusive with respect to the outside bid.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN33 [blue icon] **Mergers, Duties & Liabilities of Directors & Officers**

Board actions that are coercive in nature or force upon shareholders a management-sponsored alternative to a hostile offer, even if the threat is valid, may be struck down as unreasonable and nonproportionate responses.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN34 [blue icon] **Mergers, Duties & Liabilities of Directors & Officers**

If a defensive measure is not preclusive or coercive, Unocal requires the action to fall within a "range of reasonableness."

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN35 [blue icon] **Mergers, Duties & Liabilities of Directors & Officers**

When a corporation is not for sale, the board of directors is the defender of the metaphorical medieval corporate bastion and the protector of the corporation's shareholders. The fact that a defensive action must not be coercive or preclusive does not prevent a board from responding defensively before a bidder is at the corporate bastion's gate.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Securities Law > Postoffering & Secondary Distributions > Proxies > General Overview

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Mergers & Acquisitions Law > Takeovers & Tender Offers

HN36 [blue] **Mergers, Duties & Liabilities of Directors & Officers**

A board's decision not to redeem a pill is not coercive or preclusive where: retention of the pill will have no discriminatory effect on shareholders, as is generally the result in any situation involving a coercive offer, and more important, retention of the pill will have no effect on the success of the proxy contest.

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN37 [blue] **Mergers, Duties & Liabilities of Directors & Officers**

It is the prerogative of the directors of a Delaware corporation to determine that the market undervalues the price of its stock and to protect its stockholders from offers that do not reflect the long term value of the corporation under its present management plan.

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Governments > Fiduciaries

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Directors & Officers

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Evidence > Inferences & Presumptions > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN38 [blue] **Burdens of Proof, Ultimate Burden of Persuasion**

Under the business judgment rule the burden shifts back to the plaintiffs who have the ultimate burden of persuasion in a preliminary injunction proceeding to show a breach of the directors' fiduciary duties. In order to rebut the protection of the business judgment rule, the burden on the plaintiffs is to demonstrate, by a preponderance of the evidence that the directors decisions were primarily based on (1) perpetuating themselves in office or, (2) some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or (3) being uninformed.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > Remedies

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN39 [blue] **Injunctions, Preliminary & Temporary Injunctions**

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In ruling on a preliminary injunction, the court must weigh the extent of hardship to the plaintiffs if the requested relief is not granted against the hardship to the defendant if the relief is granted.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN40 [] **Injunctions, Preliminary & Temporary Injunctions**

At the preliminary injunction stage of a hostile tender offer case, the court must be extremely cautious when determining whether to grant the relief, given the dramatic consequences of the action. The power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN41 [] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss for failure to state a claim, all allegations in the pleadings must be accepted as true.

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 > Clayton Act > Remedies > Injunctions

HN42 [] **Remedies, Damages**

Under the Clayton Act § 16, [15 U.S.C.S. § 26](#), any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN43 [] **Private Actions, Remedies**

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Antitrust plaintiffs must allege and ultimately prove that they would suffer threatened loss or damage constituting an "antitrust injury."

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN44 [+] **Private Actions, Remedies**

Antitrust injury involves injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN45 [+] **Clayton Act, Claims**

Plaintiffs seeking an injunction under the Clayton Act § 16, [15 U.S.C.S. § 26](#), must show a threat of "antitrust injury" in order to fulfill the standing requirement.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN46 [+] **Clayton Act, Claims**

Under the Clayton Act's statutory scheme, its standing analysis for injunctive relief would "not always be identical" to standing analysis for damages.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN47 [blue icon] Clayton Act, Claims

It is anomalous to read the Clayton Act to authorize private plaintiffs to secure an injunction against a threatened injury for which they would not be entitled to compensation if the injury actually occurred.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN48 [blue icon] Clayton Act, Claims

The target of a hostile takeover has no standing to bring a Clayton Act § 7, [15 U.S.C.S. § 18](#) claim.

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN49 [blue icon] Mergers & Acquisitions Law, Antitrust

Any alleged injury suffered by a target in a merger is inherent to the merger process rather than flowing from any anticompetitive effect of the merger.

Governments > Courts > Judicial Precedent

HN50 [blue icon] Courts, Judicial Precedent

The Third Circuit Court of Appeals for the District of Delaware joins the [Anago, Inc. v. Tecmol Medical Prod., Inc., 976 F.2d 248 \(5th Cir. 1992\)](#) line of cases rather than follow [Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 \(2d Cir. 1989\)](#).

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Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Governments > Legislation > Statutory Remedies & Rights

[**HN51**](#) [] **Private Actions, Remedies**

The purpose of the requirement of antitrust injury is to ensure that the harm alleged by plaintiffs corresponds to the rationale for finding a violation of the antitrust laws in the first place.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Legislation > Statutory Remedies & Rights

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

[**HN52**](#) [] **Private Actions, Standing**

Antitrust standing is a prudential, not constitutional limitation on federal court jurisdiction.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

[**HN53**](#) [] **Antitrust & Trade Law, Clayton Act**

The Clayton Act § 7, [15 U.S.C.S. § 18](#), proscribes mergers or acquisitions 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 tend to create a monopoly.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Evidence > Inferences & Presumptions > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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HN54 [blue icon] Relevant Market, Product Market Definition

To demonstrate a likelihood of success on the merits for injunctive relief, a defendant must fulfill two criteria: first, they must show that it is more probable than not that acquisition by plaintiffs will affect a "line of commerce" in "any section of the country." These respective determinations are informed by the elucidation of a relevant product market and a relevant geographic market. Second, defendants must show that it is more probable than not that plaintiffs' takeover may substantially lessen competition in the relevant product and geographic markets; the mere possibility of substantial impairment to competition will not suffice.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Takeovers & Tender Offers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN55 [blue icon] Remedies, Injunctions

For injunctive relief under the Clayton Act, defendant need not prove the fruition of actual anticompetitive effects of the acquisition, as the Clayton Act § 7, 15 U.S.C.S. § 18's underlying purpose is to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Mergers & Acquisitions Law > Takeovers & Tender Offers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN56 [blue icon] Relevant Market, Product Market Definition

A necessary predicate to a finding of a violation of the Clayton Act § 7, 15 U.S.C.S. § 18 is the definition of the relevant product market and relevant geographical market. These market determinations confer the requisite context within which the court can analyze whether there has been a substantial lessening of competition.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Mergers & Acquisitions Law > Antitrust > General Overview

HN57 [blue icon] **Relevant Market, Geographic Market Definition**

Relevant geographic market is defined as the region where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN58 [blue icon] **Regulated Practices, Market Definition**

The outer boundaries of a product market are determined by the reasonable interchangeability of use by consumers or the cross-elasticity of demand between the product itself and substitutes for it. Interchangeability of use implies that one product or service is approximately equivalent to another; discounting any degree of preference for the one over the other, either product would work just as well. Cross-elasticity of demand refers to whether the demand for the second good or service would respond to change in the price of the first. In short, defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products or services, have the ability, actual or potential, to take significant amounts of business away from each other.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN59 [blue icon] **Relevant Market, Product Market Definition**

Under appropriate circumstances, a broad product market may be parsed into well-defined submarkets, each comprising a discrete line of commerce unto itself for the Clayton Act § 7, [15 U.S.C.S. § 18](#) purposes. If such a submarket(s) does exist, the court must scrutinize not only the broad, overall market, but must also examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN60 [blue icon] **Regulated Practices, Market Definition**

The Brown Shoe Court set forth seven "practical indicia" for lower courts to consider when determining whether a submarket exists: industry or public recognition of the submarket as a separate economic entity, the product's

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peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. All of these indicia need not be present for a well-defined submarket to exist.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN61 [blue icon] **Regulated Practices, Market Definition**

Recognized sources of evidence of industry or public recognition include (1) statements of the merging parties and their own market surveys, annual reports, marketing materials, and preacquisition reports, (2) Industry or trade association publications, (3) the existence of a discrete trade association for the product or services involved, (4) perceptions and statements of major customers, and (5) Industry classification codes of the United States Census Bureau.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN62 [blue icon] **Regulated Practices, Market Definition**

It is also important to examine the barriers to entry into the market, because without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Low barriers to entry into the market invite entry by new competitors and also expose firms well established in the market to the threat of potential entry. This in turn can induce those firms to hold prices, services, quality, and developments at competitive levels. The converse is also true: high entry barriers reduce the potential for increased competition by dissuading smaller firms from aggressively competing.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN63 [blue icon] **Relevant Market, Geographic Market Definition**

Once the relevant product and geographic markets circumscribing the area of effective competition have been defined, the court must analyze whether the effect of the merger may be substantially to lessen competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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HN64 [blue icon] **Regulated Practices, Market Definition**

While statistics reflecting market share controlled by industry leaders are the focal point of the court's analysis, the court is also mindful that statistics must be viewed in light of the particular market's structure, history, and probable future.

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN65 [blue icon] **Mergers & Acquisitions Law, Antitrust**

Courts must consider whether acquisition will make it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN66 [blue icon] **Regulated Practices, Market Definition**

Market definition provides the necessary context within which the lessening vel non of competition must be evaluated.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Evidence > Inferences & Presumptions > General Overview

HN67 [blue icon] **Relevant Market, Product Market Definition**

Antitrust plaintiffs cannot prevail by simply alleging a lessening of competition within a limited subset of customers; plaintiffs must also evaluate the significance of this impact in the "universe" of the relevant product market.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Evidence > Inferences & Presumptions > General Overview

HN68 [blue icon] **Injunctions, Grounds for Injunctions**

An injunction should issue only if the movant for the injunction produces evidence sufficient to convince the district court that all four factors favor preliminary relief.

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Judges: Murray M. Schwartz, United States District Judge

Opinion by: Murray M. Schwartz

Opinion

[*1549] OPINION

Dated: December 4, 1995

Wilmington, Delaware

Schwartz, Senior District Judge

I. INTRODUCTION

Before the Court in this securities and antitrust matter are the parties' cross motions for preliminary injunctive relief and plaintiffs' motion to dismiss defendant's counterclaim. In their motion for a preliminary injunction, plaintiffs Moore Corporation Limited and its wholly-owned subsidiary FRDK, Inc. (collectively, "Moore") **[**2]** seek to enjoin defendants Wallace Computer Services, Inc. and its Board of Directors (collectively, "Wallace," "Board," or "Wallace Board") from implementing Wallace's antitakeover devices or taking any other actions to impede Moore's tender offer. Moore contends that such antitakeover maneuvers constitute a breach of fiduciary duty to the Wallace shareholders. As principal relief, Moore seeks to compel Wallace to redeem its "poison pill," which according to Moore presents the most serious obstacle to the consummation of the tender offer.

Wallace has counterclaimed that Moore's tender offer, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. In response, Moore has moved for dismissal of the counterclaim pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Wallace has not alleged sufficient antitrust injury and therefore lacks standing to bring this claim. Wallace has also moved for a preliminary injunction as to this antitrust counterclaim.¹

¹ Wallace also alleged that both Moore and counterclaim defendant Reto Braun ("Braun"), Moore's Chairman and Chief Executive Officer, have made misleading statements in connection with the tender offer, in violation of Sections 14(d) and (e) of the Securities Exchange Act of 1934 (the "Securities Exchange Act"). Alleging false and misleading statements in violation of Section 14(a) of the Securities Exchange Act, Wallace sought to enjoin Moore's proxy contest concerning the upcoming annual Wallace Board meeting, to be held on Friday, December 8, 1995. The Wallace pre-hearing and post-hearing briefs contained no discussion whatsoever of these allegations. Additionally, Wallace's counsel advised that Wallace was taking no steps to impede the proxy contest. The Court will therefore treat the allegations as withdrawn.

[**3] Consonant with the high stakes in this case, the parties have erected a voluminous record for the Court's consideration. Prior to, contemporaneous with, and following a preliminary injunction hearing, the Court has been "carpet bombed" ² with a rash of legal memoranda, over two hundred exhibits, myriad depositions, with separately filed excerpts and highlights from those same depositions, and a salmagundi of other documents. In addition to considering all of the above, the Court also will refer to testimony elicited at a three day preliminary injunction hearing held November 7-9, 1995.

[HN1](#) [↑] Jurisdiction is based on diversity of citizenship, [28 U.S.C. § 1332](#), and federal question jurisdiction, [28 U.S.C. §§ 1331, 1337\(a\)](#), [15 U.S.C. § 1541](#) 26. [HN2](#) [↑] Venue is proper under [28 U.S.C. § 1391\(c\)](#) and [15 U.S.C. § 22](#). This opinion contains this Court's findings of fact and conclusions of law, pursuant to [Fed. R. Civ. P. 52\(a\)](#); to the extent that findings of fact are placed among conclusions of law, they should be deemed findings of fact.

For the reasons set forth below, the Court will deny Moore's motion for preliminary injunction with respect to the breach of fiduciary duty claim and grant Moore's motion to dismiss Wallace's Clayton Act counterclaim. Wallace's motion for preliminary injunction with respect to the antitrust claims will therefore become moot.

II. THE PARTIES

Plaintiff Moore Corporation Limited is an Ontario, Canada corporation engaged in the business of delivering information handling products ("business forms" or "forms") and services, with its principal place of business in Toronto, Ontario. Docket Item ("D.I.") 1, P 7. Plaintiff FRDK, Inc. is a New York corporation with its principal place of business in Toronto, Ontario. *Id.* P 8. As a wholly-owned subsidiary of Moore Corporation Limited, FRDK, Inc. was incorporated for the purpose of making a tender offer for all outstanding Wallace stock in connection [**5] with a proxy solicitation and merger. *Id.* P 8. Counterclaim defendant Braun is the Chairman and Chief Executive Officer of Moore Corporation, Limited.

Defendant Wallace is a Delaware corporation engaged predominantly in the computer services and supply industry, with its principal place of business in Hillside, Illinois. *Id.* P 9. Defendants Robert J. Cronin ("Cronin"), Theodore Dimitriou ("Dimitriou"), Fred F. Canning ("Canning"), William N. Lane, III ("Lane"), Neele E. Stearns, Jr. ("Stearns"), R. Darrell Ewers ("Ewers"), Richard F. Doyle ("Doyle"), and William E. Olsen ("Olsen") are members of the eight-member Wallace Board of Directors. Of these eight directors, all but Cronin and Dimitriou are independent directors. Cronin presently serves as President and Chief Executive Officer of Wallace. Dimitriou formerly served as Chief Executive Officer, and now serves as Chairman of the Wallace Board.

III. MOORE'S FIDUCIARY DUTY CLAIM

A. Facts

As with all actions alleging breach of fiduciary duty by a target corporation's Board of Directors, a detailed examination of the actions of the Wallace Board is required to provide context to the claim. In February, 1995, [**6] Moore's Chief Executive Officer Braun approached Wallace management proposing a possible business combination between Moore and Wallace. D.I. 176 at 2-3. On March 8, 1995, the Wallace Board instructed its Chief Executive Officer Cronin to advise Braun that Wallace had no interest in a business combination with Moore. Between February and June, 1995, attempts were made by Braun to meet with Cronin over lunch to discuss the matter, but the lunch meeting never occurred. On June 14, 1995, the Wallace Board approved an employment

² [Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F. Supp. 860, 863 \(W.D.N.Y. 1994\)](#) (citing [Consolidated Gold Fields PLC, Inc. v. Anglo Am. Corp., 713 F. Supp. 1457, 1475](#) (S.D.N.Y.), op. amended, [890 F.2d 569](#) (2d Cir.), cert. dismissed, [492 U.S. 939](#) (1989)).

agreement for Cronin that provided Cronin, among other items, a severance package in the amount of \$ 8 million in the event of a change in his job duties. D.I. 107, Deposition of Doyle ("Doyle Depo."), at 52. The substance of this agreement, in all pertinent respects, was identical to a prior agreement between Wallace and Dimitriou, Cronin's predecessor as Chief Executive Officer. Additionally, the Wallace Board adopted a bylaw amendment creating a 60-day notice requirement applicable to shareholders desiring to bring business for consideration at Wallace's annual meeting. *Id.* at 56.

On July 30, 1995, a Sunday, Moore announced its intention to commence a tender **[**7]** offer for all outstanding shares of Wallace common stock (together with the associated preferred stock purchase rights that were issued in connection with Wallace's poison pill) at a price of \$ 56 per share, a number which was determined with the advice of Moore's financial consultant Lazard Freres. The value of the proposed transaction was approximately \$ 1.3 billion. D.I. 1, P 20. Moore intends, as soon as practicable after the consummation of the tender offer, to cause Wallace to merge with FRDK, and **[*1551]** purchase all shares not tendered. Concurrently with the tender offer, Moore has delivered proxy solicitation materials to the Wallace shareholders in order to nominate three individuals to serve as and replace the entire membership of the Wallace Board. *Id.* PP 21, 22. ³

The \$ 56 tender offer was an all-cash offer for all shares that would **[**8]** provide Wallace shareholders a premium of 27% over the market price of Wallace stock value as of the date of the announcement of the offer. *Id.* PP 24, 25. The offer was conditioned upon, *inter alia*, (a) the valid tender of a majority of all outstanding shares of Wallace's common stock on a fully-diluted basis on the date of purchase; (b) the redemption, invalidation or inapplicability of the rights allowed under the Preferred Stockholder Rights Plan (the poison pill); ⁴ **[**9]** (c) Wallace Board approval of the acquisition of shares pursuant to the offer and proposed merger under [Section 203](#) of the Delaware Business Combination Statute ("[Section 203](#)"); ⁵ (d) the proposed merger having been approved pursuant to Article Ninth of Wallace's Restated Certificate of Incorporation ("Article Ninth"), or the inapplicability of such article to the offer and proposed merger; ⁶ and (e) the availability of sufficient financing to consummate the offer and proposed merger. ⁷ *Id.* P 20.

[10]** Moore communicated its intent to launch the tender offer to Wallace by leaving a telephone message that Sunday evening at Cronin's home. Upon receiving the information, Cronin contacted the Wallace Board and officers, and a group of advisors met them at their corporate headquarters. On Monday, July 31, Wallace, based on the recommendation of Dimitriou, retained Goldman Sachs ("Goldman") as its financial advisor to review the

³ On August 2, 1995, FRDK filed a Schedule 14D-1 with the Securities and Exchange Commission ("SEC"), detailing the provisions of the tender offer. D.I. 28 at 19.

⁴ The poison pill was adopted on March 14, 1990, and caused the Wallace Board to declare a dividend of one preferred stock purchase right per share of common stock, payable to each shareholder of record as of March 28, 1990. Each right entitles the holder to purchase from Wallace one two-hundredth of a share of designated stock at a price of \$ 115. Additionally, following the occurrence of certain events, including the acquisition of 20% or more of Wallace's common stock, each holder of a right is entitled to exercise that right by purchasing common stock of Wallace at half-price. D.I. 1, P 29.

⁵ [Section 203](#) applies to any Delaware corporation that has not opted out of the statute's coverage. It provides that any person acquiring 15% or more of a company's voting stock (thereby becoming an "interested shareholder") may not engage in any business combination, including a merger, for three years after becoming such, unless that person obtains or has obtained certain approvals by the Board of Directors, or the affirmative vote of at least two-thirds of the outstanding voting stock not owned by the interested **HN3** shareholder. See [8 Del. C. § 203](#).

⁶ Article Ninth, entitled "Certain Business Combinations," is designed to impede coercive and inadequate tender offers. It prohibits certain business combinations by any "interested shareholder" (defined to include any person who directly or indirectly owns 20% or more of the outstanding voting power of Wallace, or an affiliate or assignee thereof), unless the affirmative vote of at least 80% of the combined voting power of the then outstanding shares of Wallace stock is obtained. D.I. 1, PP 34, 35. Like the poison pill, Article Ninth was in place years before the initiation of the Moore tender offer.

⁷ Testimony at the November hearing was to the effect that financing had been obtained, with a commitment for the same extending to December 11, 1995.

adequacy of the Moore tender offer. Dimitriou recommended Goldman based on the fact that Goldman had previously done work for Wallace, and that Goldman enjoyed the reputation as being a leading investment firm.

That same day, at 8:30 a.m., Moore filed the complaint in this action seeking the Court to compel the removal of the antitakeover devices and to declare that the proposed merger complied with all applicable laws. See *Moore Corp. v. Wallace Computer Servs.*, 898 F. Supp. 1089, 1995 WL 590561 (D.Del. 1995). Wallace moved to dismiss the complaint on the dual grounds that the action was not yet ripe, and that plaintiffs engaged in impermissible forum shopping. The motion was denied. See *id.* On August 1, 1995, the Wallace Board met for the first time to consider [**11] the offer and to ratify the retention of Goldman as the company's financial advisor. [*1552] Doyle Depo. at 107.⁸

Cody Smith ("Smith"), a Goldman partner, headed his firm's evaluation of the proposed tender offer. In accordance with requests from Goldman, Wallace management provided a series of documents reflecting [**12] historic information and future projections to Goldman on Monday, July 31, 1995. D.I. 107, Deposition of Michael J. Halloran ("Halloran Depo."), at 72-73. These documents, assembled and presented by Michael J. Halloran ("Halloran"), a Wallace vice president and its Chief Financial Officer, included the following: annual reports for preceding years, Securities and Exchange Commission Form 10K reports, proxy reports, quarterly statements for the first three fiscal quarters of 1995, and any current analysts reports Wallace had on file. *Id.* Additionally, Halloran provided Goldman with its June, 1995 Strategic Plan (the "Strategic Plan"). *Id.* at 73-74. All of the figures and data provided to Goldman were prepared exclusively by Wallace.

The Strategic Plan contained projections which were, in large part, dependent upon future acquisitions. However, Smith testified that but for one acquisition, the Strategic Plan acquisition-related projections were not used by Goldman in preparing its report. Transcript of Hearing ("Tr.") 440, 444-45. Goldman made no independent investigation of the figures supplied by Wallace, nor did it make any changes thereto, but did speak with department heads [**13] at Wallace to review their component businesses, the basis of their forecasts, and the evidence supporting their forecasts. *Id.* at 423.

On August 4th, 1995, Goldman visited the Wallace headquarters in Hillside, Illinois. Wallace provided Goldman with its 1996 budget and additional supporting papers thereto. Wallace also gave Goldman its projections for fiscal year 1996 by quarter, as well as a projection through fiscal year 2000. The numbers set forth in the projections contained adjustments to reflect additional financial information which Wallace had gained in the two month interim since the Strategic Plan was created. Wallace then was asked to provide additional figures to include projections through the year 2002, which Wallace gave Goldman on August 9th. These projections contained more generous assumptions than previously supplied. Wallace explained that these more optimistic figures were given to Goldman because "we realized that we really had not given ourselves credit for some major initiatives we were taking to redo our manufacturing system," which was expected to be completed by the end of the calendar year 1996. Halloran Depo. at 118-119. Both subsequent sets of figures [**14] contained higher projected earnings than the first set.

On August 11, 1995, the Wallace Board met for the purpose of reviewing the adequacy of the Moore offer. Goldman presented its preliminary opinion that \$ 56 was inadequate. The Wallace Board took no action at that time. On August 14, 1995, the Board met again, when Goldman issued its final opinion as to the inadequacy of the Moore offer.⁹ The Board unanimously concluded that the offer was inadequate. Their decision was based on the presentation of Goldman and the results from the fourth quarter of fiscal 1995 (May, June and July). Wallace sales

⁸ The fee arrangement negotiated between Wallace and Goldman merits a brief description at this point, since Moore argues that the compensation arrangement biased Goldman in favor of finding inadequacy. Under the provisions of the arrangement, if Wallace remained independent, Goldman would receive \$ 500,000 initially, plus additional \$ 1.5 million increments, up to a total of \$ 8 million. If Moore's \$ 56 tender offer succeeded, Goldman would receive 6.2% of the total amount of the offer, up to approximately the same \$ 8 million. However, because the fee is structured on a percentage scale, Goldman would obviously receive more than the \$ 8 million if the eventual offer was for a price over \$ 56 per share.

⁹ The report prepared for the August 14th presentation differed from that prepared for the August 11th presentation, because the latter contained two assumptions which were inconsistent with one another, yielding an incorrect result.

had increased 32% to 33% over the prior year and profits had increased 32%. Both the actual figures from the fourth quarter of fiscal 1995 and all of fiscal 1995 were record results and were above those projected by financial analysts. Additionally, the Wallace Board believed that the proposed union between the companies would present [*1553] antitrust concerns. On August 15, 1995, Wallace formally rejected Moore's offer. D.I. 28 at 2.

[**15] On October 12, 1995, Moore raised its offer price to \$ 60 per share. Again, the Wallace Board met to consider the offer. Additional material was given to Goldman to provide an updated set of data regarding their financial status. On October 17, 1995, Goldman presented its opinion that the \$ 60 offer was inadequate. Goldman based its opinion in part on the fact that Wallace is presently generating and receiving the benefits of its capital expenditure plan for infrastructure such as the Wallace Information Network ("WIN") system, which has become successful only within the past two years.¹⁰ Tr. 429-30. Further, Wallace's recent alliance with United Stationers, an office products company, had begun to produce favorable returns. *Id.* at 430. Goldman also believed that a reorganization or recapitalization plan, which Wallace could adopt, would produce current value which could exceed \$ 60 per share, yet still allow its shareholders to retain their ownership interest in the company, a result the Moore cash-out offer could not achieve. *Id.* at 431.

[**16] The Board concurred in the Goldman conclusion that the price was inadequate, because recent financial results demonstrated continued improvement and momentum in the marketplace. At neither the August 14th nor the October 17th meeting did Goldman provide Wallace with a range of values that would be adequate or fair. Similarly, Goldman did not inform the Board the margin by which the Moore offers fell short of adequacy, nor did the Board ask. At both meetings, however, Goldman went through its materials with the Wallace Board and answered questions posed by the Board regarding the Goldman analysis. Tr. 421.

A hearing on Moore's motion for a preliminary injunction was held on November 7-9th, 1995. At that time, 73.4% of Wallace shareholders had tendered their shares. Moore alleges that the all cash tender offer, proposed merger, and proxy solicitation cannot be completed unless Wallace agrees to remove or make inapplicable its anti-takeover devices, including its poison pill, Article Ninth, and the protection of [Section 203](#). D.I. 1, P 27. The Board's failure to redeem the poison pill, however, is the gravamen of Moore's prayer for injunctive relief.¹¹

[**17] B. Analysis

1. Standard of Review

Before reaching the substantive issues in this case, the Court must determine the standard of review applicable to the Wallace Board's challenged actions. [HN4](#) [↑] A shareholder challenge to board actions usually entails one of

¹⁰ A major asset of Wallace is its recently-developed computer system known as the "Wallace Information Network" ("WIN"). The WIN system is a set of computer programs that links together several other Wallace systems, such as its order entry, order management, manufacturing, inventory management, distribution and billing systems, for the purpose of delivering services and assisting the customer, as well as reducing costs. Tr. 220. The benefits WIN provides largely accrue to large, out-source customers because it enables them to control inventories, manage accounts and identify items for consolidation. Moore's internal documents reveal that (1) the WIN system is a superior system; (2) Moore entered into an agreement with Electronic Data Systems in a bid to engage in a technological catch-up which has not been successful, Tr. 60; and (3) Wallace has been beating Moore in head-to-head competition for large, forms-intensive customers with multiple locations.

¹¹ The Wallace Board is entitled under its poison pill to redeem the rights or make the poison pill inapplicable to the offer and proposed merger by an amendment to the rights agreement. D.I. 1, P 30. The Board is also empowered under Article Ninth to avoid the shareholder vote requirement by approving the transaction by a majority vote of the Board. *Id.* P 36. Finally, the Board has the right to opt out of [Section 203](#)'s protection under Delaware law. *Id.* P 31. While the court notes that Moore also seeks to compel Wallace to make inapplicable Article Ninth of its Restated Certificate of Incorporation, and opt out of the protection of [8 Del. C. § 203](#), Moore's briefs submitted before and after oral argument confine its discussion to the poison pill. Additionally, no portion of oral argument was devoted to these defenses. Accordingly, the Court will so limit its discussion.

the following standards of judicial review: the traditional business judgment rule, the *Unocal* standard of enhanced judicial scrutiny, see *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), or the [*1554] entire fairness standard, see, e.g., *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. 1986). *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1371 (Del. 1995). Determining the appropriate standard of review is not a task this Court takes lightly. "Because [HN5](#)[¹] the effect of the proper invocation of the business judgment rule is so powerful . . . , the determination of the appropriate standard of judicial review frequently is determinative of the outcome of [the] litigation." *Id.* (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1988)). While the entire fairness standard has no application to the case presently before the Court,¹² [HN6](#)[¹] the [**18] business judgment rule and Unocal enhanced scrutiny will apply. Accordingly, the Court will first address the interplay between the two standards of review.

[**19] [HN7](#)[¹] The business judgment rule is a judicially-created doctrine which gives recognition to the fundamental tenet of Delaware General Corporation Law that directors are charged with managing the business and affairs of the corporation. See *8 Del. C. § 141*. [HN8](#)[¹] It is a presumption that in making a business decision, the directors of a corporation act on an informed basis, in good faith and honest belief that the action taken was in the best interests of the corporation. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). [HN9](#)[¹] The bedrock principle embodied in [HN10](#)[¹] the business judgment rule is the court's reluctance to substitute its judgment for that of a board if the board's decision can be attributed to any rational business purpose. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). [HN11](#)[¹] The plaintiff bears the initial burden and must establish facts sufficient to persuade the Court that the presumption of the business judgment rule has been rebutted and therefore the Court should substitute its own judgment for that of the Board. See *Unitrin*, 651 A.2d at 1374.

[HN12](#)[¹] When a board is confronted with a hostile tender offer, it has the obligation to determine whether the offer is [**20] in the best interests of the corporation and its shareholders. The board's duty to the shareholders in this context is no different from its duty in any other situation, and its decision should be entitled to the same deference it would receive in other matters. *Unocal*, 493 A.2d at 954. However, because directors might have some entrenchment motive, described by the Supreme Court of Delaware as the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders," an "enhanced judicial scrutiny" is applicable to board decisions in the tender offer context. That standard must be satisfied before the board's actions are reviewed under the traditional business judgment rule. *Id.* This enhanced test places the initial burden upon the board to demonstrate compliance therewith before the presumption of the business judgment rule may be invoked. See *Unitrin*, 651 A.2d at 1374.

[HN13](#)[¹] Under the enhanced judicial scrutiny test set forth in *Unocal*, the directors must show they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, a burden which is satisfied by showing [**21] good faith and reasonable investigation. *Unocal*, 493 A.2d at 955 (quoting *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548, 554-55 (Del. 1964)). This proof is materially enhanced where the board is comprised of a majority of outside independent directors who have complied with their duties of good [*1555] faith and reasonable investigation. *Unocal*, 493 A.2d at 955; see also *Aronson*, 473 A.2d at 812. However, the board is not empowered with unbridled discretion to defeat any perceived threat by whatever draconian means available. *Unocal*, 493 A.2d at 955. A defensive measure may only survive enhanced judicial scrutiny and fall within the purview of the business judgment rule if it is reasonable in relation to the threat posed. *Id.*

¹² The "entire fairness" standard of review applies "where a self-interested corporate fiduciary has set the terms of a transaction and caused its effectuation." *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. 1986). A reviewing court must review the transaction and determine that the merits satisfy the court of its entire fairness, *id.*, including scrutiny of both "fair dealing" and "fair price." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988). The "entire fairness" standard applies "only if the presumption of the business judgment rule is defeated," *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988) (citing *Aronson v. Lewis*, 473 A.2d 805, 812-17 (Del. 1984)), due to allegations of board self-dealing. See, e.g., *Unitrin Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1372 (Del. 1995) ("The Court of Chancery concluded that the Board's implementation of the poison pill and the Repurchase Program, in response to American General's Offer, did not constitute self-dealing that would require the Unitrin Board to demonstrate entire fairness."). Since there are no allegations in the present case of an interested transaction, this standard is inapplicable and will not be discussed.

HN14 [↑] Once the directors meet their burden under *Unocal* of showing a threat and response proportional to that threat, their actions will be subjected to review under the traditional business judgment rule. See *Macmillan, 559 A.2d at 1288*; see also *In re Sea-Land Corp. Shareholders Litigation, 642 A.2d 792, 804 (Del. Ch. 1993)* ("Before a board may receive the normal protection of the business judgment rule, it must demonstrate that its actions [**22] were reasonable in relation to the advantage sought to be achieved or to the threat allegedly posed."). The Supreme Court of Delaware and Chancery Court have repeatedly held that **HN15** [↑] the refusal to entertain an offer may comport with a valid exercise of the board's business judgment. *Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1152 (Del. 1989)* ("Time"); *Macmillan, 559 A.2d at 1285 n.35*; *Smith v. Van Gorkom, 488 A.2d 858, 881 (Del. 1985)*.

2. Preliminary Injunction Standard

In addition to bringing its legal position within the strictures of substantive Delaware corporate law, Moore must satisfy the procedural criteria for granting a preliminary injunction. Not surprisingly, at some point, the two burdens become intertwined. **HN16** [↑] In a preliminary injunction proceeding, plaintiff bears the burden of establishing (1) the likelihood of success on the merits; (2) the extent of irreparable injury from the conduct complained of; (3) the extent of irreparable harm to the defendants if the preliminary injunction issues; and (4) effect on the public interest if relief were granted. *Clean Ocean Action v. York, 57 F.3d 328, 331 (3d Cir. 1995)*; *Opticians Ass'n of [**23] Am. v. Independent Opticians of Am., 920 F.2d 187, 191-92 (3d Cir. 1990)*. In effect, the board must defeat the plaintiff's ability to discharge this burden by demonstrating that even under *Unocal*'s enhanced scrutiny, the board's actions merited the protection of the business judgment rule. See *Unitrin, 651 A.2d at 1375*. Plaintiff's likelihood of success on the merits, therefore, is a function of the board's *inability* to discharge its *Unocal* burden. See *id.*

In accordance with the *Unocal* analysis utilized by the Supreme Court of Delaware and the standard for a preliminary injunction recognized by the Third Circuit Court of Appeals, the Court will review the facts of the case *sub judice* under the following analytical framework. As to the likelihood of success on the merits: (1) Were the actions of the Wallace Board defensive? (2) If so, did the Wallace Board satisfy its burden under *Unocal*? (a) What was the nature of the threat perceived by the Wallace Board by the Moore tender offer? (b) Were the Wallace Board's actions reasonably proportionate to the perceived threat of the Moore tender offer? As to the balance of the equities and the public interest: [**24] (1) Has Moore demonstrated irreparable injury if the relief sought is not granted? (2) Is the extent of Moore's injury if the injunction does not issue greater than the injury to Wallace if the injunction issues? (3) Has Moore shown that the relief sought is not adverse to the public interest?

a) Likelihood of Success on the Merits

i) Were the Actions Taken by the Wallace Board "Defensive"?

HN17 [↑] A defensive measure taken by the board in response to some perceived threat to the corporation is the *sine qua non* triggering *Unocal*'s enhanced judicial scrutiny. See *Unitrin, 651 A.2d at 1372*. Whether board action is "defensive" can be determined from a variety of factual circumstances, such as the timing of consideration and implementation of the measure in relation to the initial appearance of the corporate threat. See *id.* (poison pill, advance notice bylaw provision for shareholder proposals, and stock repurchase program, adopted by board after commencement of tender offer, deemed defensive measures); *Gilbert v. El Paso Co., 575 A.2d 1131, 1136 (Del. 1990)* (golden parachute [***1556**] agreements, Employee Savings and Stock Ownership Plans and shareholder supermajority [**25] voting provisions adopted after initiation of tender offer deemed defensive measures). Proper determination of the defensive nature of the board's challenged actions is critical. If a particular measure taken by the board is not found to be defensive, the reviewing court must review the board's action under the business judgment rule. *Id. at 1143-44* (a business combination plan which predates the outside bid is not a defensive measure and therefore not subject to *Unocal*'s enhanced judicial scrutiny).

In the case *sub judice*, the allegedly defensive measures taken by the Wallace Board include the following: (1) the failure to redeem the poison pill; (2) the adoption of a "golden parachute" employment contract with Cronin; and (3) the amendment to the Wallace bylaws to require a 60-day advance notice period for shareholder proposals for the

Wallace annual meeting. With respect to the failure to redeem the poison pill, the Court finds this to be a defensive measure. [HN18](#)¹⁵ Poison pills are, by definition, defensive. Even when they are adopted prior to a takeover bid as a preventative measure, they become defensive when the board fails to redeem them after a hostile tender offer is [**26](#) commenced. See [*Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1350 \(Del. 1985\)](#).

Evidence adduced at the evidentiary hearing persuaded the Court that the golden parachute component of Cronin's employment agreement was not adopted as a defensive measure. Doyle testified that the Wallace Board fully intended to adopt an employment agreement for Cronin, identical in all pertinent respects to that of Dimitriou, Cronin's predecessor, but for some reason failed to get around to it in a timely fashion. During this period of laxity, Moore had been attempting to lure Wallace management over to its company. Tr. 292. In addition to finding Doyle's testimony to be credible, the facts that such agreements are commonplace among chief executives of major companies and that Cronin's severance package was identical to that of his predecessor, persuade this Court that the adoption of the golden parachute agreement was not a defensive measure. The advance notice amendment to the Wallace bylaws is a mild defensive measure, see [*Unitrin, 651 A.2d at 1369*](#). However, it has played no role in either the tender offer or the proxy contest, which explains why it was not briefed or argued by either party. [**27](#) Accordingly, enhanced judicial scrutiny will be limited to the Wallace Board's failure to redeem the poison pill.

ii) *Unocal's* Enhanced Judicial Scrutiny

(A) Did the Moore Offer Pose a Threat to Wallace?

[HN19](#)¹⁶ *Unocal's* first inquiry focuses upon the existence and nature of the threat to the target company. [*Unocal, 493 A.2d at 955*](#). Under this inquiry, the target board must demonstrate that after reasonable investigation, the board determined, in good faith, that the tender offer posed a threat to the corporation or its shareholders which warranted the adoption of a defensive measure. See [*Unitrin, 651 A.2d at 1375*](#). [HN20](#)¹⁷ An affirmative and precise determination of a threat must be demonstrated before moving to the second inquiry under *Unocal*, as this first inquiry informs the second. See [*Unitrin, 651 A.2d at 1384*](#) ("the nature of the threat associated with a particular hostile offer sets the parameters for the range of permissible defensive tactics."); see also [*Time, 571 A.2d at 1154*](#) ("The obvious requisite to determining the reasonableness of a defensive action is a clear identification of the nature of the threat."). The *Unocal* Court also held that [**28](#) the presence of a majority of outside directors will materially enhance the board's proof on this issue. [*Unocal, 493 A.2d at 955*](#).

Wallace argues that the Moore tender offer posed a serious threat to Wallace in that (1) the \$ 56 and \$ 60 offers are inadequate, (2) the offer is squarely contrary to Wallace's successful business strategy, and (3) the tender offer is illegal under the antitrust laws. Moore argues that the tender offer poses no threat to Wallace because, at least as to inadequacy, the Wallace Board never undertook to discover what an adequate or "fair" price for Wallace stock would be. Thus, Moore argues, Wallace has no basis upon which to determine that the allegedly inadequate [\[*1557\]](#) price constitutes a threat. Second, Moore argues that the alleged threat to Wallace's business plan is not legally cognizable, and dismisses as unwarranted Wallace's analogy to [*Time, 571 A.2d 1140*](#). Third, Moore argues that the alleged antitrust concerns do not constitute a threat to Wallace, because, as Wallace itself admits, the antitrust litigation was commenced solely for the purposes of deterring the consummation of Moore's offer.

Since *Unocal*, Delaware courts have struggled to [**29](#) determine what threats cited by target management as justification for defensive measures are legally cognizable. Early decisions presented easy cases for an affirmative determination of a threat. For example, in *Unocal* itself, the threat posed by the offer was due to the coercive nature of the offer.¹⁸ See [*Unocal, 493 A.2d at 956*](#) (two-tier, "front-loaded" cash tender offer for approximately 37% of

¹³ [HN21](#)¹⁹ A "coercive" offer is a term of art used to describe an offer which has the effect of compelling shareholders to tender their shares out of fear of being treated less favorably in the second stage. A classic example of a coercive offer is a partial, front-loaded tender offer. In that case, a shareholder might elect to tender immediately, since he cannot be guaranteed the same terms should he elect not to tender and the tender offeror succeeds. At that point, as a minority shareholder, he might be treated adversely. A "noncoercive" offer, on the other hand, is one which does not create that compulsion. An example of a noncoercive tender offer would be an all shares, all cash, fully negotiable tender offer, where all shareholders are treated equally, no matter

company's outstanding stock is inadequate and coercive, and posed a threat to shareholders); see also [El Paso, 575 A.2d at 1145](#) (coercive, two-tier, partial tender offer is "serious" threat to shareholders). In those cases, the threat is obvious: shareholders will feel compelled to tender their shares to avoid being treated less favorably in the second stage of the transaction. See [Time, 571 A.2d at 1152](#).

[**30] [HN22](#)¹⁴ An inadequate, *non-coercive* tender offer may also pose a legally cognizable threat in two ways. First, the target corporation may be inclined to provide the shareholders with a more attractive alternative, but may need some additional time to formulate and present that option. During the interim, the threat is that shareholders might choose the inadequate tender offer only because the superior option has not yet been presented. See, e.g., [City Capital Assoc. v. Interco Inc., 551 A.2d 787, 798 \(Del. Ch. 1988\)](#) (retention of poison pill is appropriate response to give target time to develop an alternative plan to maximize shareholder value). Second, in addition to the threat of inadequacy, the board might also find that the danger that shareholders, tempted by the suitor's premium, might tender their shares in ignorance or mistaken belief as to management's representations of intrinsic value and future expectations. See, e.g., [Time, 571 A.2d at 1153](#) (threat posed by the fact that "shareholders might elect to tender into Paramount's cash offer in ignorance or in a mistaken belief of the strategic benefit which a business combination with Warner might produce."); see also [**31] [Unitrin, 1994 Del. Ch. LEXIS 187, 1994 WL 698483](#) at *6 (Del. Ch. Oct. 13, 1994) ("Board [HN23](#)¹⁴ action may be necessary to protect stockholders from a 'low ball' negotiating strategy, or to allow the board to make an important decision over the management of the corporation. There are no limited categories of threats posed by an unsolicited offer, but the board's perception of a threat must be reasonable.") (citations omitted), *rev'd on other grounds, 651 A.2d 1361.*¹⁴

[**32] [*1558] In determining whether the Wallace Board made a good faith determination after reasonable investigation that the Moore offer posed a threat, the Court is guided by a recent and closely analogous decision of the Supreme Court of Delaware in [Unitrin, 651 A.2d 1361](#). There, the court determined that the Unitrin board reasonably perceived a threat to the corporation from the suitor's offer in that shareholders might mistakenly tender without knowledge as to the projected future value of the shares. The board cited several reasons for its determination of a threat: the board's belief that (1) Unitrin stock was worth more than the 50-3/8 offer price; (2) the tender offer price did not reflect Unitrin's long term business prospects as an independent company; (3) the "true value" of Unitrin was not reflected in the current market price of its common stock; (4) because of its strong financial position, Unitrin was well positioned to "pursue strategic and financial opportunities;" and (5) the merger with American General would have anticompetitive effects and thus raise antitrust concerns. [Id. at 1370](#). The court deferred to the board's reasonable perception of the threat. *Id.*; cf. [**33] [Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 289-90 \(Del. Ch. 1989\)](#) (noncoercive, all cash, all shares, inadequate tender offer constitutes

when they tender. For a detailed explanation of these terms, see [City Capital Assoc. v. Interco Inc., 551 A.2d 787, 797 \(Del. Ch. 1988\)](#).

¹⁴ In an effort to delineate different types of threats for the purposes of *Unocal*, the *Time* Court quoted the collected views of commentators as set forth in Ronald J. Gilson & Renier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 Bus. Law. 247, 267 (1989). Types of threats include the following:

- [HN24](#)¹⁵ (i) opportunity loss . . . [where] a hostile offer might deprive target shareholders of the opportunity to select a superior alternative offered by target management [or, we would add, offered by another bidder];
- (ii) structural coercion, . . . the risk that disparate treatment of non-tendering shareholders might distort shareholders' tender decisions; and
- (iii) substantive coercion, . . . the risk that shareholders will mistakenly accept an underpriced offer because they disbelieve management's representations of intrinsic value.

a cognizable threat since target was on verge of winning a judgment in excess of \$ 5 billion, an asset with a present value shareholders would be unable to value).

With these principles in mind, the Court turns to the evidence proffered by Wallace to determine whether it demonstrates the Board's good faith belief, made after reasonable investigation, that the Moore offer posed a legally cognizable threat. First, the procedure followed by the Wallace Board in assessing each offer by Moore demonstrates reasonable investigation for purposes of *Unocal*. When Moore's first offer of \$ 56 was made, the Wallace Board met three times within two weeks to review the terms of the offer and assess its merits. Wallace retained Goldman as its investment banker to review the financial aspects of the proposed transaction. Goldman prepared its analysis by using projections which were reasonably related to past growth and historical data which was provided by Wallace management. Collectively, the Board considered Wallace's current business plans [**34] and strategies, its financial projections, its current financial results and future projections, and the opinion of Goldman in arriving at its decision that the \$ 56 offer was inadequate. Further, several individual members of the Board took the position that, based on their knowledge and experience, the offer seemed to be a "low ball" offer.¹⁵ The same investigative procedure was followed when Moore raised its offer price to \$ 60. Updated financial information was given to Goldman which represented the actual, rather than projected, 1995 figures. After Goldman analyzed the information, Goldman again arrived at the conclusion that the \$ 60 offer was also inadequate. The Board considered the presentation of Goldman and arrived at its conclusion that the second offer was also inadequate.

[**35] The Wallace Board's decision reflected consideration of a variety of factors which were also reflected in the Goldman report, including the belief that the fourth quarter of fiscal 1995 (May, June and July, 1995), promised to be a good one. That belief became a reality: sales had increased 32% to 33% over the prior year, and profits had increased 32%. The fact that Wallace is generating [*1559] and receiving the benefits of its capital expenditure plan, specifically the WIN system, as well as Wallace's recent alliance with United Stationers which had begun to produce favorable returns, were also considered. These data suggested to the Board that Wallace could achieve returns greater than Moore's offer, while allowing the shareholders to retain their ownership interest. Accordingly, the Court cannot conclude that the Wallace Board lacked good faith or acted unreasonably in its investigation of the Moore offer.

Moore argues that the Wallace Board has not demonstrated good faith and reasonable investigation, on the ground that the preparation performed by Goldman was unreliable because of the optimistic figures provided by Wallace management. Specifically, Moore argues that Goldman based its [**36] future earnings projections on management's assumption that 30% of future profits and 38% of future sales were expected to be derived from acquisitions. However, the associated costs, share dilution, and amortization of goodwill in connection therewith were not similarly figured into its projections, and thus the results, reflecting the benefits but not the costs, were "useless." Smith, however, specifically denied using the acquisition-related figures, with the exception of one projected acquisition, testimony which was unrebutted by Moore. The testimony of Halloran corroborated Smith's statement. Tr. 375, Defense Exhibit ("DX") 33B.

Additionally, the Court finds that the financial projections assumed by Wallace were not unrealistic. In its Strategic Plan, which was provided to Goldman, Wallace had assumed certain growth percentages which proved to be

¹⁵ Characteristic of the opinions of Wallace Board members as to the future success of the company is the following excerpt from the testimony of Mr. Doyle:

I think that Wallace, personally, is the epitome of what a successful American company ought to be. If we go back to the middle sixties, Wallace decided that it would change basically -- would start to change from being basically a manufacturing and production company to a sales/marketing-oriented company that was very customer-oriented. It has -- today, it is, in my judgment, the best company in its field with respect to technology. It has an exceptionally dedicated and high-morale work force. It has a good experienced management. It has an excellent balance sheet with very little debt and a large cash position. It's in a -- in a market where many of its competitors are in trouble and, therefore, Wallace has great opportunity for success over the next five, ten years.

conservative with respect to actual numbers. Halloran Depo. at 172-73. When Wallace was asked to provide updated figures to Goldman, Halloran determined the percentage of actual growth of the company by using actual numbers representing the growth for fiscal 1994 and fiscal 1995. That percentage was then used to project future growth [**37] through the year 2002. To the extent that any prediction of future values has any indicia of trustworthiness, this was a reasonable means to project future values. This finding is bolstered by the fact that its previous projections, based on projected growth in the 1995 strategic plan, had been lower than actual results. Furthermore, Wallace's projections for growth into fiscal years 1996 and 1997 were lower in most instances than the actual growth Wallace experienced in fiscal 1995.¹⁶ [**38] While these statistics might be misleading since the Court cannot ascertain the viability of future markets in those areas, at the very least, they indicate a principled assessment of future growth, which hardly rises to the level of bad faith.¹⁷

Furthermore, the Wallace Board could reasonably conclude, based on the upward trend in earnings per share, that the company was well-positioned to reap economic benefits in the future, which would support their initial reaction that the Moore offer seemed "low ball." A review of the earnings per share growth data from recent quarters demonstrates this trend.¹⁸ For the first quarter of fiscal 1995, Wallace reported \$ 0.52 earnings per share growth. This number increased to \$ 0.60 for the second quarter of fiscal 1995, to \$ 0.64 for the third quarter, and finally reached \$ 0.70 for the fourth quarter. Figures for the first quarter of fiscal 1996, recently released, confirmed this upward trend: earnings per share growth reached [*1560] \$ 0.85.¹⁹ [**40] Additionally, [**39] the results from the first quarter of fiscal 1996, as compared to the same quarter of fiscal 1995, surpassed management's projections. Management projected a 34% increase in sales and a 50% increase in earnings for the first quarter of fiscal 1996 over the same quarter for 1995. Tr. 409-10. The actual figures for the first quarter of fiscal 1996 were 35.4% and 63.5%, respectively.²⁰ See D.I. 181 at Exh. A.²¹

Finally, as the *Unocal* court noted, [HN25](#)[↑] the target board's proof under *Unocal* is materially enhanced where board's approval [**41] was comprised of a majority of outside independent directors who exercised good faith and

¹⁶ For example, in the Business Forms Division, fiscal 1995 actual growth rate was 21%, as compared to its projected growth rate for fiscal 1996, at 14% and for fiscal 1997, at 10%. The same conservative approach was taken with other segments of Wallace's business. In its Continental Division, the 1995 actual growth rate was 24%. Its projected growth rates for fiscal years 1996 and 1997, respectively, were 17% and 15%. Similarly, in its TOPS Division, the actual growth rate for fiscal 1995 was 45%, while its projections for fiscal 1996 and 1997 were, respectively, 14% and 5%.

¹⁷ For example, Mr. Cronin testified that some of the markets in which Wallace is engaged are declining. The business forms industry is predicted to decline between 3% and 5% per year, according to industry analysts. Tr. 317. Thus, a declining market would probably require Wallace to predict declining sales and profits growth in that area.

¹⁸ The following series of numbers excludes takeover-related costs.

¹⁹ Moore argues that these increasing numbers demonstrate a phenomenon other than Wallace's continued success in the business. In particular, Moore argues that the recent strike at Ampad, a Wallace competitor, caused Wallace to receive a percent of the industry's business it would otherwise not have enjoyed. Second, Moore argues that Wallace's unexpected ability to pass on the increase of paper costs to customers yielded unexpected profits. The Court is unpersuaded, in light of the fact that Wallace is so well-positioned in the industry with its technologically advanced computer services system, that these external events were the primary cause of Wallace's upward growth trend.

²⁰ On November 20, 1995, Wallace reported results from the first quarter of fiscal 1996 as follows:

Wallace Computer Services, Inc. . . . reported that sales for its first quarter ended October 31, 1995 increased 35.4 percent to \$ 214.4 million compared to \$ 158.4 million for the first quarter last year. Before takeover expenses, net income rose 65.6 percent to \$ 19.3 million compared to \$ 11.6 million last year, and earnings per share rose 63.5 percent to 85 cents compared to 52 cents per share achieved in fiscal 1995. These results exceeded the company's most recent forecast and all analyst projections.

D.I. 181, at Exh. A.

²¹ The Court also recognizes that these increases in growth have been somewhat retarded by the pendency of the Moore bid. As Wallace's November 20, 1995 press releases states, "the hostile takeover bid was delaying the signing of some new contracts, and in its absence, results could be even higher." D.I. 181 at Exh. A.

reasonable investigation.²² [Unocal, 493 A.2d at 955](#). Their "independent" status, coupled with the substance of and procedures utilized in their review of the Moore offers, satisfies this Court that Wallace has met its initial burden under *Unocal* to demonstrate, by proof of good faith and reasonable investigation, that the Moore offer posed a threat to Wallace and its shareholders.

[**42] This case presents a factual scenario different from that which normally occurs. In most cases, the target seeks to persuade the Court that the hostile tender offer posed a threat to the company's future plans and the company's shareholders which justified the defensive measures until the expected benefits of the plan come into fruition. Here, however, the directors seek to prove that the hostile tender offer poses a threat of a different nature. The favorable results from the board's *past* actions are now beginning to be translated into financial results which even surpass management and financial analyst projections, and the financial data which manifests these results are facts only known to them. Therefore, Moore's tender offer poses a threat that shareholders might tender their shares without appreciating the fact that after substantial capital investment, Wallace is actually witnessing the beginning of the pay-off of its business strategy. The Court therefore finds that Moore's tender offer poses a threat to Wallace that shareholders, because they are uninformed, will cash out before realizing the fruits of the substantial technological innovations [*1561] achieved by Wallace. Accordingly, [**43] the Court turns its attention to the second *Unocal* inquiry, which evaluates the proportionality of the target board's response.

(B) Did the Actions of the Wallace Board Constitute a Reasonable Response?

The second prong of the *Unocal* enhanced scrutiny requires that once the threat has been identified, the board must prove that its defensive measure[s] constituted a response which was reasonably proportionate to the magnitude of the threat. [Unocal, 493 A.2d at 955. HN26](#) A claim for breach of fiduciary duty arising out of a board's failure to redeem a poison pill are reviewed under the enhanced scrutiny provided by *Unocal*. [Moran, 500 A.2d at 1356; Stahl v. Apple Bancorp, Inc., 1990 Del. Ch. LEXIS 121, 1990 WL 114222](#) at *6 (Del. Ch. Aug. 9, 1990). [HN27](#) Reasonableness turns on an assessment by the directors of the nature of the tender offer and the effect such offer would have on the corporate enterprise. [Unocal, 493 A.2d at 955](#). Factors relevant to this assessment include (1) inadequacy of the price offered; (2) nature and timing of the offer; (3) questions of illegality; (4) the impact on "constituencies" other than the shareholders (*i.e.*, creditors, customers, employees, and perhaps [**44] even the community generally); (5) the risk of nonconsummation; and (6) the qualities of the securities being offered in the exchange. *Id.*

Wallace argues that since the Moore tender offer has commenced, it has only taken three actions: (1) rejected the Moore offers for \$ 56 and \$ 60 per share, (2) authorized the commencement of antitrust litigation, and (3) declined to redeem the poison pill. Wallace argues that these actions are clearly reasonable and proper, given the gravity of the threat posed by Moore's offer. Wallace asserts that the decision not to redeem the poison pill is not draconian, because it in no way presents any obstacle to Moore's proxy contest. Moore argues that a *fortiori*, no threat exists, but that in any event, Wallace's actions were not reasonably proportionate. Since the Wallace Board never informed itself as to what a "fair" or "adequate" price would be, Moore reasons, it was poorly positioned to determine whether a threat due to inadequacy exists as an initial matter, thus obfuscating any meaningful determination of proportionate response, and concomitantly negating any justification for keeping the poison pill in place.

As an initial matter, the [**45] Court notes that [HN28](#) poison pills serve legitimate functions which create no fiduciary duty issue. For example, if a hostile tender offer is commenced at a share value which the board, in good

²² The eight-person Wallace Board is comprised of two insiders, Cronin and Dimitriou (the former Chief Executive Officer treated as an insider), and six independent directors. The independent directors are successful businessmen with proven track records. Mr. Doyle has held positions as Senior Vice President, Chief Financial Officer, Chief Administrative Officer and a member of the board at various major domestic corporations. Mr. Olsen is the former President of IGA, a wholesale and retail grocery company. Mr. Canning is the former President of the Walgreen Company, a drug retailer. Mr. Lane is Chairman of both General Binding and Lane Industries. Mr. Ewers is the former Executive Vice President of Wrigley, a chewing gum manufacturer. Mr. Sterns is the former President of a major company. Suffice it to note that all the members of the Wallace Board have substantial experience in serving as high level executives and board members. There was no evidence that Wallace management had either the ability or desire to influence the thinking of the independent directors with respect to the adequacy of the offer.

faith and after reasonable investigation, determines to be "inadequate," the board may justifiably leave the pill in place for a period of time so as to enable it to take steps necessary to protect and advance shareholder interests. See, e.g., [City Capital, 551 A.2d at 798](#). Such permissible actions include negotiation on behalf of the shareholders with the offeror, recapitalization or restructuring as an alternative to the offer, *Revlon*-style auctioning, should *Revlon* duties be triggered, or the arrangement for an otherwise better and value-maximizing alternative than that posed by the tender offer. *Id.*; see also [Stahl, 1990 Del. Ch. LEXIS 121, 1990 WL 114222](#) at *8 (failure to redeem pill was reasonable in relation to threat since it preserved the board's ability to explore alternatives to enhance shareholder value). After the period in which such alternatives may be considered has ended, and the board has determined that such alternatives are not feasible or, at any rate, not better for the shareholders, [**46] the legitimate role of the poison pill has expired. [City Capital, 551 A.2d at 798](#). At that point, the only function the pill serves is to prevent the shareholders from exercising their right to tender, as the poison pill, once activated, effectively forecloses the consummation of the tender offer.

However, [HN29](#)[[↑]] failing to redeem a poison pill can be justified by considerations other than maximizing current share value. In *Time*, the Supreme Court of Delaware noted, "Absent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover." [Time, 571 A.2d at 1150](#). The *Time* court further observed that "directors [HN30](#)[[↑]] are not [*1562] obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy." *Id. at 1154*; see also [Mai Basic Four, Inc. v. Prime Computer, 1988 Del. Ch. LEXIS 161, 1988 WL 140221](#) at *4 (Del. Ch. Dec. 20, 1988) ("Prime has recently obtained new management and is only now on the verge of reaping the economic benefits [**47] of its recent acquisition of Computervision. As a result, the projections by Prime's management for the future are optimistic."); compare, [Sutton Holding Corp. v. DeSoto, Inc., 1990 Del. Ch. LEXIS 15](#), *23, 1990 WL 13476 at *8 (Del. Ch. Feb. 5, 1990) (management's failure to attempt to maximize shareholder value, and reliance on a modest restructuring plan which had been prepared in the ordinary course of business, falls short of the business plan of *Time*, and thus ordering of the immediate redemption of the poison pill would ordinarily be required).

Delaware courts have recognized that at some point, [HN31](#)[[↑]] the failure to redeem a poison pill can constitute a fiduciary breach. "Our cases, however, also indicate that in the setting of a noncoercive offer, absent unusual facts, there may come a time when a board's fiduciary duty will require it to redeem the rights and to permit the shareholders to choose." [City Capital, 551 A.2d at 798-99](#) (failure to redeem the poison pill, to enable board to implement restructuring plan projected to produce modest increase in share value, constituted an unreasonable response to the threat posed by noncoercive tender offeror); see also [Grand Metro. Public Ltd. v. Pillsbury](#) [**48] [Co., 558 A.2d 1049, 1057-58 \(Del. Ch. 1988\)](#) (failure to redeem poison pill in order to implement board's restructuring plan projected to offer greater share value was unreasonable in relation to threat posed by noncoercive tender offer, since projected benefits of plan may never come into fruition).

[HN32](#)[[↑]] While *Unocal* gave no direct guidance to courts applying the proportionality test, the Court did expressly define the outer parameter of board action by condemning any action which is "draconian" as not reasonably proportionate to the perceived threat. [Unocal, 493 A.2d at 955](#). Draconian measures have been described as measures which are coercive or preclusive with respect to the outside bid. See [Unitrin, 651 A.2d at 1387-88](#). [HN33](#)[[↑]] Board actions that are coercive in nature or force upon shareholders a management-sponsored alternative to a hostile offer, even if the threat is valid, may be struck down as unreasonable and nonproportionate responses. See [Time, 571 A.2d at 1154-55](#) ("Time's responsive action to Paramount's tender offer was not aimed at 'cramming down' on its shareholders a management-sponsored alternative, but rather had as its goal the carrying forward of a preexisting [**49] transaction in an altered form. Thus, the response was reasonably related to the threat."). [HN34](#)[[↑]] If a defensive measure is not preclusive or coercive, *Unocal* requires the action to fall within a "range of reasonableness." [Unitrin, 651 A.2d at 1387-88; Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 45 \(Del. 1993\)](#) ("QVC"). As the *Unitrin* court noted, "proper and proportionate defensive responses are intended and permitted to thwart perceived threats," and the board need not wait for the actual takeover to be commenced, when it reasonably perceives the takeover threat to be imminent:

HN35 When a corporation is not for sale, the board of directors is the defender of the metaphorical medieval corporate bastion and the protector of the corporation's shareholders. The fact that a defensive action must not be coercive or preclusive does not prevent a board from responding defensively before a bidder is at the corporate bastion's gate.

Unitrin, 651 A.2d at 1388. The rationale for this "range of reasonableness" standard, as explained by the *Unitrin* court, is that directors need a degree of latitude in discharging their fiduciary duties when defending [**50] against threats to the company. That latitude, combined with an appropriate amount of judicial restraint, results in a reviewing court's upholding the board's defensive actions, provided the actions are not coercive or preclusive. See *id. at 1388*.

In *Unitrin*, the board's response to the hostile tender offer was found not to be preclusive or coercive. The challenged actions taken were the adoption of poison pill, advance notice provision in bylaws for shareholder [*1563] proposals, and a repurchase program. The *Unitrin* board determined that the inadequate price of the offer and potential antitrust complications caused the American General offer to be a threat. Discarding the antitrust concerns as frivolous, see *Unitrin*, 1994 Del. Ch. LEXIS 187, 1994 WL 698483, at *8, the Chancery Court determined that the inadequate price threat was "mild" because the offer was negotiable both in price and structure. *Id.* at *7. However, even in the face of a mild threat, the Chancery Court upheld the board's adoption of the poison pill because the board reasonably believed the price was inadequate and feared that the shareholders would not realize that the long term value of *Unitrin* was not reflected in the market [**51] price of the stock. *Id.* at *8. This finding was not contested on appeal to the Supreme Court of Delaware. Compare, *QVC*, 637 A.2d at 49-50 (defensive measures designed to protect desired merger with Viacom deemed draconian in light of "threat" posed by QVC all cash tender offer for majority of Paramount shares, offering aggregate premium of over \$ 1 billion).

In the present case, retention of the poison pill is not draconian. **HN36** The Board's decision not to redeem the pill is not coercive or preclusive. First, retention of the pill will have no discriminatory effect on shareholders, as is generally the result in any situation involving a coercive offer. See *Unitrin*, 651 A.2d at 1388 ("A selective repurchase of shares in a public corporation on the market, such as *Unitrin*'s Repurchase Program, generally does not discriminate because all shareholders can voluntarily realize the same benefit by selling."); Second, and more important, retention of the pill will have no effect on the success of the proxy contest. See *Moran*, 500 A.2d at 1357 ("We reject appellants' contentions . . . that the Rights Plan fundamentally restricts proxy contests."); see also *Unitrin*, 651 A.2d at 1383 [**52] (concluding that a proxy contest is not precluded by the existence of a poison pill, supermajority voting requirement and fully implemented stock repurchase plan); *Time*, 571 A.2d at 1155 (Time board's response to the Paramount bid not preclusive because Paramount was still able to make an offer for the combined Time-Warner entity or amend the conditions of its offer to eliminate the requirement that the Time-Warner agreement be nullified). Here, the poison pill is only triggered upon the acquisition of 20% of the shares of Wallace stock. Therefore, so long as Moore maintains a stock ownership percentage below that amount, it may safely wage its proxy contest free from the dramatic effect of the poison pill.

Since the Court finds that the retention of the poison pill was not a coercive or preclusive response, it must merely be satisfied that it fell within a "range of reasonableness" to survive *Unocal* scrutiny. *QVC*, 637 A.2d at 45-46. The evidence demonstrates that the Wallace Board reasonably believed that the shareholders were entitled to protection from what they considered to be a "low ball" offer. See, e.g., *Unitrin*, 1994 Del. Ch. LEXIS 187, 1994 WL 698483 at *8 ("It **HN37** is the prerogative [**53] of the directors of a Delaware corporation to determine that the market undervalues the price of its stock and to protect its stockholders from offers that do not reflect the long term value of the corporation under its present management plan."). After substantial capital investment spanning several years, Wallace had finally begun to reap the financial benefits from its WIN system. Cf. *Mai Basic Four*, 1988 Del. Ch. LEXIS 161, 1988 WL 140221 at *4 ("Prime has recently obtained new management and is only now on the verge of reaping the economic benefits of its recent acquisition"). These benefits, however, were reflected in data which remained peculiarly within the province of the Wallace Board. Shareholders, at the time of the Moore offer, were unable to appreciate the upward trend in Wallace's earnings which have been set forth in detail above. Given this situation, the Wallace Board's response can hardly be deemed unreasonable. In light of the foregoing,

the Court concludes the Wallace Board has demonstrated that its retention of the poison pill falls within the range of reasonableness required under *Unocal*. See [Unitrin, 651 A.2d at 1388](#).²³

[**54] [*1564] Having concluded that retention of the poison pill was proportionate to the threat the Wallace Board believes Moore's tender offer poses, the poison pill is entitled to review [HN38](#) under the business judgment rule. The burden now shifts "back to the plaintiffs who have the ultimate burden of persuasion [in a preliminary injunction proceeding] to show a breach of the directors' fiduciary duties." In order to rebut the protection of the business judgment rule, the burden on the plaintiffs will be to demonstrate, 'by a preponderance of the evidence that the directors' decision were primarily based on [(1)] perpetuating themselves in office or [(2)] some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or [(3)] being uninformed.' [Unocal, 493 A.2d at 958](#) (emphasis added)."[Unitrin, Inc., 651 A.2d at 1390](#) (internal citation omitted).

Moore has not carried its burden. It is held the decision of the Wallace Board not to redeem the poison pill was a valid exercise of its business judgment.

b) Hardship to Moore, Wallace, and the Public Interest

While Moore has not succeeded in showing a likelihood of success on the merits, the Court will briefly [**55] discuss the other requirements for a preliminary injunction. [HN39](#) In ruling on a preliminary injunction, the Court must weigh the extent of hardship to the plaintiff if the requested relief is not granted against the hardship to the defendant if the relief is granted. See [Clean Ocean Action, 57 F.3d at 331](#). Moore argues that if the Court does not issue a preliminary injunction, Moore will continue to suffer the consequences of the Wallace Board's breach of fiduciary duty by not having its tender offer put to the shareholders. Furthermore, Moore argues, the availability of the proxy contest does not negate Moore's right to an equitable remedy, especially since Wallace plans to rely on its defensive supermajority voting requirements to block the offer and thwart the overwhelming desires of the shareholders. Wallace argues that Moore has failed to put forward any evidence of injury since the option of a proxy contest is still available to Moore. Furthermore, Wallace argues it will suffer irreparable injury in that the company will cease to exist if the tender offer were to succeed, and there could therefore never be a trial on the merits. Finally, since this would be a cash-out merger, [**56] the Wallace shareholders will be deprived of their right to participate in the emerging glowing financial results of Wallace. A preliminary injunction would also grant Moore access to Wallace's WIN system, a move which could not later be 'unscrambled.' It is Wallace's technology which is enabling it to beat Moore in head-to-head competition. If a preliminary injunction were granted, there is a real possibility that Moore would gain access to that technology prior to trial. If that were to happen, Wallace will have lost its technological advantage and with it, its competitive edge.

The Court finds Wallace's arguments persuasive. First, Moore has not demonstrated irreparable injury if the preliminary injunction does not issue. Moore may still wage its proxy contest. Second, and perhaps most importantly, to the extent that Moore would suffer injury if relief were denied, Wallace's injury if the injunctive relief is granted would be far greater. [HN40](#) At the preliminary injunction stage of a hostile tender offer case, the Court must be extremely cautious when determining whether to grant the relief, given the dramatic consequences of the action. Cf. [United States v. Spectro Foods Corp., 571 544 F.2d 1175, 1181 \(3d Cir. 1976\)](#) ("The power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised."). Finally, the public interest favors neither side.

IV. WALLACE'S ANTITRUST COUNTERCLAIM

²³ The Wallace Board also had concerns as to whether the acquisition of Wallace by Moore would violate federal *antitrust law*. Although this Court has, for preliminary injunction purposes, concluded that it would not, as appears infra, one cannot say there was not legitimate substance to this concern. If there were antitrust standing, it is unknown what result would obtain after a full-blown trial.

A. Antitrust Standing

1. Background

Moore concedes that "on [HN41](#)[] a motion to dismiss for failure to state a claim, all allegations [***1565**] in the pleadings must be accepted as true." [Schrob v. Catterson](#), 948 F.2d 1402, 1405 (3d Cir. 1991); see also [In re Solar Mfg. Corp.](#), 200 F.2d 327, 333 (3d Cir. 1952) (applying same standard to counterclaims), cert. denied, 345 U.S. 940 (1953). The Court will assume the veracity of the facts as averred by Wallace in the context of Moore's motion to dismiss.

According to Wallace's allegations, Moore and Wallace compete in the manufacture and sale of business forms. Wallace Counterclaim, Count One, P 13, D.I. 40. Wallace asserts in its antitrust counterclaim that "if Moore were to acquire Wallace, the effect of such acquisition may be substantially to lessen competition in the relevant product and geographic market, thus violating Section 7 of the Clayton Act, [15 U.S.C. § 18](#)." D.I. 40, Counterclaim [****58**] at P19. Wallace also avers that unless the Court enjoins Moore's takeover attempt, Wallace will suffer irreparable harm flowing from the antitrust infirmity, including but not limited to, "loss of independent decision making authority, loss of trade secrets, loss of employees, and loss of customers." [Id. at P 20](#).

2. Analysis

[HN42](#)[] Under Section 16 of the Clayton Act, "any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . ." [15 U.S.C. § 26](#). As [HN43](#)[] an antitrust plaintiff, Wallace must, however, allege and ultimately prove that it would suffer threatened loss or damage constituting an "antitrust injury." [Cargill, Inc. v. Monfort of Colorado, Inc.](#), 479 U.S. 104, 113, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); [The Treasurer, Inc. v. Philadelphia Nat'l Bank](#), 682 F. Supp. 269, 273 (D.N.J.), aff'd mem. op., [HN44](#)[] 853 F.2d 921 (3d Cir. 1988). Antitrust injury involves injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [Cargill](#), 479 U.S. at 109 (citing [Brunswick Corp. v. Pueblo](#) [****59**] [Bowl-O-Mat, Inc.](#), 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)).

Prior to the *Cargill* decision, Supreme Court precedent under the Clayton Act required a Clayton Act plaintiff to demonstrate the threat of "antitrust injury" when suing for damages. [Brunswick Corp.](#), 429 U.S. at 489. However, there raged a debate in the lower courts as to whether a Clayton Act injunctive plaintiff needed to establish antitrust injury when seeking injunctive relief. See, e.g., [CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.](#), 754 F.2d 404, 407-08 (1st Cir. 1985) (plaintiff need only show threat of injury emanating from the antitrust violation); [Board of Regents v. National Collegiate Athletic Assoc.](#), 707 F.2d 1147, 1151 (10th Cir.), aff'd, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1983) (Brunswick standing limitation not fully applicable to suit for injunctive relief); but see, e.g., [Local Beauty Supply, Inc. v. Lamac Inc.](#), 787 F.2d 1197 (7th Cir. 1986) (plaintiff need show "antitrust injury" to fulfill standing requirement); [Schoenkopf v. Brown & Williamson Tobacco Corp.](#), 637 F.2d 205 (3d Cir. 1980) (same). This debate extended to merger cases involving [****60**] standing of target companies to assert Clayton Act violations as well. See, e.g., [Laidlaw Acquisition Corp. v. Mayflower Group, Inc.](#), 636 F. Supp. 1513, 1516-17 (S.D. Ind. 1986) (target plaintiff has standing to sue in antitrust case); [Gearhart Indus., Inc. v. Smith Int'l, Inc.](#), 592 F. Supp. 203, 211 n.1 (N.D. Tex.) (same), aff'd in part, modified and vacated in part, 741 F.2d 707 (5th Cir. 1984); but see, e.g., [Central Nat'l Bank v. Rainbolt](#), 720 F.2d 1183, 1186-87 (10th Cir. 1983) (target corporation lacked standing in antitrust case to sue for injunctive relief); [A.D.M. Corp. v. SIGMA Instruments, Inc.](#), 628 F.2d 753 (1st Cir. 1980) (same); [Carter Hawley Hale Stores, Inc. v. Limited, Inc.](#), 587 F. Supp. 246, 250 (C.D. Cal. 1984).

In *Cargill*, the Supreme Court finally repaired the rent in the Circuits over this issue. The Court held that [HN45](#)[] a plaintiff seeking an injunction under Section 16 of the Clayton Act must show a threat of "antitrust injury" in order to fulfill the standing requirement. In that case, the nation's fifth-largest beef packer, Monfort of Colorado ("Monfort"),

sought an injunction in a challenge to a merger between the nation's second and [**61] [*1566] third-largest beef packers. [Cargill, 479 U.S. at 106](#). The Court first acknowledged that [HN46](#)[¹] under the Clayton Act's statutory scheme, its standing analysis for injunctive relief would "not always be identical" to standing analysis for damages. [Id. at 111 n.6](#). Notwithstanding this caveat, the Court went on to declare [HN47](#)[¹] it to be "anomalous . . . to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred." [Id. at 112](#). Following this reasoning, the Court held that a plaintiff seeking injunctive relief under Section 16 of the Clayton Act must allege antitrust injury. [Id. at 113](#).

A survey of both case law and scholarly commentary subsequent to the *Cargill* decision spurs this Court to conclude that [HN48](#)[¹] the target of a hostile takeover has no standing to bring a Section 7 Clayton Act claim. See e.g., [Anago, Inc. v. Tecnol Medical Prod., Inc.](#), 976 F.2d 248 (5th Cir. 1992) (target has no standing to bring Clayton antitrust claim), cert. dismissed, 114 S. Ct. 491 (1993); [Burnup & Sims, Inc. v. Posner](#), 688 F. Supp. 1532 (S.D. Fla. 1988) (same); [**62] [Burlington Indus., Inc. v. Edelman](#), 666 F. Supp. 799 (M.D.N.C. 1987) (same), aff'd, 1987 WL 91498 (4th Cir. June 22, 1987); II Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, P 381b, at 332 (Rev. Ed. 1995) (same); Andrew Zuckerman, *Standing of Targets of Hostile Takeovers to Enjoin Their Acquisition on Antitrust Grounds*, 1992/1993 Ann. Sur. Am. Law 447 (same); but see *contra* Joseph F. Brodley, Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, [94 Mich. L. Rev. 1 \(1995\)](#). This line of cases and commentary has cited various grounds pursuant to *Cargill* to justify a lack of target standing in Clayton Act cases.

For example, courts have regarded [HN49](#)[¹] any alleged injury suffered by a target in a merger as being inherent to the merger process rather than flowing from any anticompetitive effect of the merger. See [Burnup](#), 688 F. Supp. at 1534; [Burlington](#), 666 F. Supp. at 805. Another rationale for finding a lack of target standing is the view that rather than suffering injury, the target and its shareholders ultimately benefit from any increased prices or decreased competition stemming from the merger. [Anago](#), I^{**63} 976 F.2d at 251; [Burlington](#), 666 F. Supp. at 805. Finally, courts have even found that disingenuous antitrust suits may be brought by targets to thwart the loss of control to be suffered by management, as opposed to any motives relating to antitrust. In that vein, courts have not shied from the type of cynicism first articulated by Judge Friendly:

Drawing Excalibur from a scabbard where it would doubtless remain sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial

[Missouri Portland Cement Co. v. Cargill, Inc.](#), 498 F.2d 851, 854 (2d Cir.), cert. denied, 419 U.S. 883, 42 L. Ed. 2d 123, 95 S. Ct. 150 (1974). See also [Burnup](#), 688 F. Supp. at 1534 ("The suit must be understood in its true sense, an attempt by the incumbent management to defend their own positions, not as an attempt to vindicate any public interest.").

Demonstrating a resistance to change even in light of *Cargill*, precedent from the Second Circuit Court of Appeals takes the opposite view. See [Consolidated Gold](#) [**64] [Fields PLC v. Minorco, S.A.](#), 871 F.2d 252 (2d Cir. 1989) (target corporation found to have standing to sue for Clayton Act violation), cert. dismissed, 492 U.S. 939, 110 S. Ct. 29, 106 L. Ed. 2d 639 (1989). In *Consolidated Gold Fields*, the court held that the plaintiff target would suffer antitrust injury because its "loss of independence [was] causally linked to the injury occurring in the marketplace." [Consolidated Gold Fields](#), 871 F.2d at 258. However, the loss of independent decision making, intrinsic to any takeover case, runs counter to *Cargill*'s mandate that "plaintiffs must show more than simply an 'injury causally linked' to a particular merger." [Cargill](#), 479 U.S. at 109 (citing [Brunswick](#), 429 U.S. at 489).

[*1567] This principle is further illuminated in the *Consolidated Gold Fields* dissenting opinion, where Judge Altimari posed the following hypothetical:

Each of the injuries [such as loss of decision making power] alleged by Gold Fields would occur if the combining corporations controlled a total market share of only 2% [implying no anticompetitive result], or if the entity attempting the takeover was not a competitor of the target.

Consolidated Gold Fields, Inc., [\[*65\]](#) *871 F.2d at 264* (Altimari, J., dissenting). The dissent also pointed to a further flaw in the *Consolidated Gold Fields* reasoning, where the majority expressly relied on a decision which did not have the benefit of the Supreme Court's reasoning in *Cargill* and whose continued vitality was therefore limited. *Id.* (citing Grumman Corp. v. LTV Corp., [665 F.2d 10](#) (2d Cir. 1981)).

The Third Circuit Court of Appeals has recognized that articulation of a precise formulation for antitrust standing is a continuing struggle, as standing is a somewhat "malleable concept." Alberta Gas Chemicals, Ltd. v. E.I. du Pont de Nemours and Co., [826 F.2d 1235, 1239](#) (3d Cir. 1987), cert. denied, 486 U.S. 1059, 100 L. Ed. 2d 930, 108 S. Ct. 2830 (1988). In *Alberta Gas*, the Third Circuit analyzed antitrust standing under Section 7 of the Clayton Act. Plaintiff Alberta Gas was a methanol producer who challenged the merger of a competitor, DuPont, with another company that produced methanol, Conoco. *Id. at 1236-37*. Alberta Gas claimed injury resulting in that it allegedly lost sales when the merger induced Conoco to no longer participate in the push to stimulate market demand for [\[**66\]](#) methanol. *Id. at 1237*. Applying *Cargill*, the court declined to find this type of loss as connected with or resulting from DuPont's market power in the methanol-producing industry. [826 F.2d at 1241](#). Refusing to take a lenient stance on what constitutes antitrust injury, and instructive to the case *sub judice*, the court also noted that the same type of harm, i.e., non-antitrust harm, would have occurred if any acquiror decided to curtail the target's production and marketing plans. *Id.*

The Third Circuit appellate court has not faced squarely the issue of target antitrust standing. However, with the above weaknesses in the *Consolidated Gold Fields* majority's reasoning, as well as the strict approach countenanced by the *Alberta Gas* court, I conclude that [HN50](#)[[↑]] the Third Circuit Court of Appeals would join the *Anago* line of cases rather follow *Consolidated Gold Fields*. [HN51](#)[[↑]] The purpose of the requirement of antitrust injury is to ensure that the harm alleged by a plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place. Ansell, Inc. v. Schmid Laboratories, Inc., [757 F. Supp. 467, 484](#) (D.N.J.), aff'd, 941 F.2d 1200 [\[**67\]](#) (3d Cir. 1991). In the event of a Moore takeover, Wallace alleges it will be harmed by a loss in independent decision making authority, loss of customers, loss of employees, and loss of trade secrets. These alleged injuries do not occur because of the potential lessening of competition; rather, they occur due to a change in corporate control. See Burlington Indus., [666 F. Supp. at 805](#). In other words, these sequelae can occur with the consummation of any merger, even those that are not violative of the Clayton Act, and are divorced from any considerations that less competition may exist in the open market. *Id.*

In sum, because Wallace has not alleged injury "of the type the antitrust law were intended to prevent," the Court will grant Moore's motion to dismiss Count I of Wallace's counterclaim.

Ordinarily, this opinion would stop here and the Wallace motion to preliminarily enjoin the merger on antitrust grounds would not be treated. However, the plain fact is the circuits have divided on the issue of antitrust standing. The Fifth Circuit, *Anago*, and the Fourth Circuit, *Burlington Indus.* (summary affirmance), have concluded a takeover target does not have antitrust [\[**68\]](#) standing while the Second Circuit in *Consolidated Gold Fields* has concluded the opposite. [HN52](#)[[↑]] Antitrust standing is a prudential, not constitutional limitation on federal court jurisdiction. As such, it is not surprising that the Circuits have reached opposite conclusions. Similarly, while I believe there should be this prudential limitation on antitrust jurisdiction, [\[*1568\]](#) those possessed of a higher commission might feel otherwise. In an abundance of caution, in order to facilitate appellate review should that contingency occur, the merits of the Wallace motion for preliminary injunction based on an alleged antitrust violation will be addressed.

B. Preliminary Injunction - Wallace's Antitrust Counterclaim

Wallace has moved to preliminarily enjoin a proposed merger with Moore. As stated above, Wallace asserts in its Section 7 counterclaim that "if Moore were to acquire Wallace, the effect of such acquisition may be substantially to lessen competition in the relevant product and geographic market. . . ." D.I. 40, Counterclaim at P 19. Wallace alleges that for most customers in the relevant product and geographic markets, the only acceptable vendors are Wallace, Moore and the [\[**69\]](#) Standard Register Company; thus, the acquisition of Wallace by Moore would

transform a three-firm market into a two-firm market. *Id. at PP 16-17*. Wallace identifies the relevant product market to be the sale of forms and forms services to large, forms-intensive multi-location customers. Tr. 564.

I. Facts

a) Wallace's Evidence

As an obligatory preamble for setting the stage for its definition of the relevant product market as the forms and form services market encompassing large, forms-intensive customers with multiple locations, Wallace offered a historical backdrop to contextualize the current market conditions. Over the past two decades, the business forms market has been pressured to redefine itself in response to evolving customer needs, technology, and availability of raw resources. According to Douglas Fitzgerald, Wallace's Vice President of Marketing, a business customer in the mid-1970s would typically manage most or all of its forms needs in-house. Tr. 98-100. The customer would invariably initiate a given form's inception, design, and utilization; ultimately the customer would print the form on-site or solicit bids to have a vendor (such as Wallace) print [**70] a supply of forms. Once the forms were mass produced and/or shipped to the customer, the customer would warehouse the forms and monitor the form's inventory level and restock at the appropriate time.

In this so-called traditional method of forms management, vendors competed on the basis of price and quality, as well as service, which was evaluated primarily by the turn-around time measured between time of placement of order and delivery. Tr. 100. Over time, the business forms market has mushroomed beyond the mere printing and delivery of forms. Fitzgerald described two trends at the heart of this market transition: first, the proliferation of computers has created a corresponding need for forms and other related supplies. Second, a trend towards "out-sourcing" has evolved: having the vendor assume the forms-management responsibilities formerly achieved internally. For some customers, out-sourcing their forms management functions is efficient and results in significant cost savings. For example, a Wallace customer, Pacific Bell, credits an annual savings of \$ 2 million to its out-sourcing of forms management services. Tr. 105.

Currently, the trend towards customer out-sourcing is [**71] a force to be reckoned with, and business forms vendors fiercely compete by offering an ever-expanding breadth of services. To do so effectively, forms providers such as Wallace offer a smorgasbord of options tailored specifically to the customer's particular needs. For example, in response to the changing demands of the forms marketplace, Wallace provides on-site forms management, *i.e.*, a Wallace employee(s) is stationed at the customer's workplace to perform such diverse tasks as forms design, forms utilization review (*e.g.*, elimination of duplicative forms), forms inventory management, distribution, and purchasing.

Fitzgerald identified a subset of customers who demand out-sourcing services as "large, forms-intensive" ²⁴ customers with multiple locations" ("[*1569] LFICwMLs"). Tr. 106. According to Fitzgerald, these customers typically solicit contract bids for forms and forms-related services from various competing vendors. The LFICwML will submit to each vendor-candidate a request for information or a proposal outlining the required forms and accompanying services it seeks. Many of the needs presented by the customer require the vendor to showcase its best attributes, *i.e.*, [**72] provide concrete reasons why one vendor should be considered superior over another. In Wallace's experience, a LFICwML may solicit requests for proposals or bids from as little as two to as many as "multiple dozens" of vendors. Tr. 261. Sometimes, if Wallace is a finalist in the bidding contest, it may lower its proposed price in order to be more competitive, especially if the other finalists are Moore or Standard Register. Tr. 262. However, Wallace does not generally lower its bid price if it is a finalist against vendors other than these; Wallace perceives Moore and Standard Register to be its main competitors, while it views the others as lacking the breadth of service and sophisticated out-sourcing capabilities to be considered competitive when courting LFICwMLs. Wallace did acknowledge, at least in one instance, however, the existence of a LFICwML, Kaiser

²⁴ Forms-intensive has been described by one Wallace witness as referring to either the significance of the form within the customer's organization, or to the volume of forms within the organization, or both. Testimony of Michael Leatherman, Tr. 255.

Permanente, that elected to solicit bids for its forms and forms management functions from regional vendors and not Moore, Wallace, or Standard Register. Tr. 209.

[**73] Notwithstanding its view as to its major competitors, Wallace admitted that there are other suppliers who serve LFICwMLs, such as Duplex, Ennis, Reynolds & Reynolds, Vanier, GIS, Better Business Forms, Bowater, Williamette, Jerome Business, Rittenhouse, Avery Dennison, and Ross Martin. Tr. 135-45, 155, 159, 161-62, 165-68. These suppliers may merely provide forms without forms management services, or forms management services without forms, or a mixture of forms and forms management services. Further, when Wallace wins a contract bid, the bid may be "split" or shared with one or more of these or other competitors. Tr. 129-30. For example, Wallace prints Domestic Air Bill forms for the Federal Express corporation, where Standard Register prints its International Air Bills. Tr. 155.

To compete effectively for customers, Wallace has developed state-of-the-art computer technology allowing customer orders to be automatically routed to the optimum warehouse location, where storage and shipping are bar-code driven. Tr. 117. Inventory and quality control programs track and assure accuracy of order filling; customers are provided with summary invoicing that organizes order data in a concise [**74] format.

Additionally, Wallace has developed the WIN computer system. Fitzgerald described this program as allowing "customers access to a variety of sophisticated forms management services." Tr. 171. Generally, a customized WIN program is offered to Wallace customers who purchase a combination of products that exceeds \$ 1 million. A similar program with lesser customization called Select Services, is offered to Wallace customers with accounts of over \$ 400,000 but less than \$ 1 million. Tr. 213. Customers who utilize either of these programs are charged via pricing methodology that accounts for both product and service. Charges for the services provided are not broken down separately, rather, they are incorporated into a single price incurred for both product and correlative service. Tr. 174.

The WIN program is Wallace's flagship computer program. As described above, it links together order entry, order management, manufacturing, inventory, distribution, and billing systems. Tr. 220. With all of these functions coordinated and available in a single software format, WIN allows Wallace to provide LFICwMLs, many of whom are out-source customers, with tools to streamline their forms [**75] management. If a Wallace customer qualifies for the WIN program, that customer can promptly access the gamut of WIN services on the customer's own personal computer. Tr. 251. Michael Leatherman, a Wallace Senior Vice President and its Chief Information Officer, testified that Wallace invested \$ 34 million over a nine-year period to cultivate the WIN software, basically [*1570] from scratch, as its software needs were *sui generis*. Tr. 240. Leatherman was unaware of any commercially available software that could readily supplant the WIN software.

Wallace counts its WIN system as a trump card in the competition against its competitors. Since the WIN system has become available, Wallace has won LFICwML accounts from other vendors, including Moore. Tr. 268-70. One of Moore's consultants has admitted that the WIN system "could put Wallace four years ahead of [Moore] in terms of order management." DX 60 at 834454. Moore has been struggling intensively to improve its own computer system, retaining Electronic Data Systems as an adscititious partner in systems development. Tr. 60. Moore's costs in its quest for computer system enhancement have been staggering: in 1995, Moore budgeted \$ 44 million, [**76] and for 1996, it has budgeted \$ 35 million. McKay Depo. at 111, D.I. 149. Despite these efforts, Moore has suffered delays in implementing enhanced computer systems, with consequential disappointing earnings figures in its U.S. Forms Division. Tr. 60.

i) Wallace's Customers

As anecdotal testimonial support, Wallace also offered evidence from two of its satisfied customers. John W. Rountree, an administrator at Public Service Electric and Gas Company of New Jersey ("PSE&G"), testified that his company uses about 1200 forms in its day-to-day operations. Rountree stated that PSE&G is a satisfied WIN system user, and that it has out-sourced both the printing and managing of its forms. When asked hypothetically if Moore acquired Wallace, and Moore raised prices by five percent for the same services PSE&G currently received,

Rountree answered that if no other vendor could provide those services, PSE&G would pay the increased price. Tr. 338.

Similarly, Frank Cuomo, Purchasing Manager with the Pershing Division of Donaldson, Lufkin and Jenrette Securities Corporation, testified that his company uses several hundred forms. Like his PSE&G counterpart, Cuomo is a satisfied WIN customer, **[**77]** and takes advantage of Wallace's forms management services for its national needs. Unlike his PSE&G counterpart, however, Cuomo also uses local vendors for forms purchases where no forms management is needed, so as to not be totally dependent on a single supplier. Tr. 356. In the hypothetical event of a Moore takeover and price hike, Cuomo would likewise absorb a price increase of five percent for the same services he currently receives from Wallace. Tr. 353.

ii) Wallace's Antitrust Expert

Dr. Jerry Hausman, a Professor of Economics at Massachusetts Institute of Technology, testified as Wallace's expert on the antitrust claim. Hausman's expert opinion was based on econometric analyses²⁵ he performed on raw data provided to him by Wallace. Hausman had Wallace collect all of their bidding data for their LFICwMLs, specifically those with annual contracts worth \$ 500,000 or more. These data were culled for the time period commencing January 1, 1994 up through the present.

[78]** Initially, Hausman explained that for the statistical population of large (greater than \$ 500,000) contracts on which Wallace chose to bid during the above time period, the four largest incumbent contract holders were Moore at 44%, Wallace at 18%, Standard Register at 15%, and Uarco at 12%. Tr. 547, DX 56. After the bidding process closed, these incumbent contracts were awarded anew, with a resultant reshuffling into new proportions: Wallace subsequently won over 50% of the contracts, Moore won about 15%, Standard Register won 12%. Uarco was not able to hold onto any contracts at all. Tr. 547-48, DX 57.

From these data, Hausman concluded that the three companies, Moore, Standard Register, and Wallace, are "very important competitive companies," Tr. 548, and are 'primarily responsible for servicing large, multi-location customers that wish to out-source the forms function,' Tr. 545. He added that the increase in contract wins for Wallace in **[*1571]** light of the concurrent decrease for Moore shows that these two entities significantly compete head-to-head. He pointed out that the statistics also showed that Wallace competed against Moore about 75% of the time. Tr. 552.

Hausman additionally **[**79]** looked to information generated by Moore itself. On a document entitled "Target Competitor Forms Management Accounts," Moore compiled a list of target customers in the eastern United States whose forms management programs were not administered by Moore as of late summer 1995. DX 51, Deposition of Kathleen W. Sakal at 65. Of these target accounts coveted by Moore, 34 accounts were deemed as having a potential value of \$ 1 million or more. Hausman looked at these accounts and concluded that Wallace and Standard Register each held 38% of those million dollar contracts; together they constituted the majority of Moore competitors.

Hausman conceded, however, that there are other LFICwMLs that are serviced primarily by vendors other than Moore, Wallace, and Standard Register. His review of DX 7 demonstrated that many LFICwMLs had contract with other vendors: (company -- vendor) Woodward & Lothrop - Duplex; Alex & Alex - Duplex; Alex Brown & Co. - Duplex; Beneficial Management - shared between Wallace and Federal; Schering-Plough - NCR; Wyeth Labs - Federal; Certainteed - shared between Amherst local jobber²⁶ and Moore; Smith Kline - Duplex; Show Boat - Janice Group; Sun. Co - Ross Martin; **[**80]** Caesars - Ross Martin; Fleet Bank/Shawmut - Duplex; Bankers' Trust - Howard Press; Canada Life - Reynolds & Reynolds; Cole Haan Shoes - Creative Business Forms; Blue Cross/Blue Shield of Maine - uses its own in house program; Bloomingdale's - Uarco; United Technologies - Uarco; NEC - Uarco; Northeast Utilities - Duplex; United Utilities - Duplex; CenterBank - Duplex; United Illuminating -

²⁵ An econometric study is the "use of statistical techniques to analyze economic data." Testimony of Jerry Hausman, Tr. 541.

²⁶ Jobbers have been described as forms distributors that do not manufacture the forms they distribute. Tr. 179.

Duplex; Service America - Uarco; Fag Bearings - Uarco; Mercedes Benz Credit - Jobber; Perrier Group of America - Duplex; Cincinnati Bell Info. Systems - Better Business Forms; Tech Data - Reynolds & Reynolds; People Gas - Better Business Forms; Tampa Electric Co. - Better Business Forms; Glaxo/Burroughs - Wellcome - shared between Uarco and Standard Register; Guilford Mills - Jordan Graphics; Overnite Transportation - NCR; Philip Morris USA - Reynolds & Reynolds; Owens & Manor - Reynolds & Reynolds; Crawford Co. - Duplex; Turner Broadcasting - Reynolds & Reynolds. DX 7; Tr. 588-91.

[**81] Finally, Hausman deduced further conclusions from the data supplied him by Wallace. His econometric analysis showed that Wallace's gross margin (defined as price minus cost) was lower when Moore was bidding than when Moore was not bidding. DX 12 at P 11; Tr. 566. When Wallace went head-to-head against Moore in the bidding process, Hausman found the Wallace gross margin was lower by about seven to eight percent. Tr. 566. From this, Hausman concluded that "if Moore were not going out head-to-head against Wallace, . . . on average, prices to customer will go up by between seven and eight percent." Tr. 567. Hausman based his conclusion on the premise that if Moore takes over Wallace, Wallace and Moore will be bidding together rather than as competitors; competition between these two companies will therefore be eliminated. Further, he opined that this elimination of competition will not just affect pricing; the technological rivalry between these two competitors will also be abolished, with a resultant inertia in the improvement of overall services.

Despite his econometric prowess, Hausman could not offer a definition of Wallace's market share as to LFICwMLs. Neither could he "sort out" [**82] what percentage of the total forms sales market is represented by LFICwMLs. Tr. 573. He could not testify as to how many LFICwMLs there are in the U.S. market; other Wallace testimony elucidated that there are approximately 170 Wallace WIN and Select Service customers who fall into this alleged submarket. Tr. 252-254.

[*1572] b) Moore's Evidence

i) Expert Testimony

Not surprisingly, Moore presented economist Dr. Sumanth Addanki from the National Economic Research Associates whose testimony was at stark variance with that of Dr. Hausman. Addanki concluded that the relevant market within which to analyze Moore's acquisition of Wallace is no smaller than the U.S. market for the sale of business forms and related services. Tr. 641. He characterized this market as "unconcentrated, vigorously competitive," with customers having a variety of alternative ways to meet their business forms and services needs. Tr. 641. He found that some of these alternatives include local suppliers, regional suppliers, and national suppliers.

Addanki also reasoned that there is no logical basis for discerning a discrete product submarket of LFICwMLs, and that no one in the industry tracks market share [**83] in such a theoretical arena. Tr. 653. Rather than the size of the customer, number of customer locations, or dollar amount spent on forms and forms management services, he concluded that the primary distinguishing factor is the type of industry within which the customer works and how the customer organizes its forms procurement processes. He found large customers and small customers expressing similar demands regardless of their size, albeit with idiosyncrasies varying from customer to customer.

Addanki's review of bidding data for both Moore and Wallace revealed that vendors are often called upon by large customers to bid on supply requirements without any forms-related management services. American Express, Frank Parsons Paper, and Melville Corp. requested quotes from Moore excluding forms management services. See Sakal Depo. at 41, 47, 53. Further, many large customers are supplied on a "noncontract" or ad hoc basis, as in Wallace's relationship with United Parcel Service, DiscoverCard Services, and State Farm Insurance. See PX 229. Other customers request contracts ranging in duration from one to five years, with the capability of being terminated upon notice by either [**84] party. Some customers rely on multiple suppliers for their forms need, such Avis, Homedco, Federal Express, Bank One, Nationwide Insurance and Boeing. See *Fitzgerald Depo.* at 200, 204, 214-15, 269-71, 315-17, 325. From this, Addanki concluded the following:

There is no single set of requirements that distinguishes 'large forms-intensive customers with multiple locations.' Rather, these customers can, and do, satisfy their forms need in a variety of alternative ways, out-

sourcing as little or as much of the management and distribution functions as they choose, arranging their forms procurement process accordingly, buying forms locally, regionally or centrally as needed.

Addanki Expert Report, PX 119 at 7-8.

Like Wallace's Vice President Fitzgerald, Addanki also described the forms industry as one in transition. Demand for traditional core products in the forms industry, such as single and multi-ply forms, and continuous feed forms, is declining because of technological progress and its impact on customer demands. Shipments of these core products declined by five percent in 1992 and by approximately 4 percent in 1993. PX 119 at 9. As one alternative to paper forms, **[**85]** customers have the option to perform many of their business functions via electronic mail (e-mail) and transmission over local and wide area computer networks. PX 119 at 5.

Additionally, LFICwMLs have increasingly restructured and consolidated their forms use and forms suppliers, thus intensifying the competitive pressures between vendors in the forms industry. Corporations such as Andersen Consulting, CSC Index, and Price Waterhouse offer management consulting to re-engineer a given business entity, including the revamping of information systems and the forms generated by those systems. *Id. at 12*. In sum, Addanki opined that the market for business forms today is vigorously competitive because vendors must continue to grow their sales despite the declining demand for core products. *Id.*

Finally, as a corollary to forms customers consolidation of their purchases, Addanki identified a growing trend in which many informed and sophisticated forms customers **[*1573]** assert their bargaining power by demanding and obtaining favorable pricing by playing one vendor against its competitors. Tr. 683. These factors also exert pressure on the forms vendors to create new methods of servicing customers' **[**86]** forms needs more completely.

Along with his qualitative evaluation of competition in the business forms industry, Addanki quantified his economic data. Following U.S. Department of Justice Merger Guidelines, Addanki used the Herfindahl-Hirschman Index ("HHI") to measure concentration in the relevant product market he identified as the business forms industry in the United States. He postulated that there are over 600 vendor participants in this market, with the top 20 vendors accounting for 67% of total sales. PX 119 at 16. As HHI calculations require, each vendor's market share was mathematically squared and then all the squared shares were added. Addanki calculated the HHI of the current market as 432.5. If Moore acquires Wallace, the HHI would increase to 527, an increase of 95 points. Tr. 651. According to Addanki, this figure, well below the Merger Guideline's safe harbor level of 1000, represents an unconcentrated market where a competitively healthy amount of alternative suppliers are available to customers. In terms of real dollars and cents, the entire business forms market in the United States is approximately \$ 7.5 billion dollars; Moore's and Wallace's combined sales total **[**87]** approximate \$ 1.3 billion or less than 18% of the total business forms market.

Based on his evaluation of data supplied by Moore, Addanki concluded that the acquisition of Wallace by Moore would not cause competitive harm in the forms industry in the United States.

ii) Other Moore Evidence

Gregory Lynch, Vice President of Moore's Financial Services Group, testified that in the course of its marketing and sales development plans, Moore identified a list of what could be considered LFICwMLs (as defined by Wallace) as potential clients. Out of a possible 2000 LFIC-wMLs, Moore targeted a limited number (125) of 'rational accounts,' which were defined in Moore's National Account Pocket Dossier as accounts valued at a potential for \$ 1 million or more. DX 3 at C6130516. In this National Account Pocket Dossier, Moore estimated its market share for these types of accounts as 25%; the remaining 75% were served by other suppliers. *Id. at C6130555*. Recently, Moore has shifted its focus to customers who potentially spend over \$ 250,000 in forms and forms-related services. Tr. 626. Moore also classifies its customers into three "vertical segments" by industry type rather than merely **[**88]** by account value: Financial Services, Health Services, and Government Services.

Lynch testified as to the competitive nature of the forms and forms services marketplace. In his experience, each individual customer is different and pursues a strategy related to its own needs and goals. Tr. 618. He agreed that there are many alternatives to supplying customers' needs available to Moore's customers, and the range of

alternatives itself is ever increasing. He also agreed that the industry has witnessed a trend where customers out-source functions not related to their core business. Although there are businesses that still produce and manage forms internally, using in-house print shops and in-house employees, other businesses may decide to out-source the production of forms, but retain forms management in-house. Other customers out-source both forms management and production.

Lynch also testified that, in his experience, his customers are very well informed. Customers insist on "30 day out clauses" which allow them to change suppliers after 30 days. Tr. 624. Competitive conditions in the industry itself are responding to the multiplicity of customer demands. Of increasing importance is [**89] the emergence of forms jobbers and distributors, middleman organizations which sell but do not manufacture forms. The industry has witnessed these vendors teaming up with warehousing and distribution firms that provide inventory, distribution, and billing systems. Tr. 178-79; 621-22. Paper mills themselves have also recently entered the competitive fray with various offerings.

Effects of the potpourri of alternatives available to Moore customers has not escaped [*1574] Moore's notice. When Moore informs a customer of a price hike, Moore increasingly runs the risk that the customer will defect to another vendor or vendors. Lynch cited several instances where Moore lost large accounts to smaller vendors when Moore attempted to raise prices: a large contract with a uniform company in Cincinnati was lost to Miami Business Forms; a \$ 4 million American Express contract was lost to a five person organization called General Credit; contracts with CIGNA and Bank of New York were lost to Williamette. Tr. 623.

2. Likelihood of Success on the Merits

Before this Court can preliminarily enjoin Moore's proposed merger based on this issue, Wallace, as movant and counterclaimant, must first establish [**90] that it has demonstrated a likelihood of success on the merits of its Section 7 claim. See [Clean Ocean Action v. York, supra, 57 F.3d 328, 331 \(3d Cir. 1995\)](#); [Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 510 \(3d Cir. 1969\)](#), cert. denied, 396 U.S. 1009, 24 L. Ed. 2d 501, 90 S. Ct. 567 (1970). Section 7 of the Clayton Act [HN53](#)[¹] proscribes mergers or acquisitions "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 tend to create a monopoly." [15 U.S.C. § 18](#). Accordingly, [HN54](#)[¹] to demonstrate a likelihood of success on the merits, Wallace must fulfill two criteria: first, it must show that it is more probable than not that acquisition of Wallace by Moore will affect a "line of commerce" in "any Section of the country." These respective determinations are informed by the elucidation of a relevant product market and a relevant geographic market. [Brown Shoe Co. v. United States, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#). Wallace argues that the relevant product market is the forms and forms services market encompassing large, [**91] forms-intensive customers with multiple locations; it posits the geographic market as the entire United States.

Second, Wallace must show that it is more probable than not that the Moore takeover may substantially lessen competition in the relevant product and geographic markets; the mere possibility of substantial impairment to competition will not suffice. [Fruehauf Corp. v. FTC, 603 F.2d 345, 351 \(2d Cir. 1979\)](#); see also [United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622-23, 41 L. Ed. 2d 978, 94 S. Ct. 2856 \(1974\)](#) (Clayton Act Section 7 "deals in probabilities" rather than "ephemeral possibilities"). Of equal note, however, is that [HN55](#)[¹] Wallace need not prove the fruition of actual anticompetitive effects of the acquisition, [FTC v. Procter & Gamble Co., 386 U.S. 568, 577, 18 L. Ed. 2d 303, 87 S. Ct. 1224 \(1967\)](#), as Section 7's underlying purpose is to "arrest apprehended consequences of intercorporate relationships before those relationships could work their evil," [Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 485, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#).

a) The Relevant Product and Geographic Markets

[HN56](#)[¹] A necessary predicate to a finding of a violation [**92] of Section 7 of the Clayton Act is the definition of the relevant product market and relevant geographical market. [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). These market determinations confer the requisite context within which the Court can analyze whether there has been a substantial lessening of competition. *Id.*

i) Relevant Geographic Market

The United States Supreme Court has defined [HN57](#) relevant geographic market as the region "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963). Both parties agree that the relevant geographic market in this case encompasses the entire United States, Tr. 564, 641, and the Court so finds.

ii) Relevant Product Market

Determination of the relevant product market quite often is the major battleground in Section 7 litigation, and this case is no exception. See 3 Julian O. von Kalinowski, [*1575] *Antitrust Laws and Trade Regulation*, § 18.01[2] (1995). Another commentator concurs:

However [**93] wide or narrow the range of inquiry for appraising a merger, market definition is frequently critical. For example, viewed in a wider product. . . market than the minimum necessary to include the merging firms, a merger will appear to have a less significant effect. In contrast, when the products . . . of the merging firms differ, a definition wide enough to bring the merging firms into the same market makes the merger. . . more likely to be seen as troublesome.

Phillip Areeda & Louis Kaplow, *Antitrust Analysis*, P 506, at 814-15 (4th ed. 1988).

The criteria relating to product market definition have been set forth by the Supreme Court in the seminal decision Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). The Court held that "the [HN58](#) outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it." *Id. at 325*. Interchangeability of use implies that one product or service is approximately equivalent to another; discounting any degree of preference for the one over the other, either product would work [**94] just as well. Allen-Myland, Inc. v. International Business Machines Corp., 33 F.3d 194, 206 (3d Cir. 1994), cert. denied, 130 L. Ed. 2d 615, 115 S. Ct. 684 (1994). Cross-elasticity of demand refers to whether the demand for the second good or service would respond to change in the price of the first. *Id.* In short, "defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products [or services], 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, 58 L. Ed. 2d 134, 99 S. Ct. 123 (1978).

The Supreme Court has also recognized that [HN59](#) under appropriate circumstances, a broad product market may be parsed into well-defined submarkets, each comprising a discrete line of commerce unto itself for Section 7 purposes. Brown Shoe, 370 U.S. at 325. If such a submarket(s) does exist, the Court must scrutinize not only the broad, overall market, but must also "examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability [**95] that the merger will substantially lessen competition." *Id.* [HN60](#) The *Brown Shoe* Court set forth seven "practical indicia" for lower courts to consider when determining whether a submarket exists: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* All of these indicia need not be present for a well-defined submarket to exist. General Foods Corp. v. FTC, 386 F.2d 936, 941 (3d Cir. 1967), cert. denied, 391 U.S. 919, 20 L. Ed. 2d 657, 88 S. Ct. 1805 (1968).

iii) Application of the *Brown Shoe* Criteria: Wallace's Proposed Submarket

The record evidence shows that the parties are sharply divided on their characterizations of the relevant product market. Moore, the aggressor corporation and antitrust defendant, argues for an expansive definition of the relevant product market, as being "comprised of the sales of all business forms and forms management services." Expert Report of Sumanth Addanki, PX119 at 8. In its Securities and Exchange Commission filing Form 10-K [**96] for

1994, Moore views itself as serving the "information needs of businesses, government and other enterprises." PX 122 at 5. Similarly, in its Form 10-K, Wallace describes itself as a corporation engaged "predominantly in the computer services and supply industry." PX 26 at 3. Both companies overlap in the supply of products and services, such as business forms, labels, commercial printing, direct mail, and office supplies.

Even if Moore's broad characterization of the relevant product market were accurate, definition of a relevant product submarket [*1576] would not be foreclosed under *Brown Shoe*. Wallace contends that there exists a well-defined submarket in this case: "the sale of forms and forms services" to "large, multi-location customers.", Tr. 564. Wallace argues that application of the *Brown Shoe* factors conclusively demonstrate that the relevant product market is a submarket within the broad market definition proposed by Moore, and that this submarket is a "line of commerce" unto itself for purposes of the Clayton Act. *Ansell Inc. v. Schmid Laboratories, Inc.*, 757 F. Supp. 467, 471-74 (D.N.J.) (applying the Brown Shoe criteria to determine relevant product market), [**97] aff'd mem. op., 941 F.2d 1200 (3d Cir. 1991).

(A) Industry or Public Recognition of the Submarket as a Separate Economic Entity

HN61[] Recognized sources of evidence of industry or public recognition include (1) statements of the merging parties and their own market surveys, annual reports, marketing materials, and preacquisition reports; (2) Industry or trade association publications; (3) the existence of a discrete trade association for the product or services involved; (4) perceptions and statements of major customers; and (5) Industry classification codes of the United States Census Bureau. Von Kalinowski, 3 *Antitrust Laws and Trade Regulation* § 18.02[2] (1995)(collecting cases).

In support of its proposed submarket definition of LFICwMLs, Wallace relies heavily on the first type of evidence: statements and marketing materials of the parties in this case. The record, however, shows that neither company has historically considered LFICwML as a category unto itself. The best evidence Wallace offers is differential treatment of customers according to account size based on dollar value; even then, there seem to be no well defined or accepted parameters. Wallace demonstrated [**98] that only accounts valued at \$ 1 million or above qualify for participation on the WIN system; another Wallace customer category includes those accounts valued at over \$ 400,000. For reasons known only to Wallace, its economics expert used yet another dollar value for his analyses, i.e., \$ 500,000.

Moore documentation was equally all over the scale. In one document, the National Accounts Pocket Dossier, Moore targeted accounts worth \$ 1 million or more for intensive sales promotion and marketing, DX 3 at C6130564, although these efforts have been apparently redefined to include accounts with a floor value of \$ 250,000. In another document compiled for similar purposes, Moore lumped together accounts both small and large, valued from thousands of dollars up through millions of dollars. DX 7. Significantly, in only one instance did either company define a market share for a sub-category of the entire forms industry; Moore chose a cutoff figure of \$ 250,000. DX 61.

The evidence also showed in specialized circumstances, that rather than segregating LFICwMLs as a submarket, Moore analyzes its customer base in terms of vertical segments by industry type, such as Financial Services, Health [**99] Care, and Governmental. Common sense dictates there will be similarity in forms needs within a given industry sector, such as the banking industry, as contrasted to other, diverse types of businesses, such as hospitals. Finally, and perhaps most significantly, both parties agreed that it is not unusual for a customer to split its forms and forms servicing loyalties among different vendors. As a result, a "large" customer in terms of corporate demographics does not necessarily translate into large business forms customer whose account dollar value corresponds to the breadth of its business form needs. In other words, even assuming there exists a subset of customers defined as LFICwMLs, a given LFICwML may not surrender all of its business form and form service requirements to a single or even primary vendor. Instead of falling into well-defined submarkets based on corporate size, locations, or dollar value of account, business forms and form service customers are aligned along a continuum of diverse needs. Accordingly, the Court finds that there is no industry or public recognition of submarket composed of LFICwMLs.

(B) The Product's Peculiar Characteristics and Uses

Both parties [**100] presented convincing evidence of the overwhelming importance of [*1577] serving a forms and forms service customer's distinct needs. Because customers needs are as diverse as the customers themselves, there is no one forms product or forms service (or set of products and/or services) that can be readily distinguished as its own category. Even if the Court were to accept the premise that LFICwMLs compose a circumscribed subset of forms and forms service customer, the record shows that there is no single product and/or service that is marketed to these target customers alone. A relatively small business forms customer with only one location may desire the same forms and forms management services as a LFICwML, albeit on a different scale. Although out-sourcing may be considered a particular type of service frequently utilized by LFICwMLs, the gamut of out-sourcing options available apply to customers large and small alike.

Typically, under this *Brown Shoe* factor, courts have distinguished products with specialized end uses or characteristics from similar products. See, e.g., *Ansell, Inc. v. Schmid*, 757 F. Supp. at 473 (different packaging and distribution of latex condoms enough to distinguish [**101] between product lines); *United States v. American Tech. Indus. Inc.*, 1974 Trade Cas. P74,873 (M.D. Pa. 1974) (artificial Christmas trees considered a separate market from natural Christmas trees). In the case *sub judice*, there is no basis in the record for discerning any distinct products or services sold to LFICwMLs as compared with those sold to other types of business forms and forms management customers.

(C) Unique Production Facilities.

This *Brown Shoe* factor requires the Court to evaluate whether business forms and forms management services for LFICwMLs require unique facilities or technology different than that which underlies forms and forms-related services demanded by non-LFICwMLs. See *General Foods Corp. v. FTC*, 386 F.2d 936, 943 (3d Cir. 1967) (production facility for steel wool markedly different from facilities for other cleaning devices), cert. denied, 391 U.S. 919, 20 L. Ed. 2d 657, 88 S. Ct. 1805 (1968). Wallace argues that the services demanded by LFICwMLs are "mainly produced by using integrated and sophisticated computer systems" such as WIN. Tr. 543. The record demonstrates that many LFICwMLs, especially those that out-source their [**102] forms management functions, derive great benefit from a vendor's sophisticated computer technology.

However, the record also shows many LFICwMLs as contracting with companies other than Moore, Wallace, or Standard Register. DX 7. Although Wallace characterizes these other forms vendors as "second-tier" because of a perceived lack of technological out-sourcing capability, the objective evidence demonstrates that even with "inferior" technology (as compared to WIN), these vendors still compete effectively for LFICwML contracts. The Court finds that the evidence does not support a finding that these types of customers are served by unique production facilities as typified by the Wallace facility.

(D) Distinct Customers

An oft-cited case, *Reynolds Metals Co. v. FTC*, 114 U.S. App. D.C. 2, 309 F.2d 223 (D.C. Cir. 1962), sets forth a clear paradigm of a distinct customer class. In that case, the parties disputed whether a class of customers who purchased decorative aluminum foil used in the floral industry could be considered unique. The court found that:

the sole purchasers of florist foil are the nation's 700 wholesale florist outlets and, through these, the 25,000 [**103] retail florists throughout the country. Despite a clearly lower price for florist foil, . . . other end users of decorative foil have not joined the identifiable mass of florist foil purchasers in noticeable numbers.

309 F.2d at 228.

Like the aluminum foil manufacturer in *Reynolds*, Wallace also attempted to portray LFICwMLs as somehow coalescing into a distinct class of customers. The record evidence, however, shows the opposite to be true: the needs of the customers differ greatly by industry type and idiosyncratic customer preference. For customers that could be described as LFICwML, Moore adduced evidence showing that its forms and forms service demands defy simple classification. For example, American Express requested a bid from Moore for forms and no [*1578] forms services. Avis, Homedco, and Federal Express were cited as companies that prefer to rely on multiple forms and

forms service suppliers. Furthermore, Wallace's Chief of Information Systems testified that a particular LFICwML's needs can vary greatly depending on the customer, one may handle its own forms management in-house, and another may out-source those same functions. Tr. 254-56.

Diversity of forms, forms service **[**104]** needs, and out-sourcing are not limited to the LFICwML type of customer. In a document generated by Moore well before the initiation of litigation, Moore identified forms and forms management needs for its smaller customers ranging by account size of \$ 5,000 to \$ 250,000. PX 131 at M4631332. The catalog of products and services primarily used and available to these smaller customers paralleled those described by Wallace as peculiar attributes of LFICwMLs: e.g., custom and stock forms, mailing systems, forms handling equipment, forms management services, warehousing and distribution, and electronic data interchange. Because there appears to be no easy demarcation of forms and forms management attributes as between LFICwML and other smaller customers, as well as within the population of LFICwMLs itself, the Court finds that there is no distinct class of LFICwML customers under *Brown Shoe*.

(E) Distinct Prices

During the hearing, and in its briefs, Wallace emphasized its pricing strategy for LFICwMLs who purchase a bundle of forms management services as an accompaniment to its forms purchases. Such LFICwMLs incur a unified charge that incorporates both product and service; **[**105]** a separate breakdown of price per form and price per service is not available. However, Wallace also presented evidence that other LFICwMLs choose to manage their own forms; it follows that these LFICwMLs are charged no differently for their forms purchases than any other customer who purchases only forms. While a subgroup of LHCwMLs may encounter a distinct pricing scheme, the Court finds that the industry does not price its forms and forms management services based merely on a customer's being pigeonholed as a LFICwML.

(F) Sensitivity to Price Changes

Wallace offered testimony of two selected WIN customers who expressed a loyal degree of satisfaction in their corporate relationship with Wallace. Both PSE&G and Pershing witnesses admitted without hesitation that if Wallace raised its prices by five percent, they would incur the additional cost and remain Wallace customers.

On the other hand, in equally anecdotal fashion, Moore offered concrete evidence where it had informed some of its LFICwMLs of a price increase, the customers fled to another vendor. In light of these competing offerings, the Court cannot conclusively find that LFICwMLs react uniformly with respect to price **[**106]** changes in the forms and forms services industry.

(G) Specialized Vendors

This final *Brown Shoe* criterion looks to whether a product or service is sold or marketed by a unique class of vendor. For example, in *United States v. Healthco, Inc.*, 387 F. Supp. 258 (S.D.N.Y.), aff'd mem. op., 535 F.2d 1243 (2d Cir. 1975), the court distinguished between submarkets for dental equipment and dental sundries. This distinction was based in part on the two industries' different methods for distributing and marketing those products. Dental equipment was marketed via specialized dental dealers and salespeople and was personally detailed to dental customers; dental sundries were frequently marketed and sold via mail-order. *Id. at 261, 265*. Thus, the court justified the different submarkets in part on the existence of the two different types of vendors.

Wallace has similarly argued that only three specialized vendors, Moore, Wallace, and Standard Register, offer a complete menu of options capable of serving the forms and forms management needs of LFICwMLs. Pointing to the worst case scenario of a LFICwML that completely out-sources its forms and forms management services, Wallace **[**107]** convincingly showed that extremely sophisticated vendor technology is required to be competitive, and that Moore, Wallace, and Standard Register offer the **[*1579]** most competitive, state. of the art technology available. The PSE&G customer's testimony highlighted this assertion: as a completely out-sourced customer, dependent on a single vendor, the witness regarded only the larger forms companies Moore, Standard Register, Wallace, and Uarco as viable vendors for PSE&G's out-sourcing needs. Tr. 333.

If the evidence showed all LFICwMLs as desiring to out-source the majority of their forms and concomitant services, the Court would agree that only a limited number of "specialized" vendors exist to serve those customers. However, as discussed supra, the evidence showed that LFICwMLs operate along a continuum of out-sourcing needs. Some require little or no out-sourcing; others prefer to liberally out-source. The evidence also showed that a significant number of LHCwMLs contract with vendors not designated by Wallace as specialized, such as Duplex, Vanier, Willamette, Federal, Reynolds & Reynolds, Ross Martin, and Better Business Forms. See, e.g., DX 7. Consequently, the Court cannot agree [****108**] that only specialized vendors support the forms and forms management needs of LFICwML.

(H) Barriers to Entry

In *Ansell, Inc. v. Schmid Laboratories, Inc.*, 757 F. Supp. 467, 474-75, (D.N.J.), aff'd mem. op. 941 F.2d 1200 (3d Cir. 1991), the Third Circuit Court of Appeals affirmed the district court's augmentation of the *Brown Shoe* criteria with consideration of another factor, barriers to entry. See also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 120 n.15, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) ("It [HN62](#)[] is also important to examine the barriers to entry into the market, because 'without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.'") (citation omitted). Low barriers to entry into the market invite entry by new competitors and also expose firms well established in the market to the threat of potential entry. This in turn can induce those firms to hold prices, services, quality, and developments at competitive levels. See 3 Von Kalinowski, *supra*, at § 26.02[4]. The converse is also true: high entry barriers reduce the potential for increased competition by dissuading smaller [****109**] firms from aggressively competing. *FTC v. Proctor & Gamble*, 386 U.S. [at 578](#).

Wallace presented extensive videotape, testimonial, and documentary evidence featuring the superiority of its WIN computer system. Focusing on Moore's struggle to create comparatively competitive technology, Wallace argues that a new entrant into the purported LFICwML submarket would face several years of computer research and development to become competitive. Once again, however, Wallace overlooks the heterogeneity of forms and forms-management needs among the LFICwML user population. For customers like PSE&G who totally out-source forms management, the WIN system is unparalleled. The costs of building a comparable information system would be monumental and no doubt form a high barrier to entry for those customers.

However, further down the consumer spectrum is Pershing, who uses both WIN and local/regional forms vendors; these smaller vendors compete effectively without WIN-type technology for a subset of Pershing's forms business. Depending on how much or little forms services a LFICwML decides to out-source, the evidence shows vendors with lesser technological capabilities successfully vying for [****110**] those customers. See e.g., DX 7. Wallace has demonstrated that its WIN and Select Service LFICwMLs number around 170. Moore has placed the total number of LFICwMLs at 2000; Wallace's share of these customers is less than ten percent. Even if one assumes that Moore and Standard Register each serve twice as many LFICwML customers as Wallace (a generous assumption), 50% of the LFICwML market remains served by vendors beside Moore, Wallace, and Standard Register. Therefore, even without computer technology approaching that of the WIN system, other vendors compete effectively for a large share of LFICwMLs. A vendor need not surmount as ambitious a hurdle as Wallace erects to enter the forms and forms services market for LFICwMLs.

In sum, the evidence has failed to support Wallace's contention that the relevant product [***1580**] market in this case constitutes the sale of business forms and forms-related services to large, multi-location customers. Mindful that the *Brown Shoe* factors are "practical indicia," and not intended to be mechanically applied, the Court has considered the factors and finds that they fall short of identifying LFICwMLs as a discrete segment of the forms and forms-related [****111**] services market that can fairly be considered a well-defined submarket. See *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. at 875. At best, Wallace, leading the pack in technological innovation responsive to the needs of large, form-intensive customers with multiple locations, is beginning to successfully carve out a niche in an industry in transition. That transition has not yet matured to the point where there is an identifiable submarket. Instead, at this time, because customer needs for forms and forms-related services fall along a continuum without regard to corporate size or location, the realities of the forms and forms-related services

industry, Wallace has not established that there is a submarket beyond the broader relevant product market in this case, i.e., the entire U.S. market for business forms.²⁷

[**112] b) Substantial Lessening of Competition

HN63 Once the relevant product and geographic markets circumscribing the area of effective competition have been defined, the Court must analyze whether the effect of the merger "may be substantially to lessen competition."

Brown Shoe, 370 U.S. at 328 (quoting [15 U.S.C. § 18](#)). Inquiry into the likely effect of a Moore-Wallace merger on competition starts with an evaluation of the level of economic concentration in the U.S. market for business forms.

HN64 While statistics reflecting market share controlled by industry leaders are the focal point of the Court's analysis, the Court is also mindful that statistics must be viewed in light of the particular market's structure, history, and probable future. *Brown Shoe, 370 U.S. at 322 n.38*.

The Department of Justice Merger Guidelines reference the Herfindahl-Hirschman Index ("HHI"), a statistical formula used to calculate and compare market concentration pre- and post-merger. As indicated by Moore's expert Addanki, a market's HHI is calculated by adding the squares of the market shares of those vendors participating in the market. See Merger Guidelines § 1.5. The Merger Guidelines contemplate [**113] a product market to fall into one of three categories: unconcentrated (HHI below 1000), moderately concentrated (Hill between 1000 and 1800), and highly concentrated (HHI above 1800). *Id.* at § 1.51.

Finding the relevant product and geographic market to be the forms industry in the entire U.S., Addanki looked at market shares of the top 20 forms vendors (who account for approximately 67 % of the forms market dollars). He found the pre-merger HHI value at 432, indicating an unconcentrated market. Following an acquisition of Wallace by Moore, the post-merger HHI value would be 527, indicating that the forms industry market would remain unconcentrated. According to the Merger Guidelines, an unconcentrated product or service market post-merger is indicative of a market "unlikely to have adverse competitive effects." Merger Guidelines § 1.51. Based on his statistical analysis and qualitative market considerations discussed above, Addanki concluded that a Wallace-Moore merger is unlikely to cause competitive harm. He reported that post-acquisition, forms and forms-related service customers will still enjoy realistic alternatives to which they can readily turn for their needs. DX 119 [**114] at 17. Addanki [*1581] further opined that in such a competitive environment, a Wallace-Moore combination could neither successfully exercise unilateral market power, nor facilitate coordination and collusion among remaining vendors. See Merger Guidelines § 2.2 (cautioning against the danger that, post-acquisition, a merged firm may be able to unilaterally elevate the price and suppress the output of a product and still capture any sales lost due to that price rise, if buyers will substitute another product that is now sold by the merged firm); *Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986)* (courts **HN65** must consider whether acquisition will make it "easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level"), cert. denied, 481 U.S. 1038, 95 L. Ed. 2d 815, 107 S. Ct. 1975 (1987).

In direct contrast, Wallace's expert, Hausman, offered no such market share or market concentration statistics in his data, all of which incorrectly assumed a relevant product submarket of sales of large, forms-intensive customers with multiple locations. In fact, Hausman explicitly disclaimed any knowledge [**115] of Wallace's market share of LFICwMLs and what percentage of the total forms sales market is represented by LFICwMLs. Notwithstanding his incomplete information base, Hausman concluded that were Moore to acquire Wallace, Moore would be able to

²⁷ The parties have not argued for the Court's consideration of the relevant product market under the U.S. Department of Justice Merger Guidelines ("Merger Guidelines"), which call for analysis of factors similar to some noted in *Brown Shoe*. Courts have frequently looked to these Merger Guidelines (most recently promulgated in 1992) as an advisory aid in determining the relevant product market, see [57 Fed. Reg. 41552 \(1992\)](#); see e.g., *Allis-Chalmers Mfg. Co., 414 F.2d at 524; Ansell Inc. v. Schmid, 757 F. Supp. at 475*. Because neither party has advanced evidence or data supporting a relevant product market using Merger Guideline analysis, the Court will refrain from considering whether the Merger Guidelines would have yielded that same conclusion as reached under decisional law. However, as discussed *infra*, Moore has offered evidence under the Merger Guidelines as to the effects of a Moore-Wallace merger on competition within the relevant market.

raise prices of forms and forms-related services to LFICwML by seven or eight percent, a figure Hausman termed as statistically significant.

First, Hausman drew his conclusion based on 51 bidding situations in 1994 and 1995 where Wallace bid on LFICwML contracts valued at \$ 500,000 or greater. Tr. 584. Where Wallace successfully competed directly against Moore for such contract bids, the data showed that Wallace had enjoyed a lesser gross profit margin by seven or eight percent. These figures are corroborated by the testimony of Wallace's Chief Executive Officer Cronin. Cronin confirmed that when competing directly against Moore as finalists for a customer contract, Wallace's corporate strategy involved lowering its bid price to be more competitive. With respect to other competitors, however, Wallace did not lower its prices as much or even at all. Hausman's data also showed that for this same time period, Wallace was able to win over 46% of [**116] Moore's LFICwLMs with its bidding tactics.

From the data, Hausman then assumed the converse to be true: post-acquisition, with Wallace eliminated from the marketplace, Moore would be able to raise its contract prices by this same seven or eight percent. Hausman postulated this effect to be the sine qua non of substantially lessened competition. The Court will assume Wallace has preliminarily established that when Moore competes against Wallace for LFICwMLs, those customers will receive a lower price than if the two entities did not compete. However, the Court cannot credit Hausman's other empirical assertions, unsupported by market share data, that no matter how broadly or narrowly one defines the market, there would be a substantial lessening of competition post-acquisition. Hausman cannot draw his conclusion in a vacuum; [HN66](#)[¹] market definition provides the necessary context within which the lessening *vel non* of competition must be evaluated. [*United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593, 1 L. Ed. 2d 1057, 77 S. Ct. 872 \(1957\)*](#).

The Court is unaware of any precedent where a substantial lessening of competition was found without regard to definition of a relevant [**117] product market, submarket, market share, or market concentration. To the contrary, [HN67](#)[¹] an antitrust plaintiff cannot prevail by simply alleging a lessening of competition within a limited subset of customers; plaintiff must also evaluate the significance of this impact in the "universe" of the relevant product market. [*United States v. Gillette Co., 828 F. Supp. 78, 83 \(D.D.C. 1993\)*](#). Here, as stated above, Wallace has not shown any probability of establishing its proposed submarket of LFICwML within the entire U.S. business forms industry; the only realistic market definition supported by the evidence, at least at this stage of the litigation, is the broad U.S. forms industry. The Court is willing to assume *arguendo* that there is a subset of LFICwMLs that would only look to Moore, Standard Register, or Wallace for [*1582] their forms and forms-management services, and that these will pay higher prices if there is a Moore takeover of Wallace. Even so, Wallace's failure to show that the lessening of competition for these customers would have the effect of substantially lessening competition in the overall relevant product market is fatal.

Similarly, the Court is willing to assume as true [**118] that if Moore were to merge with Wallace, Moore's arch-rival in the technology and service arena would be removed from the competitive mix. However, the evidence showed that other competitors are "attempting to create similar services" to the WIN system, Tr. 256-57, some of which "compete[] favorably with WIN," PX 128 at 2. Moore has demonstrated that it views competitors other than Wallace as posing real and significant competitive threat; it therefore unlikely that Moore will be content with the status quo in terms of staying competitive on the technological and service fronts.

In short, the uncontested evidence shows that the relevant product market in this case is currently unconcentrated and will remain so even if Moore acquires Wallace. HHI calculations confirm that the merger falls within the safe harbor as defined by the Department of Justice Merger Guidelines. In addition, most likely stymied by both lack of time and the transitional nature and state of flux of the forms industry, Wallace did not present a requisite showing under decisional law that competition in the relevant product market will be substantially lessened in the event of a Moore takeover. Accordingly, [**119] the Court finds that Wallace has failed to show a likelihood of success on the merits of its Section 7 Clayton Act counterclaim.

3. Irreparable Injury and Harm to Public Interest

Wallace has presented uncontested testimony that customers have deferred their award of contracts to Wallace because of the uncertainty of the pending takeover offer. If these customers eventually choose other vendors, Wallace will certainly suffer the damage in the form of lost profits. Moreover, Wallace correctly asserts if Wallace is merged into Moore, Moore will gain access to its proprietary computer technology, thereby negating its technological advantage and consequent competitive superiority. The Wallace technological and correlative competitive superiority could never be reclaimed if an eventual trial should result in a finding that Moore violated Section 7 of the Clayton Act. In contrast, the injury Moore would suffer if the merger were preliminarily enjoined on antitrust grounds is loss of incremental profit anticipated by reason of the merger. The Court concludes that if the merger goes through and there is no injunction, Wallace will suffer far more irreparable injury than Moore.

Those [**120] form intensive customers with multiple locations who require the full panoply of forms and form services, which can only be met by Moore, Wallace and Standard Register, will incur higher costs if in fact there is a merger of Moore and Wallace. In that sense, since those customers are part of the public, the public interest would be served by grant of an injunction.

4. Balancing of All Four Preliminary Injunction Factors

The Court has found Wallace has failed to satisfy the first criteria for grant of injunctive relief in that it has not demonstrated a likelihood it will prevail on the merits at a final hearing. However, the Court has found Wallace did carry its burden in demonstrating that the irreparable harm it will suffer far exceeds the irreparable injury to Moore if the injunction does not issue. Similarly, the fact that there will be a decrease in competition for even a limited subset of business forms customers weighs in favor of finding that Wallace has carried its burden in demonstrating the public interest will be served if an injunction were granted on antitrust grounds.

[AT&T Co. v. Winback and Conserve Program Inc., 42 F.3d 1421, 1429 \(3d Cir. 1974\)](#), instructs [**121] that "the HN68[] injunction should issue only if the plaintiff (movant for the injunction) produces evidence sufficient to [*1583] convince the district court that all four ²⁸ factors favor preliminary relief." In a footnote in the same opinion, the above-quoted language was blunted with the instruction that the "district court should award preliminary injunctive relief only upon weighing all four factors." [Id. at 1427, n.8](#). Weighing all four factors and recognizing that three of the criteria counsel for issuance of the injunction, the fact remains that without both a probability of success on the merits and irreparable injury to the movant, a preliminary injunction should not issue. Accordingly, if the entire section IV(B) were not dicta, an order would be entered denying the Wallace motion for preliminary injunction.

V. CONCLUSION

The Court has found Wallace carried its burden under the *Unocal*/enhanced [**122] judicial scrutiny test and Moore has not rebutted the presumption that the Wallace Board acted properly under the Business Judgment Rule in refusing to redeem its poison pill. As a consequence, an order will be entered denying Moore's motion for preliminary injunction.

The Court has also held a target in a hostile tender offer cannot challenge a proposed merger with the acquirer on the ground the merger would violate federal antitrust laws because it lacks antitrust standing. In order to facilitate appellate review in the event the Third Circuit Court of Appeals were to hold a target does have antitrust standing, this Court concluded that the requested Wallace injunction should not issue.

An order will be entered denying Moore's motion for preliminary injunction and granting Moore's motion to dismiss the Wallace antitrust counterclaim.

²⁸ Relativity of harm to the plaintiff and defendant has been combined into one factor in the text.

ORDER

At Wilmington this 4th day of December, 1995, for the reasons set forth in the accompanying Opinion issued this date,

IT IS ORDERED:

1. Plaintiff's motion for preliminary injunction is denied.
2. Plaintiff's motion to dismiss the defendant Wallace's antitrust counterclaim is granted.
3. Defendants' motion for preliminary injunction **[**123]** is denied as moot.

Murray M. Schwartz

United States District Judge

End of Document



Santiago v. Connecticore Inc.

Superior Court of Connecticut, Judicial District of Hartford, At Hartford

December 6, 1995, Decided ; December 12, 1995, Filed

NO. CV93 - 0704032 S

Reporter

1995 Conn. Super. LEXIS 3523 *; 1995 WL 780934

JOANNE SANTIAGO, D.C. v. CONNECTICORE INC., ET AL.

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

preemption, state law, plans, summary judgment, chiropractic, provider, benefits, cases, counts, employee benefit plan, antitrust, entities, network, issue of material fact, initial burden, rule of reason, state statute, membership, preempted, relations, factors, courts

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

A motion for summary judgment must not be granted if there is a genuine issue of material fact.

Constitutional Law > Supremacy Clause > Federal Preemption

Insurance Law > ... > ERISA > Preemption Clause > Bad Faith & Misrepresentation

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

Constitutional Law > Supremacy Clause > General Overview

Insurance Law > ... > ERISA > Preemption Clause > General Overview

Pensions & Benefits Law > ERISA > Federal Preemption

Pensions & Benefits Law > ERISA > Federal Preemption > General Overview

HN2 [down arrow] **Supremacy Clause, Federal Preemption**

Section 1144 of the Employment Retirement Income Security Act, 29 U.S.C.S. § 1001 et seq., in part states that ERISA shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. Section 1144(c) provides and the Supremacy Clause of the federal constitution requires that the term "state laws" includes any state statute, regulation, common law ruling or other state action.

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

Pensions & Benefits Law > ERISA > Federal Preemption

Pensions & Benefits Law > ERISA > Federal Preemption > General Overview

HN3 [down arrow] **Federal Preemption, State Laws**

The reach of federal preemption under 29 U.S.C.S. § 1144(a) is described in broad language. A state law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection or reference to such a plan. A court's analysis of this problem must be guided by a respect for the separate spheres of governmental authority preserved in our federalist system.

Insurance Law > ... > ERISA > Preemption Clause > Bad Faith & Misrepresentation

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

Pensions & Benefits Law > ERISA > General Overview

Pensions & Benefits Law > ERISA > Federal Preemption

Pensions & Benefits Law > ERISA > Federal Preemption > General Overview

HN4 [down arrow] **Preemption Clause, Bad Faith & Misrepresentation**

There are a variety of factors when determining whether a state statute of general application "relates to" Employment Retirement Income Security Act (ERISA) plans. These factors include whether the state law negates an ERISA plan provision, whether the state law affects relations between primary ERISA entities, whether the state law impacts the structure of ERISA plans, whether the state law impacts the administration of ERISA plans, whether the state law has an economic impact on ERISA plans, whether preemption of the state law is consistent with other ERISA provisions, and whether the state law is an exercise of traditional state power. The court must still look to the totality of the state statute's impact on the plan - both how many of the factors favor preemption and how heavily each individual factor favors preemption are relevant. No one factor is controlling. Merely because a state law or cause of action represents a traditional exercise of state power will not dictate a finding that there is no ERISA preemption. Likewise just because a particular law does not affect relations between primary ERISA plan entities

should not be controlling. A primary concern must be whether the state law or state common law or statutory action affects the structure, the administration or the type of benefits provided by an ERISA plan.

Pensions & Benefits Law > ERISA > Federal Preemption

HN5 ERISA, Federal Preemption

If a state law or cause of action does not affect the structure of an Employment Retirement Income Security Act plan or administration or type of benefits mere economic impact does not require a finding of preemption.

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

Pensions & Benefits Law > ERISA > Federal Preemption

HN6 Federal Preemption, State Laws

A state rule of law may be preempted even though it has no such direct nexus with or is not purposely aimed at Employment Retirement Income Security Act (ERISA) plans if its effect is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN7 Types of Contracts, Covenants

Every contract carries an implied covenant of good faith and fair dealing.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN8 Public Enforcement, State Civil Actions

Connecticut's anti-trust statute is set forth in [Conn. Gen. Stat. § 35-28](#), and the judicial interpretation of the federal act is particularly pertinent in a court's construction of the state statute.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In determining whether a challenged activity constitutes an unreasonable restraint on trade the courts use a per se analysis or a rule of reason analysis. A per se analysis is used only in a limited class of cases - a court must conclude that 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 the need for further examination. Most cases fall outside these narrow categories held to be illegal per se. In the general run of cases a plaintiff must prove an antitrust injury under the rule of reason. Under this test the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN10 [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Rule of reason analysis requires the antitrust plaintiff to bear the initial burden of demonstrating that the defendant's conduct or policy has had a substantially harmful effect on competition. The plaintiff may satisfy this burden without detailed market analysis by offering proof of actual detrimental effects, such as a reduction of output. It is only after that initial burden is met that the antitrust defendant must offer evidence to exonerate its conduct such as pro competitive justifications for its conduct.

Judges: Thomas Corradino, Judge

Opinion by: Thomas Corradino

Opinion

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant Connecticcare has moved for summary judgment on three of the counts of the plaintiff's complaint, second count (state antitrust law), third count (breach of implied covenant of good faith and fair dealing), Fourth count (CUTPA violation).

Connecticcare is engaged in providing health care coverage to groups of employees through benefit plans sponsored by employees. It contracts with employers to provide health care. The plaintiffs formerly were providers of chiropractic services in the defendant's health provider network. In 1990 the defendant began to consider the formation of an independent practice association (IPA) as an alternative to the existing individual contractual relationships with chiropractors - chiropractic treatment of subscribers would be limited to a single chiropractic group. One of the plaintiffs, Dr. Curry, was elected vice chairman and [*2] the committee was organized to determine standards of membership in the prospective chiropractic group.

The defendant corresponded with providers who at the time where chiropractic providers; information was requested from these individuals.

The committee decided to set up an IPA and to that end organized and incorporated Connecticut Chiropractic care, P.C. (C.C.C.). Credentials and standards were adopted by CCC. Certain chiropractors were chosen initially and future membership determinations were to be based on agreed upon credential standards. The plaintiffs were not selected by CCC for membership and this can longer participate in the defendant's restructured provider network.

The plaintiffs maintain, and support their position by affidavit, that the defendant Connecticcare did play a role in the decision as to who would participate in the determination as to who would participate in the IPA. The plaintiffs

assert by way of affidavit that a document generated by the defendant showed "high utilizers" - utilization refers to the cost per patient per visit and the number of visits per year. Dr. Curry was informed that high utilizers wouldn't be accepted in the I.P.A. Some of those [*3] accepted had higher utilization rates than those of the plaintiffs. At a meeting of prospective IPA member chiropractors a map of the state was displayed showing pins placed on certain cities. Later the defendant and CCC informed the plaintiff Santiago she would not be offered an IPA contract based on a review of geographical need and participation criteria. Dr. Santiago's practice is located in the same town as Dr. Owens who was a member of the CCC board of directors and who was thus in the IPA. As noted the plaintiffs assert the defendant did participate in determining who would be allowed in the IPA.

The defendant by affidavit asserts it only provided logistical and administrative support to CCC pursuant to a contract but denies participating in selecting the chiropractors who would be let into the IPA and did not require CCC that include or exclude certain individuals from membership.

The rules to be applied in summary judgment matters are wellknown. Such [HN1](#) a motion must not be granted if there is a genuine issue of material fact.

The motion for summary judgment claims that the second, third and fourth counts brought against Connecticare are barred by the federal act known as ERISA [*4] and also that as a matter of state law the causes of action in the three counts cannot be maintained and no genuine issue of material fact bars the granting of summary judgment on these counts.

The ERISA preemption claim appears to be based on an analysis the allegations of the complaint and the relief sought. This issue appears to be resolvable as an issue of law and, at least to the court, it does not appear that the plaintiffs claim an issue of material fact prevents the granting of the motion - they argue, as a matter of law there is no ERISA preemption. The plaintiffs do maintain the three counts should not be dismissed on state law grounds because there exist genuine issues of material fact.

(1)

ERISA PREEMPTION

The first issue that must be discussed by the court is whether the Employment Retirement Income Security Act (ERISA), [29 USC § 1001 et seq.](#), and specifically [§ 1144 \(a\)](#) of that act preempts the state law claims made by the plaintiffs in this case. [HN2](#) [Section 1144](#) in relevant part states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." [Section 1144\(c\)](#) provides and the [Supremacy Clause](#) [*5] of the federal constitution requires that the term "state laws" includes any state statute, regulation, common law ruling or other state action.

[HN3](#) The reach of federal preemption under [§ 1144 \(a\)](#) has been described in broad language. In [Shaw v. Delta Airlines Inc.](#) [463 U.S. 85, 96-97, 77 L. Ed. 2d 490, 103 S. Ct. 2890 \(1982\)](#), the court said: "A (state) law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection or reference to such a plan." This broad language must be tempered for as the court said in [Alessi v. Raybestos-Manhattan, Inc.](#), [451 U.S. 504, 522, 101 S. Ct. 1895, 68 L. Ed. 2d 402 \(1980\)](#): "Our analysis of this problem must be guided by a respect for the separate spheres of governmental authority preserved in our federalist system." In a recent case Justice Souter in referring to [§ 1144 \(a\)](#) added an even more dramatic flourish by saying "we . . . have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law." [New York Blue Cross v. Travelers Insurance](#), [514 U.S. , 115 S. Ct. 1671, 131 L.Ed 2d 695, 704 \(1995\)](#) However, it is difficult to see how Congress could [*6] have used clearer language than that set forth in [§ 1144 \(a\)](#). Also even in these days when the philosophy of Federal retrenchment seems so far advanced Justice Souter in the end quoted with approval language in an earlier case, [Ingersoll-Rand v. McClendon](#), [498 U.S. 133, 142, 112 L. Ed. 2d 474, 111 S. Ct. 478 \(1992\)](#). There the court said that in enacting the statute Congress intended:

"to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." [Ingersoll-Rand, 498 U.S. at 142, 112 L. Ed. 2d 474, 111 S. Ct. 478.](#)

This echoes the statement of a Senator quoted in [Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56, 95 L. Ed. 2d 39, 107 S. Ct. 1549 \(1987\)](#) who said: "The uniformity of decision which the act is designed to foster will help administrators, fiduciaries and participants to predict [*7] the legality of proposed actions without the necessity of reference to varying state laws."

In deed as Justice Souter notes at page 706 of *New York Blue Cross v. Travelers Ins.*: "The basic thrust of the preemption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."

The question really becomes what type of litigation based on state statute or common law should be held to interfere with the administration of an employee benefit plan? For preemption to be found then two issues must be addressed: (1) what does the "administration" of such a plan mean and (2) assuming we establish a definition for that term what type and/or degree of state interference is permissible without a finding of preemption.

There are scores of Federal cases that struggle with the issue of preemption and the analysis is confused because of the broad range of employee benefit plans covered by ERISA. They range from pension to health plans. Often then it is not helpful to cull out language in one case or another that might be said to define what the administration of a plan means in one context and apply it to a different [*8] factual setting.

In a triumph of understatement the court in *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, 947 F.2d 1341, 1344* (CA 8, 1991) said that [Shaw v. Delta Airlines Inc., supra](#) doesn't "provide courts with a fool-proof method for determining on which side of the preemption line a specific state statute falls." But the court then goes on to provide a helpful review of the cases and some general principles that should be considered in deciding the issue of Federal preemption under ERISA. The court notes that Federal cases:

"have relied on [HN4](#)[↑] a variety of factors when determining whether a state statute of general application 'relates to' ERISA plans. These factors include whether the state law negates an ERISA plan provision, [Baxter v. Lynn, 886 F.2d 182, 185 \(8th Cir. 1989\)](#), whether the state law affects relations between primary ERISA entities, [Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 556 \(6th Cir. 1987\)](#); [Sommers Drug Stores v. Corrigan Enters, 793 F.2d 1456, 1467 \(5th Cir. 1986\)](#), whether the state law impacts the structure of ERISA plans, [United Food & Commercial Workers v. Pacyga, 801 F.2d 1157, 1160 \(9th Cir. 1986\)](#), whether [*9] the state law impacts the administration of ERISA plans, [Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9-10, 107 S. Ct. 2211, 2216-17, 96 L. Ed. 2d 1 \(1987\)](#), whether the state law has an economic impact on ERISA plans, [Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 147-48 \(2d Cir. 1989\)](#), whether preemption of the state law is consistent with other ERISA provisions, [Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 832-40, 108 S. Ct. 2182, 2186-90, 100 L. Ed. 2d 836 \(1988\)](#), and whether the state law is an exercise of traditional state power, Aetna Life Ins. Co., 869, F.2d at 148; [Firestone Tire & Rubber Co., 810 F.2d at 555.](#)

This court agrees that all these factors can be relevant to an ERISA preemption analysis. Like any list of factors, however, they only serve to focus and clarify the court's analysis. The court must still look to the totality of the state statute's impact on the plan - both how many of the factors favor preemption and how heavily each individual factor favors preemption are relevant.

We do not believe that any one factor, by itself, is determinative of the ERISA preemption issue before the court today."

[*10] No one factor is controlling. Merely because a state law or cause of action represents a traditional exercise of state power won't dictate a finding that there is no ERISA preemption. Likewise just because a particular law does not affect relations between primary ERISA plan entities should not be controlling.

But as a 10th Circuit case has put it a primary concern must be whether the state law or state common law or statutory action affects the "structure, the administration or the type of benefits provided by an ERISA plan", [Airparts Co. v. Custom Benefit Services of Austin Inc., 28 F.3d 1062, 1065](#) (CA 10, 1994), see also [Hospice of Metro Denver Inc. v. Group Health Ins. of Okla, Inc., 944 F.2d 752, 753](#) (CA 10, 1991), [Rebaldo v. Cuomo, 749 F.2d 133, 139](#) (CA 2, 1984). In *Airparts* Co. the employers and trustees of a pension plan brought state law claims for negligence indemnity and common law fraud against a consultant to the plan administrators. The court noted the state law claims wouldn't have any effect on the plan entities who were united in seeking redress against the defendant. But the court went on to say: "Additionally, these claims will not affect, the [*11] structure and administration of the plan or type of benefits provided by the plan;" there was no effort to "modify the terms of the plan," 23 F.3d at 1066. The court went on to quote from [Joos v. Intermountain Health Corp., Inc., 25 F.3d 915, 917](#) (CA 10, 1994) which said: "If the elements of the ERISA plan are inherently part of the factual basis of the . . . lawsuit, the lawsuit is preempted in part because of the possibility of inconsistent or contradicting interpretations."

To ascertain whether a particular state law or suit would affect the structure, administration or the type of benefits of an ERISA plan one must not merely look at which entity - here Connectic平 - the litigation is aimed at but at the relief being sought. Here the plaintiffs seek inclusion in the provider network that certain of their patients' employee benefit plans utilize. As the defendant notes the provider network "is an integral part of, and established pursuant to the employee benefits plans of the plaintiffs' patients."

The recent case of *Hollis et al v. Agna*, 13 Conn. L. Rptr. 396 (1995) has a bearing on the issue now before this court. The factual setting and the issues presented are similar.

[*12] In that case a group of participants in a CIGNA health plan sued the defendant on a variety of state statutory claims. The basis of the claims was that the defendant had wrongfully excluded a physician from its list of participating physicians whose fees would be reimbursed under a private medical plan. The court at page 400 said: "This is in essence a complaint about plan administration. This is a core ERISA concern.

A moment's reflection will confirm why this is so. The preemption clause "was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." [Ingersoll-Rand Co. v. McClendon, supra, 498 U.S. at 142](#). Allowing state law actions like the one here would subject plans and plan sponsors to burdens not unlike those that the preemption clause seeks to foreclose. It is entirely foreseeable that different state courts, construing a wide array of state statutory provisions and common-law principles, might develop different substantive standards governing the circumstances [*13] under which health plans could remove physicians from their lists. This would, in the language of Ingersoll-Rand, require "the tailoring of plans . . . to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement." Id.

As in *Hollis* the relief sought here would permit an intervention into the very provider network the defendant administers.

From that perspective cases like [Aetna Life Insurance v. Borges, 869 F.2d 142](#) (CA 2, 1989) really are not on point or helpful to the resolution of the issue now before the court. There the plaintiff insurance company brought an action for declaratory and injunctive relief contending that the state improperly demanded the surrender under state escheat laws of \$ 2.5 million in uncashed checks and drafts under ERISA plans. The discussion of the court at 869 F.2d pages 145-147 is replete with comments that no preemption should be found where there is only a "peripheral" effect on a plan or there is some "minimal indirect impact on administration". In other words the court in *Borges*

assumed as a starting point that the state action did "not [*14] affect the structure, the administration or the type of benefits provided by an ERISA plan."

In other words the cases seem to say [HN5](#) if a state law or cause of action does not affect the structure of an ERISA plan or administration or type of benefits mere economic impact does not require a finding of preemption; thus see [*Aetna Life Insurance Co. v. Borges, supra, Mackey v. Lanier Collection Agency & Service Inc., 486 U.S. 825, 100 L. Ed. 2d 836, 108 S. Ct. 2182 \(1988\)*](#) (generally applicable garnishment law), [*Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 96 L. Ed. 2d 1, 107 S. Ct. 2211 \(1987\)*](#) (law lump sum severance payments when closing a plant), [*Rebaldo v. Cuomo, 749 F.2d 133*](#) (CA 2, 1984) (a law prescribing what hospitals can charge for in-patient care, thereby preventing plans from negotiating their own discount rates with hospitals), [*Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550*](#) (CA 6, 1987) (city tax of general application that effects employee contributions to benefit plans) But again that is not what is involved here - here the plaintiffs seek to be included in the provider network, directly affecting the administration of the plan and its benefits. [*15]

Similarly as noted in the *Arkansas Blue Cross, Blue Shield* case some courts have found that preemption is dictated when a state law affects relations between primary ERISA entities, [*Sommers Drug Stores v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1468*](#) (CA 5, 1986). Such laws would obviously affect the administration of the ERISA plan or its benefits. But so too would a state law or suit which, as here, would affect the delivery of plan benefits by the plan to beneficiaries even if the way that result is effected is through the relief sought in a suit brought by an "outside" entity against the plan, cf [*Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380 \(1985\)*](#).¹

[*16] Also while it is true that an important consideration must be whether the state law giving rise to the cause of action focuses specifically on ERISA benefit plans. cf [*Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 147*](#) (CA 2, 1989) (escheat law sought to be enforced applied to lost or abandoned property generally), "this does not end (the) inquiry, however. [HN6](#) A state rule of law may be preempted even though it has no such direct nexus with or is not purposely aimed at ERISA plans if its effect is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states," [*United Wire, Metal & Machine Health and Welfare Fund v. Morristown Memorial Hospital, 995 F.2d 1179, 1193*](#) (CA 3, 1993), see also *Erisa Preemption - State Law*, 121 L.ed 2d 783, 797-798 (1995) which cites [*Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 141, 112 L. Ed. 2d 474, 111 S. Ct. 478 \(1990\)*](#). That is exactly the situation here.

The plaintiffs also argue that a finding of preemption here would create an insulated legal world in [*17] which Connecticut's laws of general applicability wouldn't apply to the defendant. They cite [*DiPietro-Kay v. Interactive Benefits Corp., supra*](#) which quoted [*Rebaldo v. Cuomo, supra*](#) to the effect that ERISA can't be held to invalidate every state action that may increase the costs of operating these plans because otherwise the plans would be permitted to lead a "charmed existence that was never contemplated by Congress." [*825 F. Supp. at p. 462*](#). But *DiPietro-Kay* in rejecting the claim of preemption was dealing with an allegation that the defendant misrepresented and concealed the renewal protection rider on the plan from the employer who brought suit. Before making the above noted comment the court explicitly found that the plaintiff "does not challenge any action taken by (the defendant) in administering the plan, e.g. processing a claim or disbursing a benefit, nor do (the plaintiffs) claim any right under the plan, dispute its terms or attempt to modify it." The court went on to hold that the one time recovery sought by the plaintiff based on benefits it would've been provided with if it'd been allowed to take advantage of the

¹ Courts talk loosely about a particular state law or action as not being preempted because it does not affect the relations between primary ERISA entities when suits are brought by third parties against the plan. Thus [*Hospice of Metro-Denver v. Group Health Insurance, 944 F.2d 752, 756*](#) (CA 10, 1991) a health care provider was not preempted from bringing suit against a benefit plan for failure to make promised payment for services rendered. cf [*DiPietro-Kay v. Interactive Benefits Group, 825 F. Supp. 459, 462 \(D. Conn. 1993\)*](#). Actions of this type may have an economic impact on the plan but they don't affect the actual structure of the plan and its administration - the plan has been already set up and operates and there is simply a claim that it violated legal rights given to outside parties that such parties would have against any other entity to which they delivered services of a similar nature.

renewal protection rider would not "implicate [*18] the administration of the plan", [825 F. Supp. at p. 462](#). Having made these observations the court went on to conclude although there might be some economic impact on benefit plans by allowing such claims, that would not demand preemption. It was in this context that the court made the above referenced remarks now relied upon by the plaintiff. If the administration of the plan isn't affected, a de minimis increase in operating costs certainly don't dictate preemption. Here the plan is directly affected.

Also the fact that the plaintiffs are forestalled in asserting general remedies provided by state law won't defeat a finding of preemption when even a law of general application must be preempted because of its impact on an ERISA plan.

The point is that if preemption is found then the only remedy provided is a federal one and the point of the federal remedy is that it is provided to plan participants and beneficiaries, [29 USC § 1132](#). Given the broad fiduciary duties placed on plan administrators under the act and the power of the Secretary of HEW under § 1109 of the federal act to enforce those duties, I certainly can't say federal law doesn't provide adequate protection to plan [*19] participants for ensuring the adoption and implementation of an appropriate employee benefit plan. Third party providers and their interest in participation in a plan were not a concern the federal act meant to directly address.

Their exclusion would only become a concern of the Federal act if it could be shown that their exclusion somehow violated the fiduciary obligations of the plan administrators to the plain beneficiaries. If apart from that such exclusion is claimed to have been improper or illegal and no state or federal remedy is available due to preemption, perhaps a due process claim would be presented. But that is not before me.

In any event I find that the action brought in this case is preempted by ERISA. No genuine issue of material fact is presented since the allegations of the complaint and the relief sought properly raise the issue of preemption

(2)

NON ERISA CLAIMS FOR SUMMARY JUDGMENT

(a)

In the third count the plaintiffs allege the defendant violated an implied covenant of good faith and fair dealing owed to plan beneficiaries by failing to inform beneficiaries that it entered into a contract with a group of chiropractic physicians which they must use but [*20] with whom the defendant agreed to pay a lump sum each month for chiropractic services. [HN7](#) Every contract carries an implied covenant of good faith and fair dealing but it is difficult to understand how this theory can be relied upon here since there does not appear to be an underlying between the plaintiffs and Connecticare. Apart therefore from the court's ruling on ERISA preemption there is an independent ground to grant the defendant's motion for summary judgment on the third count. It should be noted, however, that the very allegations set forth in this count and in the second count, asserting CUTPA violations, underline the reasons why ERISA preemption must be found. Both counts base much of their factual allegations giving rise to their respective legal claims on the perceived effect that the actions of the defendant and a certain group of chiropractic physicians will have on plan beneficiaries. The plan administrators and the beneficiaries are certainly primary entities of the ERISA plan.

The defendant also raises a non-ERISA standing objection to the plaintiff's CUTPA claim in the second count. The plaintiffs do point out that the CUTPA claim does allege Connecticare breached [*21] obligations owed to prospective I.P.A. members - the plaintiffs themselves. On the state of the record before me I'm not prepared to say that summary judgment should be granted on the non-ERISA preemption claim of lack of standing as to the CUTPA count.

(b)

The fourth count of the complaint alleges that the defendant violated the state anti-trust act. The court has ruled that the claim is precluded by ERISA and will discuss whether apart from the ERISA grounds the defendant should prevail on its motion for summary judgment as to this count.

The plaintiffs allege the defendant conspired with chiropractic physician competitors of the plaintiffs to persuade or induce third parties - plan beneficiaries to utilize the services of other doctors than the plaintiffs. Their exclusion from membership in CCC would according to the plaintiff's allegations be a secondary boycott.

HN8 Our anti-trust statute is set forth in [§ 35-28](#) of the general statutes and regarding the interpretation of this statute our court has said: "the judicial interpretation of the federal act is particularly pertinent in our construction of the state statute," [*Elida v. Harinor Realty Corp., 177 Conn. 218, 226, 413 \[*22\] A.2d 1226 \(1979\)*](#).

A major contention of the defendant is that an essential element of an antitrust violation is the allegation that the concerted action imposes an unreasonable restrain on trade, see subsection (a) of the statute, [*State v. Hossan-Maxwell, Inc. 181 Conn. 655, 666, 436 A.2d 284 \(1980\)*](#).

HN9 In determining whether a challenged activity constitutes an unreasonable restraint on trade the courts use a per se analysis or a rule of reason analysis.

A per se analysis is used only in a limited class of cases - a court must conclude that a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they're conclusively presumed illegal without the need for further examination, [*Broadcast Music Inc. v. CBS, 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 \(1979\)*](#). As said in [*Capital Imaging v. Mohawk Valley Medical Assoc., 996 F.2d 537, 543 \(CA 2, 1993\)*](#).

"Most cases fall outside these narrow categories held to be illegal per se. In the general run of cases a plaintiff must prove an antitrust injury under the rule of reason. Under this test the plaintiff bears the initial burden of showing that [*23] the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice."

As the court noted the Supreme Court has cautioned against applying the per se rule to professional associations "because the economic impact of professional activities is difficult to track", [*id at page 543*](#).

Cases cited by the plaintiffs on other points raised in their brief support the application of a rule of reason test here, cf [*Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1491 \(CADC, 1984\)*](#), [*Wilk v. AMA, 895 F.2d 352, 359 \(CA 7, 1990\)*](#) but see [*Weiss v. York Hospital, 745 F.2d 786, 817 \(CA 3, 1984\)*](#). The underlying purposes sought to be effectuated by setting up the IPA and forming the CCC are not illegal, in fact they merely seek to control costs. Given that courts should be wary about creating per se rules in this area. Since I believe it is appropriate to use the rule of reason test to determine if there has been a sufficient showing of restraint of trade, it is helpful to examine the *Capital Imaging* case. That case involved a situation [*24] where the court of Appeals upheld the trial court's granting of the defendant's motion for summary judgment. Later on in the opinion at [*996 F.2d page 546*](#) the court said that in the summary judgment context the: **HN10** "Rule of reason analysis requires the antitrust plaintiff to bear the initial burden of demonstrating that the defendant's conduct or policy has had a substantially harmful effect on competition. The plaintiff may satisfy this burden without 'detailed market analysis' by 'offering proof of actual detrimental effects, such as a reduction of output.' The plaintiff in *Capital Imaging* had failed to meet its initial burden of showing that the defendant's activities have had an adverse impact on price, quality, or output of medical services offered to consumers in the relevant market. It is only after that initial burden is met that the antitrust defendant must offer evidence to exonerate its conduct such as pro competitive justifications for its conduct., [*996 F.2d at 547*](#).

My problem here is that the plaintiffs have not offered any evidence to meet their initial burden of showing an adverse impact on price, quality, or output of chiropractic services offered to consumers in [*25] the relevant market - i.e. the plan beneficiaries.² On this basis alone I conclude there is a non-ERISA basis for granting the defendant's summary judgment motion as to the fourth count.

²I will not discuss the other reasons advanced by the defendant as a non-ERISA basis for granting its motion as to the fourth count. Failure to establish this preliminary element warrants the granting of the motion.

In any event based on the ERISA analysis the court grants the defendant's motion for summary judgment as to all counts and also grants the motion as to the third and fourth counts on non-ERISA grounds.

Thomas Corradino, Judge

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American Chiropractic Clinics, P.C. v. Spence

Court of Appeals of Texas, Fifth District, Dallas

December 11, 1995, Opinion filed

No. 05-93-01971-CV

Reporter

1995 Tex. App. LEXIS 3110 *; 1995-2 Trade Cas. (CCH) P71,199

AMERICAN CHIROPRACTIC CLINICS, P.C. and PAUL LIECHTY, Appellants v. TERRY SPENCE, Appellee

Notice: [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

Subsequent History: Writ denied by, 07/08/1996

Rehearing of writ of error overruled, 08/16/1996

Prior History: On Appeal from the 298th Judicial District Court. Dallas County, Texas. Trial Court Cause No. 92-6584-M.

Disposition: AFFIRMED in part, REVERSED and RENDERED in part.

Core Terms

Chiropractic, no evidence, attorney's fees, partner, non competition agreement, damages, asserts, insufficient evidence, trial court, clinic, relevant market, profits, promise, six-month, overrule, employment contract, collection, parties, breach of contract, anti trust law, jury's finding, segregation, antitrust, financing, antitrust violation, present evidence, false representation, complaining party, rule of reason, great weight

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

[HN1](#) **Standards of Review, Substantial Evidence**

In reviewing no evidence points, the appellate court considers only the evidence and reasonable inferences drawn therefrom which support the jury's findings. The appellate court disregards all evidence and inferences contrary to the fact finding. If there is more than a scintilla of evidence to support the finding, the no evidence challenge fails.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

[HN2](#) **Standards of Review, Substantial Evidence**

In reviewing factual insufficiency points, the appellate court reviews all of the evidence in the record, including any evidence contrary to the verdict. It will set aside a jury's finding on the basis of a factual insufficiency or great weight and preponderance point only if it determines that the evidence is factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust, shocking to the conscience, or clearly demonstrating bias. If it is inclined to reverse on the basis of factual insufficiency or great weight and preponderance point, the appellate court must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN3 **Standards of Review, Substantial Evidence**

The appellate court must set forth in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. If it sustains a factual insufficiency or great weight and preponderance point, it can only remand the case. The Constitution empowers the courts of appeals to "unfind" facts, even if they cannot "find" them. The appellate court cannot substitute its interpretation of the evidence for that of the jury even if a different answer can be reached on the evidence.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Interpretation

HN4 **Antitrust & Trade Law, Sherman Act**

Tex. Bus. & Com. Code Ann. § 15.05(a) is interpreted consistent with the Sherman Antitrust Act § 1.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN5 **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful. Tex. Bus. & Com. Code Ann. § 15.05(a) (1987). A noncompetition agreement is a restraint on trade. Notwithstanding the broad language of § 15.05(a), it does not prohibit every contract in restraint of trade. Noncompetition agreements are not per se violations of § 15.05(a); therefore, they must be analyzed under the rule of reason. Only noncompetition agreements that unreasonably restrain trade are prohibited.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN6 **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

"The rule of reason" and "rule of reason" are terms of art in securities law. The terms refer to the test used to evaluate restraints of trade which are not per se violations of antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN7 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason test used in antitrust analysis is distinct from the reasonableness test applied to noncompetition agreements under [Tex. Bus. & Com. Code Ann. § 15.50](#) and common law. A noncompetition agreement may be unreasonable between the parties yet not violate the rule of reason test under [antitrust law](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN8 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Antitrust laws were enacted for the protection of competition, not competitors. Rule of reason analysis focuses on "the effect of the restraint on competition. This is distinguished from the effect a noncompetition agreement may have on the employee and employer.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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 facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

While many factors may be considered, the rule of reason focuses directly on the challenged restraint's impact on competitive conditions. The purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11 [blue icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To establish an antitrust violation, the complaining party must prove that the agreement has a substantial adverse effect on competition in the relevant market. Ordinarily, a plaintiff must delineate the relevant market and show that the defendant has enough market power to significantly impair competition. However, such a showing is not required if an actual, substantial, adverse effect on competition is proven.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN12 [blue icon] **Regulated Industries, Higher Education & Professional Associations**

A showing of adverse impact on a competitor will not support recovery for violation of the antitrust laws. To show a violation of the rule of reason, actual adverse impact on the relevant market must be shown. Further, the adverse impact must be considered in light of procompetitive or other redeeming effects the practice may have on the market. Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints. Limited restraints may actually enhance market-wide competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN13 [blue icon] **Regulated Practices, Market Definition**

A "relevant market" has both geographic and product dimensions. The geographic component is dependant upon the nature and extent of the alleged restraint and the product or products in issue. The geographic limits of a relevant market may exceed the geographic limit of a particular agreement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN14 [blue icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To a limited extent, the legislature exempts noncompetition agreements from antitrust laws. [Tex. Bus. & Com. Code Ann. § 15.50](#) (1995).

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN15 [blue icon] **Business Torts, Fraud & Misrepresentation**

In order to prevail on a fraud cause of action, the complaining party must prove that: (1) a material representation is made; (2) the representation is false; (3) when the speaker makes the representation, he knows it is false or makes it recklessly without any knowledge of its truth and as a positive assertion; (4) the representation is made with the intention that it should be acted upon by the complaining party; (5) the complaining party acts in reliance on the representation; and (6) the complaining party suffers injury as a result. A promise to do something in the future can be an actionable misrepresentation when it is made with no intention of performing the act.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN16 [blue icon] **Jury Trials, Province of Court & Jury**

Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given their testimony. A party's intent is determined at the time the representation is made; however, it may be inferred from the party's subsequent acts after the representation is made.

Civil Procedure > ... > Justiciability > Standing > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN17 [blue icon] **Justiciability, Standing**

Intent to defraud is generally not susceptible to direct proof. It almost invariably must be proven by circumstantial evidence. Standing alone, failure to perform is no evidence of the promisor's intent not to perform when the promise is made. However, failure to perform is a fact that a jury may consider in determining intent. A promisor's denial that he ever makes a promise is a fact showing no intent to perform when the promise is made; however, standing alone it is insufficient evidence to support a finding of lack of intent to perform. "Slight circumstantial evidence" of fraud, when considered with the breach of promise to perform, is sufficient to support a finding of fraudulent intent.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Remedies > Damages > General Overview

HN18 [blue icon] **Business Torts, Fraud & Misrepresentation**

The correct measure of damages for fraud is the actual amount of the complaining party's loss resulting directly and proximately from the fraud practiced upon him. A party may recover either out-of-pocket damages or benefit-of-the-bargain damages. Out-of-pocket damages are calculated as the difference between the value of that with which the

complaining party parted and the value of the thing received. Benefit-of-the-bargain damages are calculated as the difference between the value as represented and the value actually received. Speculative losses and lost profits are not recoverable in a fraud action.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

HN19 [blue icon] **Reviewability of Lower Court Decisions, Preservation for Review**

A party may not complain about an attorneys' fee award not being segregated when a broad form attorneys' fee question is submitted to the jury without objection.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN20 [blue icon] **Appeals, Appellate Jurisdiction**

The appellate court has the discretion, when it reverses and renders judgment in part, to remand the issue of attorneys' fee under the rules of appellate procedure. [Tex. R. App. P. 80\(c\)](#) and 81(c). It also has discretion to do so in the interest of justice.

Judges: Before Justices Barber, Morris, and Whittington. Opinion By Justice Barber

Opinion by: WILL BARBER

Opinion

OPINION ON MOTION FOR REHEARING

Opinion By Justice Barber

We deny the parties' motions for rehearing. We vacate our opinion and judgment of August 24, 1995. This is now the opinion of the Court.

American Chiropractic Clinics, P.C. and Paul Liechty (collectively ACC) appeal the judgment rendered against them for violation of Texas antitrust laws, fraud, and breach of contract. In seven points of error, ACC asserts the trial court erred in awarding Spence: (1) damages for violation of Texas **antitrust law** because there was no evidence that the noncompetition agreement(s) adversely affected competition; (2) damages under Texas **antitrust law** because there was no evidence or insufficient evidence that the noncompetition agreement(s) damaged Spence; (3) damages for fraud because there was no evidence [*2] or insufficient evidence showing Spence was defrauded; (4) damages for fraud because there was no evidence of damages; (5) damages for breach of contract because there was no evidence of damages; (6) attorney's fees because there was no evidence or insufficient evidence of segregation of fees between prosecution and defense of claims and causes of action; and (7) punitive damages because the fraud claim must be set aside.

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Paul Liechty is a chiropractor. In 1982, he formed American Chiropractic Clinics, P.C. (American Chiropractic). American Chiropractic is a professional corporation that owns and operates a clinic in Mesquite, Texas. Liechty also had ownership interests in clinics in Rockwall, downtown Dallas, north Dallas, and Duncanville.² Liechty is president of [*3] and a shareholder in American Chiropractic. The jury was instructed, without objection, that Liechty's wife, Sharon, was an officer of and shareholder in American Chiropractic.³

In February of 1989, Liechty contacted Spence about working for American Chiropractic. Spence made it clear that he was not looking for an associateship. Although the evidence conflicts as to when the agreement was reached and what its terms were, Liechty agreed to sell Spence a fifty-percent interest in American Chiropractic for between \$ 800,000 and \$ 1,000,000. Liechty and Spence agreed to a six-month "trial period" before proceeding with the purchase. Spence thought he would be made a "partner" in six [*4] months, or shortly thereafter.⁴ Liechty agreed to help Spence obtain financing for the purchase. At trial, the parties disagreed as to the type of financing Liechty agreed to arrange or provide. Spence and Liechty never executed any written documents regarding Spence's being made a partner.

Spence agreed to work for American Chiropractic, and signed a six-month employment contract. The term of this contract was March 1, 1989 though September 1, 1989. The contract contained a noncompetition agreement. Spence thought he would be made a partner at the end of the six-month period, or shortly thereafter. After the first contract expired, Spence continued to work for American Chiropractic for about six months. He then signed another six-month contract [*5] containing a noncompetition agreement. The second employment contract ran from March 1, 1990 through September 1, 1990.

Sometime between December of 1990 and March of 1991, Spence and Liechty met with Harlan Bilton of Swiss Avenue Bank to discuss financing Spence's purchase of a fifty-percent interest in American Chiropractic. The bank agreed to loan Spence the money for the purchase if the loan was secured by a certificate of deposit. Additionally, the bank proposed a series of loans, as opposed to a single loan, to finance the purchase. Liechty agreed to provide security for the loan. Spence rejected the loan package because he felt the proposed loan terms were not consistent with his and Liechty's agreement.⁵ Spence began planning to leave American Chiropractic and to open his own clinic.

[*6] Spence executed a third employment contract which ran from December 11, 1990 through April 1, 1991. The third employment contract contained a noncompetition agreement. The noncompetition clause encompassed the area within a ten-mile radius of the Mesquite clinic. The third employment contract also contained a nonsolicitation clause, as did the earlier employment contracts.

Numerous disputes arose between Liechty and Spence regarding compensation, partnership, health insurance, patient switching, and office administration. Liechty testified that after the third employment contract expired, he told Spence he did not want him working for American Chiropractic anymore. Liechty characterized the situation as not

¹ Conflicting evidence was presented on many of the matters set forth in this section. Generally, the facts are recited in a manner favorable to the jury's findings and the judgment rendered.

² Each of these clinics is a separate corporation. The record is unclear regarding the relationship between American Chiropractic and these other clinics. There is evidence showing that they shared a common payroll account and had joint staff meetings.

³ In his brief, Liechty states that he was the sole shareholder of ACC.

⁴ Throughout the trial, the parties referred to Spence being made a "partner." However, it is clear that the parties were contemplating a sale of 50% of the stock of American Chiropractic to Spence. We will follow the parties convention and speak in terms of partnership.

⁵ Spence also testified that at the time of the meeting with the bank, he had already decided that he was not going to become a partner with Liechty due to "other factors." He later recanted this and testified that he would have become a partner had acceptable financing been available.

renewing Spence's contract and not allowing him to work for American Chiropractic without one. Spence testified that he was fired.

After leaving American Chiropractic, Spence first worked for another chiropractor within the ten-mile noncompetition area. He also treated patients, some of whom were former ACC patients of his, in his home. Later, he opened his own office in Rockwall. Spence treated a number of patients in his Rockwall Clinic whom he had previously treated at American [*7] Chiropractic.

American Chiropractic sued Spence, seeking enforcement of the noncompetition and nonsolicitation provisions of the employment agreement and for breach of contract. American Chiropractic also sought injunctive relief. Spence counter-claimed, and sued Paul and Sharon Liechty as third-party defendants. In his petition, Spence sought recovery for breach of contract, breach of fiduciary duty, fraud, and antitrust violations.

The trial court found that the ten-mile geographical radius of the noncompetition clause was unreasonable and reduced it to a five-mile radius from the Mesquite clinic.⁶ The case was tried to a jury. Pursuant to the jury's verdict, the trial court signed a judgment against Liechty for antitrust violations, fraud, and punitive damages. The trial court entered judgment against American Chiropractic for breach of contract, antitrust violations, attorney's fees, and punitive damages. The trial court signed a judgment against Liechty and ACC jointly and severally for fraud. The judgment also awarded Spence punitive damages of \$ 10,000 against American Chiropractic and Liechty severally. American Chiropractic took nothing on its claims against Spence. Pursuant [*8] to the trial court's judgment non obstante veredicto, Spence took nothing on his claims against Sharon Liechty.

STANDARD OF REVIEW: SUFFICIENCY OF THE EVIDENCE

A. No Evidence

HN1[] In reviewing no evidence points, we consider only the evidence and reasonable inferences drawn therefrom which support the jury's findings. See [Phillips v. ACS Mun. Brokers, Inc., 888 S.W.2d 872, 874 \(Tex. App.--Dallas 1994, no writ\)](#). We disregard all evidence and inferences contrary to the fact finding. [Stafford v. Stafford, 726 S.W.2d 14, 16 \(Tex. 1987\)](#); [Phillips, 888 S.W.2d at 874](#). If there is more than a scintilla of evidence to support the finding, the no evidence challenge fails. [Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d \[*91 486, 488 \(Tex. 1979\)](#).

B. Insufficient Evidence

HN2[] In reviewing factual insufficiency points, we review all of the evidence in the record, including any evidence contrary to the verdict. [Plas-Tex., Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 \(Tex. 1989\)](#); [R____ S____ v. J____ B____ B____, 883 S.W.2d 711, 715 \(Tex. App.--Dallas 1994, no writ\)](#). We will set aside a jury's finding on the basis of a factual insufficiency or great weight and preponderance point only if we determine that the evidence is factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust, shocking to the conscience, or clearly demonstrating bias. [Ames v. Ames, 776 S.W.2d 154, 159 \(Tex. 1989\)](#)(quoting [Pool v. Ford Motor Co., 715 S.W.2d 629, 635 \(Tex. 1986\)](#)), cert. denied, 494 U.S. 1080, 108 L. Ed. 2d 939, 110 S. Ct. 1809 (1990); see also [Pilkington v. Kornell, 822 S.W.2d 223, 230-31 \(Tex. App.--Dallas 1991, writ denied\)](#). If we are inclined to reverse on the basis of factual insufficiency or great weight and preponderance point, we must "detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is [*10] so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or

⁶ Appellants do not challenge the trial court's modification of the noncompetition provision and we express no opinion on it. Over Spence's objection, the jury was not advised of the trial court's modification of the geographical scope of the noncompetition agreement.

clearly demonstrates bias." *Pool*, 715 S.W.2d at 635. Additionally, [HN3](#)⁷ we must set forth in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *Id.* If we sustain a factual insufficiency or great weight and preponderance point, we can only remand the case. "Our present Constitution empowers the courts of appeals to 'unfind' facts, even if they cannot 'find' them." *Id. at 634*. We cannot substitute our interpretation of the evidence for that of the jury even if a different answer could be reached on the evidence. *R*___ *S*___, 883 S.W.2d at 715; see *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988).

ANTITRUST

In its first point of error, ACC asserts the trial court erred in entering judgment against American Chiropractic for antitrust violations. ACC argues there was no evidence that the noncompetition provisions of Spence's employment contracts or the other associate doctors' contracts adversely affected competition.

A. Applicable Law ⁷

[*11] "[HN5](#)⁸ Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful." *TEX. BUS. & COM. CODE ANN. § 15.05(a)* (Vernon 1987).⁸ A noncompetition agreement is a restraint on trade. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990), cert. denied, 498 U.S. 1048, 112 L. Ed. 2d 775, 111 S. Ct. 755 (1991). Notwithstanding the broad language of [section 15.05\(a\)](#), it does not prohibit every contract in restraint of trade. *Id. at 687*. Noncompetition agreements are not per se violations of [section 15.05\(a\)](#); therefore, they must be analyzed under the rule of reason.⁹ *Id. at 688*. Only noncompetition agreements that unreasonably restrain trade are prohibited. *Id. at 687*.

[HN7](#)¹⁰ The rule of reason test used in [*12] antitrust analysis is distinct from the reasonableness test applied to noncompetition agreements under [section 15.50](#) and common law. *Id. at 688*. A noncompetition agreement may be unreasonable between the parties yet not violate the rule of reason test under [antitrust law](#). *Id.*

[HN8](#)¹¹ Antitrust laws were enacted "for the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962); accord *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). Rule of reason analysis focuses on "the effect of the restraint on competition." *DeSantis*, 793 S.W.2d at 688; accord *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984). This is distinguished from the effect a noncompetition agreement may have on the employee and employer. See *DeSantis*, 793 S.W.2d at 688.

The rule of reason is a standard used to determine the legality of restraints on commerce. *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 769 S.W.2d 339, 342 (Tex. App.--Houston [1st Dist.] 1989, no writ). The basic parameters of the test were set forth by Justice Brandeis in his often-cited opinion in [*13] *Board of Trade of Chicago v. United States*, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918).

⁷ [HN4](#)¹² [Section 15.05\(a\) of the business and commerce code](#) is interpreted consistent with section 1 of the Sherman Antitrust. *DeSantis v. Wackenhut*, 793 S.W.2d 670, 687 (Tex. 1990), cert. denied, 498 U.S. 1048, 112 L. Ed. 2d 775, 111 S. Ct. 755 (1991); see *TEX. BUS. & COM. CODE ANN. § 15.04* (Vernon 1987) (Texas antitrust laws "shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes . . ."). The supreme court has referred to [section 15.04](#) as legislative mandate. *Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 505 (Tex. 1995). Thus, we will rely on federal authority to supplement the available Texas authority on antitrust issues.

⁸ All future references will be to the Texas Business and Commerce Code unless otherwise indicated.

⁹ [HN6](#)¹³ "The rule of reason" and "rule of reason" are terms of art in securities law. The terms refer to the test used to evaluate restraints of trade which are not per se violations of antitrust laws.

HN9[] The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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.

Board of Trade of Chicago, 246 U.S. at 238. **HN10**[] While many [*14] factors may be considered, the rule of reason focuses directly on the challenged restraint's impact on competitive conditions. National Soc'y of Professional Eng'r's v. United States, 435 U.S. 679, 688, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978). "The purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." Id. at 692.

HN11[] To establish an antitrust violation, the complaining party must prove that the agreement has a substantial adverse effect on competition in the relevant market. MJR Corp. v. B & B Vending Co., 760 S.W.2d 4, 22-23 (Tex. App.--Dallas 1988, writ denied); see Plueckhahn v. Farmers Ins. Exch., 749 F.2d 241, 246 (5th Cir.), cert. denied, 473 U.S. 905, 87 L. Ed. 2d 652, 105 S. Ct. 3527 (1985); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir.), cert. denied, 502 U.S. 994, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991). Ordinarily, a plaintiff must delineate the relevant market and show that the defendant has enough market power to significantly impair competition. Bhan, 929 F.2d at 1413; see Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 17-18, 31-32, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). However, [*15] such a showing is not required if an actual, substantial, adverse effect on competition is proven. Federal Trade Comm'n v. Indiana Fed. of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986); Bhan, 929 F.2d at 1413.

HN12[] A showing of adverse impact on a competitor will not support recovery for violation of the antitrust laws. See Consolidated Metal Prods. v. American Petroleum Inst., 846 F.2d 284, 293 (5th Cir. 1988); see DeSantis, 793 S.W.2d at 688. To show a violation of the rule of reason, actual adverse impact on the relevant market must be shown. DeSantis, 793 S.W.2d at 688. Further, the adverse impact must be considered in light of procompetitive or other redeeming effects the practice may have on the market. See National Collegiate Athletic Ass'n, 468 U.S. at 103; Plueckhahn, 749 F.2d at 246; Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc., 647 F. Supp. 292, 296 (S.D. Tex. 1986). "Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints." Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 23, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979). Limited restraints may [*16] actually enhance market-wide competition. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-57, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977).

HN13[] A "relevant market" has both geographic and product dimensions. See Bhan, 929 F.2d at 1413. The geographic component is dependant upon the nature and extent of the alleged restraint and the product or products in issue. See Jefferson Parish, 466 U.S. at 7-8. The geographic limits of a relevant market may exceed the geographic limit of a particular agreement. See Bhan, 929 F.2d at 1413.

In determining whether the subject noncompetition agreements give rise to an antitrust violation, we must be mindful of the position that the Texas Legislature has taken with respect to noncompetition agreements and antitrust. At least **HN14**[] to a limited extent, the legislature has exempted noncompetition agreements from antitrust laws. See TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1995).¹⁰ From this we may infer that

¹⁰ Section 15.50 provides:

the legislature has determined that the anticompetitive consequences of reasonable noncompetition agreements are outweighed by their overall desirability.

[*17] B. Application of Law to Facts

With respect to the alleged antitrust violation, the jury was instructed that it "must consider all the evidence in the case and the economic effects upon competition of ACC's and the Liechty's practice of placing the covenants-not-to-compete in their associate doctor's [sic] contracts." Evidence presented at trial showed that when considered together, the noncompetition agreements of the associate doctors could cover Dallas. For purposes of evaluating the sufficiency of the evidence, the geographic scope of the relevant market is Dallas. Spence's position is that the product in issue is chiropractic care.¹¹ Spence argues the noncompetition agreements wrongfully exclude chiropractic physicians from the relevant market.

[*18] The record before us contains no evidence regarding the availability of chiropractors or chiropractic care in the relevant market. Spence introduced evidence showing that in the ten years prior to the trial, Liechty had approximately thirty associate doctors sign covenants not to compete. However, Spence presented no evidence showing how many of those covenants were in effect at any given time. There is no evidence establishing how many chiropractic physicians practice in Dallas or within a five or ten mile radius of the Mesquite clinic. There is no evidence showing what percentage of the chiropractic care market was controlled by ACC in Dallas or anywhere else. Thus, there was no evidence showing that ACC had market power to significantly impair competition in Dallas or within a five or ten mile radius of the Mesquite clinic.

Spence presented evidence showing that his rates were lower than those charged by ACC; however, Spence did not establish what the prevailing rates were generally in Dallas. The record contains no evidence linking the noncompetition agreements to the price or availability¹² [*20] of chiropractic services and physicians in Dallas.¹³ Spence did present evidence [*19] indicating that a chiropractic physician who was required to move outside a ten-mile radius of a clinic might never return to practice within that area. This evidence may show the effect the noncompetition agreements had on certain potential competitors. However, to be violative of the antitrust laws

Notwithstanding [Section 15.05](#) of this code, a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Because the trial court reformed the geographical scope of the subject non-competition agreement and because ACC makes no argument on appeal on the basis of [section 15.50](#), we express no opinion as whether [section 15.50](#) affects this case beyond being an indicia of legislative intent and public policy. See *De Santis*, 739 S.W.2d at 688 n.9.

¹¹ However, an argument could be made that the product was chiropractic physicians. See [Bhan, 929 F.2d at 1413](#). As will be shown below, we need not determine which product(s) is in issue as it would not affect our disposition of Spence's antitrust claim.

¹² The record does contain evidence showing that most patients obtain their chiropractic care within five miles of their homes. However, as Spence did not present any evidence establishing the availability of chiropractic care generally in Dallas or around the Mesquite clinic, that was no evidence of anticompetitive effect on the relevant market. Further, the evidence showed that a number of patients Spence treated at the Mesquite clinic sought and obtained chiropractic care from Spence outside the ten-mile noncompetition area and outside Dallas. Spence testified that his patients would travel ten miles to see him.

¹³ In his appellate brief, Spence discusses certain billing practices and treatment plans ACC used with various insurance companies and patients. Spence's position is that these billing practices and treatment plans were improper in that they resulted in excessive charges and unnecessary treatment. Spence asserts, "the jury could have concluded that ACC was better able to pull off such a scheme if it avoided competition from the departing doctors who were aware of it." There is no evidence linking the subject practices to ACC's market power, the noncompetition agreements, or the cost or availability of chiropractic care in the relevant market; therefore, the practices were not evidence of anticompetitive affect on the relevant market.

effect on competition in the relevant market must be shown. See [DeSantis, 793 S.W.2d at 688](#). Spence presented no evidence establishing what actual effect the noncompetition agreements had on the price or availability of chiropractic care in the relevant market. Spence failed to produce legally sufficient evidence showing that ACC had market power or that the noncompetition agreements had a substantial enough impact on the relevant market to constitute a violation of the [section 15.05\(a\)](#). We sustain ACC's first point of error. Because of our disposition of ACC's first point of error, we do not reach its second point of error which also challenged the antitrust award. See TEX. R. APP. P. 90(a).

FRAUD

In its third point of error, ACC asserts there was no evidence or insufficient evidence to support the jury's finding that it defrauded Spence. Specifically, ACC asserts there was: (1) no evidence or insufficient evidence showing that ACC made false representations; (2) no evidence of justifiable reliance; (3) no evidence or insufficient evidence [*21] of fraudulent intent; and (4) factually insufficient evidence that ACC's representations caused Spence damage.

Generally, [HN15](#) in order to prevail on a fraud cause of action, the complaining party must prove that: (1) a material representation was made; (2) the representation was false; (3) when the speaker made the representation, he knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that it should be acted upon by the complaining party; (5) the complaining party acted in reliance on the representation; and (6) the complaining party suffered injury as a result. [Trenholm v. Ratcliff, 646 S.W.2d 927, 930 \(Tex. 1983\)](#); see [DeSantis, 793 S.W.2d at 688](#). A promise to do something in the future can be an actionable misrepresentation when it is made with no intention of performing the act. [T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 222 \(Tex. 1992\)](#); [Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 434 \(Tex. 1986\)](#).

A. Misrepresentations

In its appellate brief, ACC's argument centers on the representation regarding financing the loan and the [*22] loan Swiss Avenue Bank offered. ACC does not address the other representations which Spence asserted were false. The jury charge did not specify the representations which might have been false.¹⁴

¹⁴ With respect to fraud, the jury was charged as follows:

Do you find that Paul Liechty or ACC fraudulently induced Spence into going to work or continuing to work for ACC under the Employment Agreements?

You are instructed that a "fraudulent inducement" has occurred in this case if you find each of the following elements:

(1)

One or more promise was made;

(2)

The promise(s) was false;

(3)

The false promise(s) was made with no intention to perform at the time it was made;

(4)

The promise(s) was made with the intention that Spence act on it; and

(5)

Spence justifiably acted in reliance on the promise(s), to his detriment.

[*23] Spence testified that in February of 1989, Liechty promised to make Spence a partner after six months if all things went well between them. Both Spence and Liechty testified that things were going well after six months. Spence was not made a partner after six months, although the parties continued to discuss a partnership. The meeting with Swiss Avenue Bank regarding financing of the purchase did not take place until sometime between December 1990 and March 1991. Finally, there was evidence that Liechty had no intent to make Spence a partner.

There was legally and factually sufficient evidence from which the jury could have concluded that Liechty represented that Spence would be made a partner in the Mesquite clinic at the end of the initial six-month period if things went well between the parties, and that the representation was false. There was sufficient evidence from which the jury could have found that Spence was fraudulently induced into staying with ACC after the initial six-month period. We overrule ACC's third point of error to the extent it asserts there was insufficient evidence of misrepresentation.

B. Reliance

ACC argues that there was no evidence of [*24] justifiable reliance because the promise to make Spence a partner was conditioned on the parties being satisfied with each other at the end of the six-month period. ACC relies on *Barrier v. Brinkmann*, 130 Tex. 350, 109 S.W.2d 462 (Tex. 1937) to support its position. We conclude *Barrier* is distinguishable from the case before us.

In *Barrier*, a real estate dealer proposed a contract with property owners that would give the dealer plenary power over the real estate for the purpose of preventing foreclosure. The owners refused to sign the contract. *Id. at 465*. The court held that under these circumstances, the dealer was not liable in contract or fraud even though the dealer had promised to effect an arrangement that would avoid foreclosure. *Id. at 466-67*. Contract liability was not available because the oral promise contemplated execution of the contract giving the dealer powers to deal with the foreclosure. *Id. at 466*. Fraud liability was not available because performance of the promise was dependent upon the making of the proposed contract and investing in the dealer certain power, to be defined therein, with respect to the property. *Id. at 466-67*. The *Barrier* court [*25] did not address the question of whether *Barrier* ever intended to take steps to prevent foreclosure.

In the instant case, ACC promised to make Spence a partner six months after Spence started working for it or shortly thereafter, if the parties were happy with each other. The jury may have found that ACC never intended to make Spence a partner regardless of whether the parties were happy with each other after the initial six months. Alternatively, the jury may have found that ACC defrauded Spence into continuing employment with ACC based on false representations regarding partnership.¹⁵ Further, there is evidence in the record that ACC and Spence were happy with each other after the initial six-month period. Thus, even if the representation was not sufficient to constitute the basis of actionable fraud when it was made, it became actionable when the condition was satisfied. Based on the foregoing, we conclude that this case is factually distinguishable from *Barrier*, and that *Barrier* is not controlling.

[*26] There was sufficient evidence showing that Spence justifiably relied on ACC's false representations. We overrule ACC's third point of error to the extent it asserts there was insufficient evidence of justified reliance.

C. Fraudulent Intent

ACC asserts there was legally and factually insufficient evidence of fraudulent intent. Specifically, ACC argues there was insufficient evidence to show it never intended to make Spence a partner.

The jury answered the question affirmatively as to Liechty and American Chiropractic. The above question encompassed misrepresentations which might have been made before Spence began working for ACC and representations made after he began work there which induced him to remain.

¹⁵ Either finding is supported by the evidence and the charge as submitted.

[HN16] Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given their testimony." *Spoljaric, 708 S.W.2d at 434*. A party's intent is determined at the time the representation is made; however, it may be inferred from the party's subsequent acts after the representation is made. *Id. at 434*.

[HN17] Intent to defraud is generally not susceptible to direct proof. It almost invariably must be proven by circumstantial evidence. See *id. at 435*. Standing alone, failure to perform is no evidence of the promisor's intent not to perform when the promise was made. However, failure to perform is a fact that a jury may consider in determining [*27] intent. *Id.* A promisor's denial that he ever made a promise is a fact showing no intent to perform when the promise was made; however, standing alone it is insufficient evidence to support a finding of lack of intent to perform. *T.O. Stanley Boot Co., 847 S.W.2d at 222*; see *Spoljaric, 708 S.W.2d at 435*. "Slight circumstantial evidence' of fraud, when considered with the breach of promise to perform, is sufficient to support a finding of fraudulent intent." *Spoljaric, 708 S.W.2d at 435* (citing *Maulding v. Niemeyer, 241 S.W.2d 733, 738 (Tex. Civ. App.--El Paso 1951 orig. proceeding)*).

Spence presented evidence from which the jury could have concluded that ACC made no effort to make him a partner after the initial six-month period even though ACC and Spence were satisfied with each other. ACC and Spence did not meet with Swiss Avenue Bank until approximately twelve months after the end of the initial six-month period. Spence also testified that the financing scheme offered by Swiss Avenue Bank was not the arrangement ACC represented would be available. Terry Lynn Upton, a former ACC employee, testified that Sharon Liechty said on numerous occasions that Spence would [*28] not be made a partner. Upton testified that Sharon Liechty started saying this in early 1990.

The foregoing is legally and factually sufficient evidence from which the jury could have found that ACC never intended to make Spence a partner, and that it intentionally induced him into remaining with American Chiropractic through other false representations. We overrule ACC's third point of error to the extent it asserts there was legally and factually insufficient evidence to show fraudulent intent.

D. Causation

ACC argues there was factually insufficient evidence to show Spence was damaged by the allegedly false representations.¹⁶ ACC bases its argument on Spence's testimony that at the time of the meeting with Swiss Avenue Bank, he had decided he did not want to become a partner.

Spence testified that at the time of the meeting with Swiss Avenue Bank, he had decided he did not want to become a partner. [*29] However, he later recanted that testimony.

[ACC'S COUNSEL]: Okay. Last Wednesday you told me you were ready to become a partner.

[SPENCE]: That's correct.

[ACC'S COUNSEL]: Half an hour ago you told me that by September of '90, even if Dr. Liechty had come up with the financing, you weren't going to become a partner. You just told me that under oath half an hour ago.

[SPENCE]: Yes, I did.

[ACC'S COUNSEL]: Now, do you want to change that story again?

[SPENCE]: Yes, I do.

[ACC'S COUNSEL]: What is it, Dr. Spence? You're sitting here under oath. Were you going to become a partner, or weren't you?

¹⁶ ACC challenges the amount of damages the jury awarded for fraud in its fourth point of error.

[SPENCE]: That meeting happened, what, two years ago? I'm trying to recall exactly what happened. And the fact is, a lot of information I have received after I left ACC after the meeting, which was not exactly the way it was when I went to the meeting. When I went to the meeting -- I'm talking about before the meeting, before we actually saw Harlan Bilton, I had full intentions of becoming a partner. Immediately when I was presented his package I was definitely not going to become a partner. So if we can split those two things then--now [*30] my story is correct.

Spence's testimony as to whether he would have become a partner at the time of the meeting with Swiss Avenue Bank was undoubtedly contradictory. However, the conflict was one for the jury to resolve. See *R____ S____, 883 S.W.2d at 715; Greater Houston Transp. Co. v. Zrubeck, 850 S.W.2d 579, 590 (Tex. App.--Corpus Christi 1993, writ denied)*. We cannot say the jury's evaluation of the evidence was so against the great weight and preponderance of the evidence as to be manifestly unjust, shocking to the conscience, or clearly demonstrating bias. Further, the fraud question submitted to the jury asked whether ACC fraudulently induced Spence into going to work for it as well as whether it fraudulently induced him into staying with ACC. ACC did not challenge the jury's response to the question as it related to whether ACC fraudulently induced Spence into going to work for ACC.

The evidence was factually sufficient to support the jury's finding that Spence was damaged by ACC's false representation(s). We overrule ACC's third point of error to the extent that it asserts there was factually insufficient evidence of causation.

We overrule ACC's third point [*31] of error.

DAMAGES FOR FRAUD

Based upon the jury's answer to question number nine, the trial court entered judgment awarding Spence \$ 221,928 in damages on his fraud claim. In its fourth point of error, ACC contends there was no evidence to support the damages award. ACC argues that the record contains no evidence of either out-of-pocket or benefit-of-the-bargain damages suffered by Spence. Rather, ACC asserts, Spence only presented evidence of lost profits, which are not recoverable for fraud.

A. Applicable Law

HN18 [+] The correct measure of damages for fraud is the actual amount of the complaining party's loss resulting directly and proximately from the fraud practiced upon him. *C & C Partners v. Sun Exploration & Prod. Co., 783 S.W.2d 707, 719 (Tex. App.--Dallas 1989, writ denied)*. A party may recover either out-of-pocket damages or benefit-of-the-bargain damages. *Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 373 (Tex. 1984)*. Out-of-pocket damages are calculated as the difference between the value of that with which the complaining party parted and the value of the thing received. *Id.* Benefit-of-the-bargain damages are calculated as the difference [*32] between the value as represented and the value actually received. *Id.* Speculative losses and lost profits are not recoverable in a fraud action. *C & C Partners, 783 S.W.2d at 719*.

B. Application of Law to Facts

Although the parties loosely characterize the damages as lost profits, the record reflects that the profits belonged to American Chiropractic. There was evidence that ACC represented to Spence that he would receive a fifty-percent partnership interest in American Chiropractic, which would entitle him to fifty percent of American Chiropractic's profits. Thus the damages were not Spence's lost profits. Rather, the damages claimed were the difference between the fifty-percent interest in the profits that ACC represented Spence would receive and what Spence actually received when he was not made a partner. This is benefit-of-the-bargain damages. See *Khalaf v. Williams, 814 S.W.2d 854, 857 (Tex. App.--Houston [1st Dist.] 1991, no writ)*.

There was evidence that American Chiropractic was worth approximately 1.6 million dollars and that it was represented to Spence he could buy into one-half of American Chiropractic for \$ 800,000. Spence testified that his [*33] partnership interest would entitle him to one-half of American Chiropractic's profits. There was evidence that American Chiropractic's profits equalled one-half of its collections. Spence presented testimony and financial statements showing what American Chiropractic's profits were for the fifteen month period in which he would have been a partner, and what the value of his share of the profits would have been. He also presented evidence of what he actually received.

We conclude the evidence was not too speculative. The jury could have used it in calculating the difference between what ACC represented to Spence he would receive and what Spence actually received. Viewing only the evidence and reasonable inferences supporting the jury's finding, we conclude there is more than a scintilla of evidence to support the damages award. See *id.* We overrule ACC's fourth point of error.

DAMAGES FOR BREACH OF CONTRACT

In its fifth point of error, ACC asserts there was no evidence to support the amount of damages the jury awarded Spence for breach of contract. The substance of ACC's complaint is that one of the premises underlying Spence's breach of contract damage calculation was [*34] flawed.

Spence sought damages for breach of contract asserting that ACC wrongfully failed to pay him commissions after he left ACC. ACC summarizes Spence's damages evidence as follows:

According to Spence, this stat sheet showed that, after he had worked at ACC for about a year, his collections in a given month would roughly equal 70% of his production in that month. He called this his 'collection rate.'

Spence took the total production during his 25 months at ACC (\$ 1,723,330), and then subtracted the total collections that were received for his work during these same 25 months (1,5065,136) to obtain the difference \$ 685,194. He then multiplied that figure time his 70% 'collection rate' to obtain \$ 460,736. He contended that this was the amount of money that ACC would have received for his work after April 1, 1991. He then claimed 20% of that under his employment contract.

ACC asserts the damage calculation was flawed because the collection rate may not have been correct because "the fact that he collected 70% of his current billing does not mean that he would also collect 70% of his past due bills. . . . the logical inference would be that ACC would collect much less than [*35] 70% of those [past due] accounts."

In considering this no evidence point, we must disregard all evidence and inferences contrary to the fact finding. Stafford, 726 S.W.2d at 16. If there is more than a scintilla of evidence to support the finding, the no evidence challenge fails. Stedman, 595 S.W.2d at 488.

On appeal, ACC does not dispute that Spence was entitled to commissions for the work he did while employed by American Chiropractic and for which the fees were collected after he left.¹⁷ By detailing and relying on the evidence Spence used to show what he was due, ACC implicitly concedes there was more than a scintilla of evidence showing Spence's contract damages. The evidence Spence used in his calculation was evidence of his contract damages. ACC does not contest Spence's evidence regarding his total production and the portion of that production for which Spence was not paid. Instead, ACC asks us to set the jury's finding aside on the basis of its inference regarding Spence's collection rate which is contrary to the evidence and the jury's finding. We cannot do this. Stafford, 726 S.W.2d at 16. There was more than a scintilla of evidence regarding Spence's contract [*36] damages.

¹⁷ Spence's employment contract provided for either a fixed rate of compensation or a percentage of his billings once they were collected, whichever was greater. At trial, ACC took the position that it was not obligated to pay Spence for billings attributable to him that were collected after he stopped working for ACC. Spence took the contrary position and prevailed.

We overrule ACC's fifth point of error.

ATTORNEYS' FEES

In its sixth point of error, ACC asserts the trial court erred in awarding Spence attorneys' fees because there was no evidence or insufficient evidence of segregation of recoverable fees. ACC also asserts that if we reverse on the breach of contract or antitrust claims, we must remand for redetermination of attorneys' fees in view of the changed result.

HN19 [Footnote] A party may not complain about an attorneys' fee award not being segregated when a broad form attorneys' fee question is submitted to the jury without objection. *Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d [*371] 821, 823 (Tex. 1985); Matthews v. Candlewood Builders, Inc., 685 S.W.2d 649, 650 (Tex. 1985)* (per curiam). In this case, a broad form question was submitted to the jury on attorneys' fees: "Find the reasonable and necessary attorneys' fees for the legal services provided and to be provided to Spence in connection with this lawsuit." ACC did not object to this jury question.¹⁸ Therefore, ACC has waived any complaint it may have had regarding Spence's failure, if any, to segregate his attorneys' fees between defense of ACC's claims and prosecution of his own. Likewise, ACC cannot complain of Spence's failure, if any, to segregate his attorneys' fees between his fraud claim and his antitrust and contract claims.

[*38] ACC also asserts that we must remand this case for redetermination of attorneys' fees if we reverse the antitrust award. ACC relies on two opinions of the Fort Worth court of appeals. See *Collins v. Beste, 840 S.W.2d 788 (Tex. App.--Fort Worth 1992, writ denied); French v. Diamond Hill-Jarvis Civic League, 724 S.W.2d 921 (Tex. App.--Fort Worth 1987, writ ref'd n.r.e.)*. Neither case mandates the result ACC wants.

In *Collins*, the court reversed and remanded the question of breach of contract, finding that the trial court erred in refusing to submit an issue on it. *Collins*, 724 S.W.2d at 789. Because of the reversal and remand of the breach of contract question, the court did not reach the merits of Collins' point of error on attorneys' fees but summarily reversed and remanded the issue of attorneys' fees. *Id. at 792*. The opinion does not reflect the nature of Collins' point of error on attorneys' fees. It is clear that Collins was entitled to seek attorneys' fees on remand of his breach of contract claim.

In *French*, the court reversed a portion of the trial court's declaratory judgment and rendered a declaratory judgment that was favorable to French. *French [*391] 724 S.W.2d at 924*. After noting that a trial court has broad discretion in awarding attorneys' fees in declaratory judgment actions, the court remanded the issue of attorneys' fees to "give the trial court the opportunity to exercise its discretion in view of the changed result . . ." *Id.*

Neither *Collins* nor *French* held that remand was required under their particular facts. Further, they are distinguishable from the case before us. We are not remanding a cause of action for which attorneys' fees are recoverable nor are we faced with a declaratory judgment action. *Collins* and *French* do not compel us to remand the issue of attorneys' fees because of our reversing and rendering Spence's antitrust recovery.

¹⁸ ACC did object to a jury question on attorneys' fees. However, it appears the objection was to a question which was not submitted to the jury in the final charge. ACC objected as follows:

Plaintiff objects to Question No. 12 because attorneys' fees have not been properly pleaded for this claim. Defendant pled general attorneys' fees without making reference to any statute whatsoever, certainly not to this statute, and this issue should not be submitted as a result of the insufficient pleading.

In the final charge, question number twelve addressed whether ACC knew the noncompetition clause was unreasonable. ACC's objection seems to have been with respect to an issue on fraud in a stock transaction. See *TEX. BUS. & COM. CODE ANN. § 27.01(e)* (Vernon 1987). In his cross-point of error, Spence complains of the trial court's refusal to submit an attorneys' fees question pursuant to *section 27.01(e)*.

HN20 [+] We have the discretion, when we reverse and render judgment in part, to remand the issue of attorneys' fee under the rules of appellate procedure. See [TEX. R. APP. P. 80\(c\)](#); TEX. R. APP. P. 81(c). We also have discretion to do so in the interest of justice. See [Gill Savs. Ass'n v. International Supply Co., Inc., 759 S.W.2d 697, 706-07 \(Tex. App.--Dallas 1988, writ denied\)](#).

Neither of Spence's experts on attorneys' fees testified as to whether the fees [*40] incurred in prosecuting the antitrust claim were segregable from the remainder of Spence's attorneys' fees. Spence's antitrust claim involved proof of facts such as market conditions, anticompetitive effect, and market power. Such essential facts did not overlap essential facts of any of Spence's other claims of defense of ACC's claims. Thus, segregation could be an issue. See [id. at 705-06](#) (noting that segregation of fees not required where the claims and defenses arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts).¹⁹

We have reviewed Spence's attorneys' invoices which itemize the work done on the case. We note that a number of entries reflect [*41] work specifically attributable to the antitrust claim. However, our review of the billing records does not persuade us that it would be in the best interests of the parties or justice to reopen the issue of attorneys' fees, even assuming it were legally appropriate to do so. We deny ACC's request to remand the issue of attorneys' fees. We overrule ACC's sixth point of error.

PUNITIVE DAMAGES

In its seventh point of error, ACC asserts we must set aside the punitive damages award because the judgment based on fraud must be set aside. We have affirmed the fraud findings and award. Therefore, we overrule ACC's seventh point of error.

SPENCE'S CROSS-POINT OF ERROR

In his cross-point of error, Spence asserts the trial court erred in denying his requested trial amendment and not awarding him attorneys' fees under [section 27.01\(e\) of the business and commerce code](#). Through a trial amendment, Spence sought to add a claim under [section 27.01](#). Spence requested the trial amendment after the close of evidence and before the charge was submitted to the jury.

After reviewing the evidence presented at trial, we conclude that Spence was not harmed by the trial court's ruling on the trial [*42] amendment, even assuming it erred in its denial of the request. In his brief, Spence does not discuss how the judgment would have been different had the trial court allowed the trial amendment and submitted the requested question on attorneys' fees to the jury. Spence recovered attorneys' fees in the exact amount he requested and on which he presented evidence to the jury. His evidence on attorneys' fees did not delineate any particular fees attributable to his [section 27.01](#) claim. Spence has failed to show how, or if, he was harmed by the trial court's rulings. Thus, even assuming error, it is not reversible error. See TEX. R. APP. P. 81(b)(1).

We overrule Spence's cross-point of error.

DISPOSITION

We reverse the trial court's judgment for antitrust damages and render judgment that Spence take nothing on his antitrust claim. We affirm the trial court's judgment in all other respects.

WILL BARBER

¹⁹ We also note that Spence obtained judicial modification of the noncompetition agreement. Attorneys' fees are recoverable for a promisor who prevails in obtaining modification of a noncompetition agreement. [TEX. BUS. & COM. CODE ANN. § 15.51\(c\)](#) (Vernon Supp. 1995).

JUSTICE

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CSU Holdings v. Xerox (In re Independent Serv. Orgs. Antitrust Litig.)

United States District Court for the District of Kansas

December 11, 1995, Dated ; December 11, 1995, FILED

CIVIL ACTION No. MDL-1021 (94-2102)

Reporter

910 F. Supp. 1537 *; 1995 U.S. Dist. LEXIS 19558 **; 38 U.S.P.Q.2D (BNA) 1273 ***; Copy. L. Rep. (CCH) P27,502; 1995-2 Trade Cas. (CCH) P71,237

IN RE: INDEPENDENT SERVICE ORGANIZATIONS ANTITRUST LITIGATION; This Document Applies to: CSU Holdings, Inc., et. al. v. Xerox

Core Terms

software, diagnostic, license, copyright infringement, copier, license fee, infringement, misuse, irreparable harm, copying, manuals, injunction, antitrust, prices, disks, customers, preliminary injunction, damages, enjoin, injunctive relief, public interest, anti trust law, counterclaims, constitutes, calculated, machine, floppy, patent, antitrust violation, damages remedy

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Special Venue

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > Federal Court Jurisdiction

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Venue

HN1[] Pleadings, Counterclaims

The United States District Court has jurisdiction over copyright infringement counterclaims pursuant to [28 U.S.C.S. §§ 1331, 1338\(a\)](#).

910 F. Supp. 1537, *1537 1995 U.S. Dist. LEXIS 19558, **19558 38 U.S.P.Q.2D (BNA) 1273, ***1273

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

HN2 [down] **Injunctions, Preliminary & Temporary Injunctions**

The court is authorized by the Copyright Act, [17 U.S.C.S. § 502\(a\)](#), to grant temporary and final injunctions on such terms as the court deems reasonable to prevent or restrain infringement of a copyright.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN3 [down] **Injunctions, Preliminary & Temporary Injunctions**

To obtain preliminary injunctive relief, a plaintiff must establish each of the following factors: (1) a substantial likelihood that plaintiff will eventually prevail on the merits; (2) plaintiff will suffer irreparable injury unless injunctive relief is granted; (3) the threatened injury to plaintiff outweighs whatever damage the proposed injunction may cause defendant; and (4) the injunction, if granted, will not be adverse to the public interest.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4 [down] **Grounds for Injunctions, Likelihood of Success**

To demonstrate a substantial likelihood of success on the merits, a plaintiff is required to present a prima facie case showing a reasonable probability that it will ultimately be entitled to the relief sought. A plaintiff is not required to show to an absolute certainty that it will prevail. Rather, if the other three requirements for a preliminary injunction are satisfied, it is enough if the plaintiff raises questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.

Copyright Law > ... > Civil Infringement Actions > Elements > Copying by Defendants

Evidence > Inferences & Presumptions > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > General Overview

HN5 [down] **Elements, Copying by Defendants**

To establish a likelihood of success, a plaintiff must present a prima facie case of copyright infringement. This requires the plaintiff to show: (1) ownership of a valid copyright, and (2) copying.

910 F. Supp. 1537, *1537 1995 U.S. Dist. LEXIS 19558, **19558 38 U.S.P.Q.2D (BNA) 1273, ***1273

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

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 > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

Evidence > Inferences & Presumptions > General Overview

HN6 Scope of Copyright Protection, Formalities

The Copyright Act, [17 U.S.C.S. § 410\(c\)](#) provides that a certificate of registration of a copyright shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Copyright Law > ... > Ownership Rights > Distribution > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > Sherman Act > General Overview

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

HN7 Ownership & Transfer of Rights, Assignments

Generally, the exercise of one's rights under the Patent and Copyright Acts, even by refusing to license or sell one's protected work to a competitor, does not automatically equate with an antitrust violation. A copyright owner possesses the exclusive right to sell, license, or otherwise distribute copies of a copyrighted work under [17 U.S.C.S. § 106\(3\)](#). In essence, a copyright provides the copyright holder with a legal monopoly. A good faith effort to enforce one's copyright is not the type of exclusionary conduct condemned by § 2 of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

910 F. Supp. 1537, *1537 1995 U.S. Dist. LEXIS 19558, **19558 38 U.S.P.Q.2D (BNA) 1273, ***1273

Copyright Law > ... > Damages > Types of Damages > Costs & Attorney Fees

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

HN8 Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Anti-trust laws are designed to protect competition, not competitors. Moreover, a competitor is not entitled to maintain its competitive edge by infringing others' copyrights.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN9 Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

An exercise of rights under a copyright can lead to antitrust liability. Power gained through some natural or 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 > Misuse of Rights > Copyright & Trademark Misuse Defenses

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10 Misuse of Rights, Copyright & Trademark Misuse Defenses

Ownership of intellectual property entitles the owner to exact royalties as high as he can negotiate with the leverage of that monopoly. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Under this rationale, exorbitant pricing alone is not copyright misuse.

Computer & Internet Law > Intellectual Property Protection > Copyright Protection > Conveyances

Copyright Law > ... > Civil Infringement Actions > Online Infringement > Determinations

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > General Overview

Computer & Internet Law > ... > Civil Infringement > Defenses > General Overview

910 F. Supp. 1537, *1537 1995 U.S. Dist. LEXIS 19558, **19558 38 U.S.P.Q.2D (BNA) 1273, ***1273

Computer & Internet Law > ... > Civil Infringement > Remedies > General Overview

Computer & Internet Law > ... > Remedies > Damages > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > 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 > ... > Assignments & Transfers > Licenses > General Overview

HN11[**Copyright Protection, Conveyances**

The Copyright Act mandates that an infringer pay the fees charged by a copyright holder for the use of its copyrighted materials. Without a license, the infringer's use of the diagnostic software to service the copyright holder's product constitutes infringement. Similarly, the infringer's copying of copyrighted manuals constitutes infringement. If a copyright holder's manual prices or licensing fees are exorbitant and, if when combined with other monopolistic activity, they give rise to antitrust violations, the infringer's remedy lies in damages on its antitrust claims, not blatant copyright infringement during the pendency of the resolution of the antitrust claims.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Evidence > Inferences & Presumptions > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > General Overview

HN12[**Injunctions, Preliminary & Temporary Injunctions**

Irreparable harm may be presumed upon a prima facie showing of copyright infringement.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Evidence > Inferences & Presumptions > General Overview

HN13[**Injunctions, Preliminary & Temporary Injunctions**

Delay in moving for a preliminary injunction may rebut the presumption of irreparable harm. However, delay caused by a copyright owner's good faith efforts to investigate the suspected infringement should not rebut the presumption.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

[HN14](#) [blue icon] Injunctions, Preliminary & Temporary Injunctions

Even assuming the injunction would have such a devastating effect a knowing infringer cannot be permitted to construct its business around its infringement.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

[HN15](#) [blue icon] Grounds for Injunctions, Public Interest

Upholding the rights of a copyright holder is generally regarded as being in the public interest.

Counsel: **[**1]** For CSU HOLDINGS INC, Case Number: 94-2102-EEO - USDC for the District of Kansas, COPIER SERVICES UNLIMITED, INC., Case Number: 94-2102-EEO - USDC for the District of Kansas, COPIER SERVICES UNLIMITED OF ST. LOUIS, INC., Case Number: 94-2102-EEO - USDC for the District of Kansas, plaintiffs: Eric D. Braverman, Employers Reinsurance Corporation, Overland Park, KS, P. John Owen, Lori R. Schultz, Morrison & Hecker, Kansas City, MO, Michael C. Manning, Morrison & Hecker, Phoenix, AZ. For ACQUISITION SPECIALISTS, INC, Case Number: 94-1285 - USDC for the Northern District of California - USDC for the District of Kansas 94-2502, TECSPEC, INC, A Texas Corporation, Case number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas dba Atek, CONSOLIDATED PHOTO COPY, INC., A Virginia corporation. Case number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, COPIER REBUILD CENTER, INC., a Maryland corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, CPO LTD, a California corporation. Case Number 94-1285 - USDC for the Northern District of **[**2]** California. 94-2502 USDC for the District Court of Kansas, GRADWELL COMPANY, INC., an Alabama corporation. Case number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, GRAPHIC CORPORATION OF ALABAMA, an Alabama corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, INTERNATIONAL BUSINESS EQUIPMENT, INC, a California corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, LASER RESOURCES INC, an Iowa corporation, Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, LASER RESOURCES OF MINNESOTA, INC., a Minnesota corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, LASER SOLUTIONS, INC, a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, LASER SUPPORT AND ENGINEERING, INC., a California corporation. Case Number: 94-1285 - USDC for Northern District of California. 94-2502 USDC for the District of Kansas, **[**3]** MARATHON COPIER SERVICE, INC., a California corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, NATIONWIDE TECHNOLOGIES, INC., a Illinois corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, REPROGRAPHICS RESOURCES SYSTEMS, INC, an Iowa corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, SUNTONE INDUSTRIES, INC, a Florida corporation. Case Number: 94-1285 - USDC for the Northern District of

California. 94-2502 USDC for the District of Kansas, TECHNICAL DUPLICATION SERVICES, INC, a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, X-TECH SYSTEMS INC, a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, XER-DOX INC., a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, XEROGRAPHIC COPIES SERVICES, INC., a Texas corporation. Case Number: [**4] 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiffs: James A Hennefer, San Francisco, CA, Maxwell M Blecher, Unknown. RESOURCES SYSTEMS, INC, an Iowa corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, San Francisco, CA.

XEROX CORPORATION, Case Number 94-2102-EEO - USDC for the District of Kansas and Case Number: 94-1285 USDC for the Northern District of California, defendant: Peter K Bleakley, Arnold & Porter, Washington, DC, Peter W Marshall, Xerox Corporation, Stamford, CT, Michael G. Norris, Norris, Keplinger & Logan, L.L.C., Overland Park, KS, C Larry O'Rourke, E Robert Yoches, Vincent P Kovalick, Leslie I Bookoff, Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, DC.

XEROX CORPORATION, Case Number 94-2102-EEO - USDC for the District of Kansas and Case Number: 94-1285 USDC for the Northern District of California, counter-claimant: Peter K Bleakley, Arnold & Porter, Washington, DC, Peter W Marshall, Xerox Corporation, Stamford, CT, Michael G. Norris, Norris, Keplinger & Logan, L.L.C., Overland Park, KS, C [**5] Larry O'Rourke, E Robert Yoches, Vincent P Kovalick, Leslie I Bookoff, Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, DC.

For CSU HOLDINGS INC, COPIER SERVICES UNLIMITED, INC., COPIER SERVICE UNLIMITED OF ST. LOUIS, INC., counter-defendant: Eric D. Braverman, Employers Reinsurance Corporation, Overland Park, KS, P. John Owen, Lori R. Schultz, Morrison & Hecker, Kansas City, MO, Michael C. Manning, Morrison & Hecker, Phoenix, AZ. ACQUISITION SPECIALISTS, INC, TECSPEC, INC dba Atek, CONSOLIDATED PHOTO COPY, INC., COPIER REBUILD CENTER, INC., CPO LTD, CREATIVE COPIER SERVICES, INC, GRADWELL COMPANY, INC., GRAPHIC CORPORATION OF ALABAMA, INTERNATIONAL BUSINESS EQUIPMENT, INC, LASER RESOURCES INC, LASER RESOURCES OF MINNESOTA, INC., LASER SOLUTIONS, INC, LASER SUPPORT AND ENGINEERING, INC., MARATHON COPIER SERVICE, INC., NATIONWIDE TECHNOLOGIES, INC., REPROGRAPHICS RESOURCES SYSTEMS, INC, RESOURCES SYSTEMS, INC, SUNTONE INDUSTRIES, INC, TECHNICAL DUPLICATION SERVICES, INC, X-TECH SYSTEMS INC, XER-DOX INC., XEROGRAPHICS COPIES SERVICES, INC., counter-defendants: James A Hennefer, San Francisco, CA.

Judges: EARL E. O'CONNOR, United States District Judge

Opinion by: EARL E. O'CONNOR

Opinion

[*1275] [**6] [*1539] MEMORANDUM AND ORDER**

This matter came before the court for hearing October 12, 1995, on Xerox's motion for a preliminary injunction against counterclaim defendant CSU Holdings, Inc. (Doc. #109). Pursuant to the court's request at the hearing, Xerox submitted a modified proposed order clarifying and narrowing the relief requested (Doc. #158). For the reasons set forth below, Xerox's motion for a preliminary injunction will be granted as modified. After carefully considering the parties' briefs, oral arguments, testimony at the hearing, and exhibits, the court makes the following findings of fact and conclusions of law as required by [Federal Rule of Civil Procedure 52\(a\)](#).

[*1540] Findings of Fact

1. Counter claimant Xerox Corporation ("Xerox") is a New York corporation with its principal offices in Stamford, Connecticut. Counterclaim defendants Copier Services Unlimited ("CSU") Holdings, Inc., is a Kansas corporation located in Kansas City, Kansas. CSU Kansas City is a Kansas corporation with its principal place of business at 9261 Cody, Overland Park, Kansas. CSU St. Louis is a Missouri corporation with its principal place of business at 2275 Cassens Drive in Fenton, Missouri. Counterclaim **[**7]** defendants will be referred to collectively as "CSU."

2. CSU filed suit against Xerox in this court seeking injunctive relief and damages for antitrust violations pertaining to Xerox's allegedly restrictive parts policy. Xerox filed second amended counterclaims alleging, *inter alia*, copyright infringement by CSU. Only the copyright infringement counterclaims are implicated by the instant motion for preliminary injunction.

3. Xerox is in the business of inventing, manufacturing, selling, and servicing copiers and printers. Xerox also manufactures and sells parts for Xerox copiers and printers.

4. CSU is a competitor of Xerox in the sale and servicing of copiers and printers.

5. Xerox's 5090 copier, among other Xerox copier machines, utilizes Xerox-developed operating system and diagnostic software, which are contained on floppy disks. Operating system software directs the operation of the machine, while diagnostic software assists in diagnosing machine failures. There are two types of diagnostic software used on a Xerox 5090 copier -- that which is resident and, therefore, permanent on the hard drive of the machine ("resident diagnostic software") and that which is installed **[**8]** temporarily from portable floppy disks ("diagnostic disk software" and "diagnostic utility disks").

Although Xerox has brought claims alleging that CSU's use of all types of copyrighted software infringes Xerox's copyrights, Xerox is not presently seeking to enjoin CSU's use of any resident software. Xerox is only seeking to enjoin CSU from copyright infringement with respect to: (1) Xerox diagnostic software on floppy disks; and (2) unauthorized copies of Xerox manuals.

6. Xerox is the sole owner and/or assignee of all right, title, and interest in and to the copyrights on all versions of diagnostic software for the Xerox 5090 copier. Xerox's copyrights are duly registered, pursuant to the Copyright Act, [17 U.S.C. § 410](#).

7. CSU utilizes Xerox diagnostic software in providing maintenance service for Xerox 5090 copiers and 4050, 4090, and 4650 laser printers. Neither CSU nor its customers have purchased a license to use Xerox's copyrighted software. Xerox will sell CSU or its customer a license to use Xerox's copyrighted diagnostic software for \$ 4,080 per copier.

8. CSU officials have admitted copying Xerox copyrighted manuals and software and that they knew that the materials **[**9]** were **[***1276]** copyrighted. They assert that at the time the materials were copied, copying was one of the only means by which they could acquire the materials.

9. Xerox did not have concrete evidence, until recent discovery in the instant case, that CSU was infringing its copyrights in the particular manner Xerox now seeks to enjoin. There is strong evidence that Xerox may have suspected infringement by CSU for quite some time, and at least as early as November 30, 1994, when it sought leave to bring its copyright infringement counterclaims, Xerox knew of CSU's allegedly infringing conduct. Nevertheless, the court finds that actual evidence to warrant the bringing of the instant motion for preliminary relief, i.e., admissions by CSU officials of ongoing unauthorized copying of Xerox manuals and diagnostic software disks, was not known by Xerox until recent depositions in this case.

Conclusions of Law

HN1 This court has jurisdiction over the copyright infringement counterclaims pursuant to [28 U.S.C. §§ 1331](#) and [1338\(a\)](#). Venue lies pursuant to [28 U.S.C. § 1400\(a\)](#).

HN2[] We are authorized by the Copyright Act to "grant temporary and final injunctions on such terms" as we deem "reasonable to prevent [**10] or restrain infringement of a copyright." [***1541**] [17 U.S.C. § 502\(a\)](#). See [Autoskill Inc. v. National Educ. Support Sys., Inc.](#), [994 F.2d 1476, 1487](#) (10th Cir.), cert. denied, [126 L. Ed. 2d 254](#), 114 S. Ct. 307 (1993).

In addition, **HN3**[] to obtain preliminary injunctive relief, Xerox must establish each of the following factors: (1) a substantial likelihood that Xerox will eventually prevail on the merits; (2) Xerox will suffer irreparable injury unless injunctive relief is granted; (3) the threatened injury to Xerox outweighs whatever damage the proposed injunction may cause CSU; and (4) the injunction, if granted, will not be adverse to the public interest. See id. (citations omitted).

Likelihood of success on the merits

HN4[] To demonstrate a substantial likelihood of success on the merits, Xerox is required to present "a prima facie case showing a reasonable probability that [it] will ultimately be entitled to the relief sought." Id. Xerox is not required to show to an absolute certainty that it will prevail. See id. Rather, if the other three requirements for a preliminary injunction are satisfied, it is enough if Xerox raises "questions going to the merits so serious, [**11] substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." Id.

HN5[] To establish a likelihood of success, Xerox must present a prima facie case of copyright infringement. This requires Xerox to show: (1) ownership of a valid copyright, and (2) copying. See id. Both prongs of Xerox's prima facie case are easily met in this case.

The Copyright Act **HN6**[] provides that a certificate of registration of a copyright "shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." [17 U.S.C. § 410\(c\)](#). By presenting the registration certificates for the copyrights in question, Xerox shifts the burden to CSU to dispute the validity of the copyrights. See Autoskill, [994 F.2d at 1487](#).

Xerox has also established copying by CSU. We agree with the court in [MAI Sys. Corp. v. Peak Computer, Inc.](#), [991 F.2d 511, 519](#) (9th Cir. 1993), cert. dismissed, 114 S. Ct. 671, 126 L. Ed. 2d 640 (1994), that transferring a computer program from a storage device to a computer's RAM constitutes a copy for purposes of copyright law. See also NLFC, Inc. v. Devcom Mid-America, Inc., [45 F.3d 231, 235](#) (7th **[**12]** Cir.), cert. denied, 132 L. Ed. 2d 257, 115 S. Ct. 2249 (1995) ("loading software into a computer constitutes the creation of a copy under the Copyright Act"); [Vault Corp. v. Quaid Software Ltd.](#), [847 F.2d 255, 260](#) (5th Cir. 1988) ("the act of loading a program from a medium of storage into a computer's memory creates a copy of the program"); [Advanced Computer Servs. v. MAI Sys. Corp.](#), [845 F. Supp. 356, 363](#) (E.D. Va. 1994) (where "a copyrighted program is loaded into RAM and maintained there for minutes or longer, the RAM representation of the program is sufficiently 'fixed' to constitute a 'copy' under the Act"); [Triad Sys. Corp. v. Southeastern Express Co.](#), [1994 U.S. Dist. LEXIS 5390](#), No. C 92 1539-FMS, 1994 WL 446049 at *2 (N.D. Cal. March 18, 1994), aff'd in pertinent part, [64 F.3d 1330](#) (9th Cir. 1995), petition for cert. filed, (U.S. November 24, 1995) (No. 95-808) (loading the operating system software into a computer's RAM "necessarily creates a 'copy' in the computer's internal memory").

CSU does not seriously challenge that Xerox holds valid copyrights or that CSU's use of the diagnostic software constitutes copying. Rather, CSU alleges that Xerox cannot enforce its copyrights **[**13]** because it is misusing the copyrights to perpetrate antitrust violations. The misuse defense, first recognized in the patent context in [Morton Salt Co. v. G.S. Suppiger Co.](#), [314 U.S. 488, 86 L. Ed. 363, 62 S. Ct. 402](#) (1942), has been discussed by several courts in the copyright context as well. See Atari Games Corp. v. Nintendo of America, Inc., [975 F.2d 832, 846](#) (Fed. Cir. 1992) (listing numerous circuit court cases on the misuse defense); [Service & Training, Inc. v. Data Gen., Inc.](#), [963 F.2d 680, 690](#) (4th Cir. 1992) (finding no misuse); [Lasercomb America, Inc. v. Reynolds](#), [911 F.2d 970, 976-80](#) (4th Cir. 1990) (finding misuse); [Edward v. Marks Music Corp. v. Colorado Magnetics, Inc.](#), [497 F.2d 285, 290-91](#) (10th Cir. 1974), cert. denied, 419 U.S. 1120, 42 L. Ed. 2d 819, 95 S. Ct. 801 (1975) (discussing the

conflict of policies between "preventing piracy of copyrighted matter" and "enforcing the antitrust laws" and finding no misuse).

[*1542] [HN7](#) Generally, the exercise of one's rights under the Patent and Copyright Acts, even by refusing to license or sell one's protected work to a competitor, does not automatically equate with an antitrust violation. See, e.g., *Fox Film* [**14] [Corp. v. Doyal, 286 U.S. 123, 127, 76 L. Ed. 1010, 52 S. Ct. 546 \(1932\)](#) (A copyright owner may refrain from "vending or licensing and content himself with simply exercising the right to exclude others from using his property."); [SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1204 \(2d Cir. 1981\)](#), cert. denied, 455 U.S. 1016, 72 L. Ed. 2d 132, 102 S. Ct. 1708 (1982) (similar holding in patent arena); [Service & Training, 963 F.2d at 686-88, 690](#) (copyright case) (selective licensing is not evidence of an illegal tying arrangement).

Indeed, a copyright owner possesses the *exclusive* right to sell, license, or otherwise distribute copies of a copyrighted work. See [17 U.S.C. § 106\(3\)](#). In essence, a copyright provides the copyright holder with a legal monopoly. "[A] good faith effort to enforce one's copyright is not the type of exclusionary conduct condemned by [§] 2 of the Sherman Act." [Marks Music, 497 F.2d 285, 291](#).

CSU asserts that Xerox ought not be permitted to enforce its exclusive rights under the Copyright Act because Xerox is misusing the copyrights to further its antitrust scheme. CSU relies heavily on the Fourth Circuit's opinion in [Lasercomb, 911 F.2d at 970](#), one of the few courts to have found the misuse defense applicable. However, [Lasercomb](#) is readily distinguishable from the instant case and certainly does not convince the court that CSU can avoid a preliminary injunction against further infringement by invoking the misuse defense in the instant case.

[Lasercomb, 911 F.2d at 978](#), involved a licensing agreement which restricted the licensee from independently creating a program using the idea embodied in the copyrighted software program. The court found that Lasercomb (the licensor) had misused its copyright by using the license to attempt to restrict independent creative expression: "Lasercomb is attempting to use its copyright in a manner adverse to the public policy embodied in copyright law" (i.e., to promote independent creative expression of an idea). *Id.* "Misuse arises from Lasercomb's attempt to use its copyright in a particular expression, . . . to control competition in an area outside the copyright." *Id. at 979*. See also, [Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1337 \(9th Cir. 1995\)](#) (distinguishing [Lasercomb](#) on similar grounds).

Similar circumstances do not exist in [**16] the instant case. At least since June 1994, Xerox has offered to sell licenses for its diagnostic software. There is no evidence that Xerox's licensing agreement prohibits CSU from developing its own diagnostic software for Xerox copiers. Indeed, there is no evidence that CSU has ever attempted to develop its own software program, choosing instead to simply pirate Xerox's copyrighted work.

CSU urges that Xerox is including "intellectual property litigation in its arsenal of weapons, along with its restrictive Parts Policy, to defeat competition by independent service organizations ("ISOs") in order to maintain its monopoly in servicing high volume copiers and printers." CSU maintains that the license fee charged by Xerox is exorbitant and that paying it will put CSU out of business. However, CSU's profit analysis is based on a scenario in which CSU does not pass any portion of the licensing fee on to its customers. CSU presently offers service at 20-25% below Xerox service prices. On the present record, it appears that even if CSU passes on *all* of the licensing fee to its customers, it will still be able to price its service at or below prices charged by Xerox.

[HN8](#) "Anti-trust laws [**17] are designed to protect competition, not competitors." [Service & Training, Inc. v. Data Gen. Corp., 737 F. Supp. 334, 344 \(D. Md. 1990\)](#), aff'd, [963 F.2d 680 \(4th Cir. 1992\)](#). Moreover, CSU is not entitled to maintain its competitive edge by infringing Xerox's copyrights. [Autoskill, 994 F.2d 1476, 1498](#). We believe that Xerox is entitled to recoup the development costs of copyrighted material by charging a reasonable licensing fee to those who use the copyrighted work, without running afoul of the antitrust laws. [***1278]

Exactly where the line of reasonableness is to be drawn with respect to a license fee for Xerox's copyrighted software and manuals, [*1543] need not be determined at this stage of the litigation. Xerox has presented evidence that significant resources went into developing the copyrighted software and manuals. From the testimony at the hearing, it is evident that Xerox's diagnostic software involves a very sophisticated computer program which

creates significant savings in terms of repair and maintenance time and expense. The Xerox diagnostic software is obviously a very valuable resource to those involved in servicing Xerox equipment.

Xerox charges \$ 4,080 per machine for **[**18]** a license to use the 5090 diagnostic software. Xerox sells manuals for approximately \$ 400. Although CSU vehemently disputes the reasonableness of these fees, CSU has submitted no evidence that they are excessive. Moreover, even if we were to assume that Xerox's prices are excessive, we question whether excessive pricing alone constitutes copyright misuse, which triggers antitrust liability.

HN9 [↑] An exercise of rights under a copyright can lead to antitrust liability. In *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 n.29, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992), the Supreme Court stated, "the Court has held many times that power gained through some natural or 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.'" In *Marks Music*, 497 F.2d at 290, the Tenth Circuit assumed *arguendo* that an antitrust violation is a defense in a copyright infringement action. The court also stated, "utilization of the courts in a manner which is in accordance with the spirit of the law continues to be exempt from the antitrust laws." *Id.* **[**19]** at 290-91. By negative implication, *Marks Music* suggests that a bad faith effort, contrary to the spirit of copyright and **antitrust law**, to enforce one's copyright is condemned by the Sherman Act. The *Lasercomb* court also said, "the attempted use of a copyright to violate **antitrust law** probably would give rise to a misuse of copyright defense." *911 F.2d at 978*.

However, we are not aware of any court that has held that price alone is a basis for antitrust liability. Indeed, courts have held that **HN10** [↑] ownership of intellectual property "entitles the owner to exact royalties as high as he can negotiate with the leverage of that monopoly." *Brulotte v. Thys Co.*, 379 U.S. 29, 33, 13 L. Ed. 2d 99, 85 S. Ct. 176 (1964); *Continental Cablevision v. American Elec. Power Co.*, 715 F.2d 1115, 1121 (6th Cir. 1983) ("Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive."); *LaSalle St. Press, Inc. v. McCormick & Henderson, Inc.*, 445 F.2d 84, 95 (7th Cir. 1971) (patent case). Under this rationale, exorbitant pricing alone is not copyright misuse.

Perhaps exorbitant pricing, combined with other monopolistic conduct, may trigger antitrust liability. **[**20]** In *W. L. Gore & Assoc., Inc. v. Carlisle Corp.*, 529 F.2d 614, 623 (3d Cir. 1976) (quoting *Brulotte*, 379 U.S. at 33), the court stated, "absent any overriding unlawful conduct, a patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly." In *Marks Music*, 497 F.2d at 291, the court spoke of balancing the conflicting policies implicated by the copyright and antitrust laws by "taking into account the comparative innocence or guilt of the parties, the moral character of their respective acts, the extent of harm to the public interest, [and] the penalty inflicted" if relief is denied.

Even if Xerox may ultimately be found to have used the copyrights as part of an overall restrictive parts policy aimed at snuffing out ISO competition, we do not believe this forecloses Xerox's entitlement to an injunction against CSU's continued copyright infringement in the interim. The present situation is that Xerox is offering its copyrighted manuals and licenses for its copyrighted diagnostic software for sale to CSU and other ISOs.

HN11 [↑] The Copyright Act mandates that CSU pay the fees charged by Xerox for the use of its copyrighted materials. **[**21]** Without a license, CSU's use of the diagnostic software to service Xerox copiers constitutes infringement. Similarly, CSU's copying of Xerox's copyrighted manuals constitutes infringement. If Xerox's manual prices or licensing fees are exorbitant and, if when combined with other monopolistic activity, they give rise to antitrust violations, CSU's remedy lies in damages on its antitrust claims, not blatant copyright **[*1544]** infringement during the pendency of the resolution of the antitrust claims. See, e.g., *Service & Training*, 737 F. Supp. at 342 (citations omitted) ("Numerous courts have held that an alleged violation of the anti-trust laws, while perhaps affording a ground for affirmative relief, generally does not provide a defense to copyright infringement.").

We conclude that CSU's antitrust allegations against Xerox do not warrant denial of preliminary injunctive relief in this case. Xerox has established a reasonable likelihood of success on the merits of its copyright infringement claims.

[*1279] Irreparable Harm**

Although the Tenth Circuit has not ruled on the issue, the majority of circuits have held that [HN12](#) irreparable harm may be presumed upon a prima facie showing of copyright [\[**22\]](#) infringement. See [Service & Training, 963 F.2d at 690](#); [Johnson Controls, Inc. v. Phoenix Control Sys., Inc.](#), [886 F.2d 1173, 1174 \(9th Cir. 1989\)](#); [Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.](#), [843 F.2d 600, 611 \(1st Cir. 1988\)](#); [West Pub. Co. v. Mead Data Central, Inc.](#), [799 F.2d 1219, 1229 \(8th Cir. 1986\)](#), cert. denied, [479 U.S. 1070, 93 L. Ed. 2d 1010, 107 S. Ct. 962 \(1987\)](#); [Hasbro Bradley, Inc. v. Sparkle Toys, Inc.](#), [780 F.2d 189, 192 \(2d Cir. 1985\)](#); [Apple Computer, Inc. v. Franklin Computer Corp.](#), [714 F.2d 1240, 1254 \(3d Cir. 1983\)](#), cert. dismissed, [464 U.S. 1033, 104 S. Ct. 690, 79 L. Ed. 2d 158 \(1984\)](#); [Atari, Inc. v. North Am. Philips Consumer Electronics Corp.](#), [672 F.2d 607, 620 \(7th Cir.\)](#), cert. denied, [459 U.S. 880, 74 L. Ed. 2d 145, 103 S. Ct. 176 \(1982\)](#).

In [Autoskill, 994 F.2d at 1498](#), the Tenth Circuit expressly declined to decide whether to adopt the irreparable harm presumption because evidence of a loss of uniqueness in the marketplace provided an independent ground for finding irreparable harm. CSU suggests that the [Autoskill](#) court expressly rejected the irreparable harm presumption and that irreparable harm must be shown by evidence of a loss [\[**23\]](#) of uniqueness in the marketplace or an inability to calculate damages. Citing [Autoskill, 994 F.2d at 1498](#), CSU contends that injunctive relief should only be granted where a damage remedy is inadequate because damages cannot be calculated. CSU submits that because CSU has given Xerox a list of CSU's model 5090 copier customers, any license fees due can be easily calculated. CSU argues that Xerox is already relying on its damages remedy with respect to a portion of its copyright infringement claims.

We acknowledge that although Xerox continues to allege that CSU's unlicensed use of resident operating and diagnostic software violates Xerox's copyrights, it does not seek to enjoin CSU's use of that software. Xerox has chosen instead to rely on its damage remedy and seek a permanent injunction relative to that copyrighted software at trial. However, Xerox's decision to rely on its damages remedy and only seek to enjoin a portion of CSU's conduct does not preclude a finding of irreparable harm. Even though the license fees for the copiers presently serviced by CSU are rather easily calculated, that damages remedy alone does not fully realize the value of Xerox's rights in its copyrighted [\[**24\]](#) materials.

In addition to the license fee, Xerox's copyright gives it a competitive advantage over competitors who do not have the copyrighted materials. It may very well be that when CSU is forced to compete with Xerox at more similar pricing, Xerox will pick up additional service accounts which will generate additional revenue. We have no way of calculating the value to Xerox of its enhanced ability to compete with CSU in the service market, and simply cannot determine the full damages stemming from CSU's alleged copyright infringement at this juncture. See [Encyclopaedia Britannica Educ. Corp. v. C.N. Crooks](#), [447 F. Supp. 243, 247-48 \(W.D. N.Y. 1978\)](#) (irreparable harm found where licensing agreements did not provide a clear measure of damages).

We believe that the presumption of irreparable harm is precisely directed at such a situation. As we have already discussed, Xerox is not legally required to license its copyrighted work. While refusal to license may implicate the antitrust laws if it is found to be anticompetitive conduct, the fact that licenses are presently offered (at what appears to be reasonable prices) weakens CSU's antitrust claim. Moreover, irreparable harm [\[**25\]](#) can be presumed, notwithstanding [\[*1545\]](#) that a portion of Xerox's damages can be easily calculated based on the license fee.

CSU also attempts to rebut the presumption of irreparable harm by arguing that Xerox unreasonably delayed bringing its motion for a preliminary injunction in that it knew about CSU's alleged copyright violations for years before seeking to enjoin CSU. CSU asserts that Xerox had such knowledge because CSU is one of Xerox's main competitors in the service market. CSU argues that because the software is required to service the equipment, Xerox knew for some time that CSU was servicing Xerox machines using the copyrighted software without a license.

Xerox counters that it did not have a good faith basis for seeking preliminary injunctive relief until recent depositions in this case when CSU officials admitted copying manuals and unlawfully obtaining and reproducing floppy disks containing copyrighted software. Xerox also points out that CSU had previously denied using copyrighted diagnostic software in performing service to customers.

Admittedly, [HN13](#)[↑] delay may rebut the presumption of irreparable harm. See, e.g., [Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.](#), [**261 60 F.3d 27, 39 \[***1280\] \(2d Cir. 1995\)](#). However, delay caused by a copyright owner's good faith efforts to investigate the suspected infringement should not rebut the presumption. [Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.](#), [25 F.3d 119, 124-25 \(2d Cir. 1994\)](#). Under all the circumstances, we do not believe that CSU has sufficiently rebutted the presumption of irreparable harm with its allegations that Xerox unreasonably delayed in seeking injunctive relief.

Balance of Hardships

Xerox is required to demonstrate that the injury it will sustain if the injunction does not issue outweighs the potential harm the injunction will cause to CSU. [Autoskill](#), [994 F.2d 1476, 1498](#). CSU contends that enjoining it from continued infringement of Xerox's copyright will have a devastating impact on its business. We seriously question this assertion because all of the evidence presented has been that this is true only if CSU does not pass on any of the license fees to its customers.

In any event, as the court in [Autoskill](#) stated, [HN14](#)[↑] "even assuming the injunction would have such a devastating effect . . . a knowing infringer cannot be 'permitted to construct its business around its infringement.'" [\[**27\]](#) *Id.* (quoting [Apple Computer, Inc. v. Franklin Computer Corp.](#), [714 F.2d 1240, 1255 \(3d Cir. 1983\)](#)). The court's reasoning that "placing too much weight on this factor would reward infringers" is also particularly appropos in the instant case. In sum, the balance of hardships weighs in favor of Xerox's right to enforce its copyrights.

Public Interest

Xerox is required to demonstrate that the issuance of the injunction is not adverse to the public interest. [Autoskill](#), [994 F.2d at 1499](#). CSU seems to argue that issuance of a preliminary injunction is not in the public's best interest because Xerox is trying to use the copyright to put the ISOs out of business, and that once that is accomplished, Xerox will usurp monopolistic prices from the public. CSU also suggests that passing on the licensing fee to its customers is contrary to the public interest because it furthers Xerox's monopolistic activity by forcing the public to pay higher prices.

CSU has not presented any concrete evidence to support its claims.¹ On the present record, it is not apparent that the payment of the \$ 4,080 license fee will, necessarily, put CSU out of business. It is also not evident that if [\[**28\]](#) CSU passes on some or all of the licensing fee to its customers, the higher prices paid by the public will exceed the true value of the service provided.

Moreover, [HN15](#)[↑] upholding the rights of a copyright holder is generally regarded as being in the public interest. *Id.* We note that the injunction is narrowly tailored so as not to reach only the most blatant of CSU's alleged copyright infringement. Overall, the public interest is best served by the issuance of the [\[*1546\]](#) injunction to prohibit CSU from continuing to thumb its nose at the requirements of the Copyright Act.

Conclusion

¹ Throughout the course of this litigation, CSU has levelled accusations of monopolistic activity based on internal Xerox documents pertaining to ISO competition. While certainly relevant to CSU's antitrust claims, these documents do not affirmatively establish misuse by Xerox of its copyrights.

910 F. Supp. 1537, *1546 1995 U.S. Dist. LEXIS 19558, **28 38 U.S.P.Q.2D (BNA) 1273, ***1280

We conclude that Xerox has met the requirements for the issuance of a preliminary injunction. An injunction is consistent with our authority [**29] under 17 U.S.C. § 502 in that it is necessary to prevent and restrain further infringement of Xerox's copyrights by CSU.

IT IS THEREFORE ORDERED that Xerox's motion for preliminary injunction (Doc. #109) is granted, on the condition that, pursuant to Federal Rule of Civil Procedure 65(c), Xerox post security, within fourteen (14) days, in the amount of \$ 375,000 to assure payment to CSU of any damages incurred in the event Xerox does not ultimately prevail on its copyright infringement claims at trial.

IT IS FURTHER ORDERED that CSU shall, within ten (10) days of the posting of security in this matter, deliver to Xerox all unauthorized copies (whether made by CSU or acquired from unlicensed sources) of Xerox manuals and floppy disks containing diagnostic software for the 5090 copier which are in CSU's possession, custody, or control.

IT IS FURTHER ORDERED that CSU and its officers, agents, servants, employees, and any other persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, are hereby immediately restrained and enjoined, pending trial, from: (1) reproducing Xerox manuals and/or distributing unauthorized [**30] copies of Xerox manuals or substantial portions thereof; and (2) acquiring, using, or distributing, in the absence of a license from Xerox, any floppy [***1281] disks or upgrade disks containing diagnostic software or diagnostic utility disks for the Xerox 5090 copier.

Dated this 11th day of December, 1995, at Kansas City, Kansas.

EARL E. O'CONNOR

United States District Judge

End of Document

Caribbean Broadcast Sys., Ltd. v. Cable & Wireless Plc

United States District Court for the District of Columbia

December 21, 1995, Date ; December 21, 1995, FILED

Civil Action No. 93-2050

Reporter

1995 U.S. Dist. LEXIS 19225 *; 1996-1 Trade Cas. (CCH) P71,263

CARIBBEAN BROADCAST SYSTEM LTD., and ALVIN KORNGOLD, Plaintiffs, v. CABLE and WIRELESS PLC, et.al., Defendants.

Core Terms

advertising, facilities, commerce, Defendants', subject matter jurisdiction, anti trust law, competitor, markets, radio

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN1[] Subject Matter Jurisdiction, Jurisdiction Over Actions

In deciding a motion to dismiss for want of subject matter jurisdiction, the allegations of the complaint should be construed favorably to the pleader.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Sherman Act, Jurisdiction

In order to invoke the jurisdiction of the court under the Sherman Antitrust Act, a plaintiff must allege conduct "involving trade or commerce" that has a direct, substantial and reasonably foreseeable adverse effect on U.S. trade and commerce. [15 U.S.C.S. § 6a\(1\)\(A\)](#). An anti-competitive effect on United States commerce is required for jurisdictional nexus, regardless of whether there was anti-competitive conduct in the United States.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

[HN3](#) [] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act of 1982, [15 U.S.C.S. § 6a](#) makes clear that the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

[HN4](#) [] International Aspects, International Application of US Law

When considering a motion to dismiss, all factual allegations in the complaint must be presumed true and liberally construed in favor of the plaintiff. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

[HN5](#) [] Sherman Act, Claims

In order to state a violation under [§ 2](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 2](#), for denial of use of essential facilities, a plaintiff must plead and 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.

Antitrust & Trade Law > Sherman Act > General Overview

[HN6](#) [] Antitrust & Trade Law, Sherman Act

The holder of the essential facility must be in competition with the deprived party for the essential facilities doctrine to apply.

Antitrust & Trade Law > Sherman Act > General Overview

[HN7](#) [] Antitrust & Trade Law, Sherman Act

A subsidiary's competition with a third person does not confer a "competitor" status on the corporate parent unless the parent impermissibly controls the day-to-day affairs of the subsidiary.

Antitrust & Trade Law > Sherman Act > General Overview

HN8 [+] Antitrust & Trade Law, Sherman Act

A sole proprietor may bring suit based upon alleged violations of the antitrust laws.

Counsel: [*1] For CARIBBEAN BROADCASTING SYSTEM, LTD., ALVIN L. KORNGOLD, plaintiffs: Philip John Mause, DRINKER, BIDDLE & REATH, Washington, DC.

For CABLE AND WIRELESS P.L.C., CABLE AND WIRELESS (WEST INDIES) LTD., defendants: Theodore Case Whitehouse, WILLKIE, FARR & GALLAGHER, Washington DC. For CARIBBEAN COMMUNICATIONS COMPANY, LTD., defendant: Terrence James Leahy, QUAESTUS, L.P., Milwaukee WI.

Judges: Gladys Kessler, U.S. District Court

Opinion by: Gladys Kessler

Opinion

MEMORANDUM OPINION AND ORDER

I. Introduction

Plaintiffs Caribbean Broadcasting System, Ltd. ("CBS") and Alvin Korngold¹ filed suit against Defendants Cable and Wireless PLC ("C&W")² [*2], Cable and Wireless West Indies ("WI")³, and Caribbean Communications Co., LTD ("CCC")⁴ alleging that all Defendants violated [sections 1](#) and [2](#) of the Sherman Act⁵ [*3], [15 U.S.C. §§ 1](#) and [2 \(1982\)](#), and that Defendant CCC violated section 43(a) of the Lanham Act, [15 U.S.C. § 1124\(a\)](#).⁶

¹ Plaintiff CBS is a limited liability company organized under the laws of the British Virgin Islands. CBS owns three FM radio stations in the Eastern Caribbean on the island of Tortola. Plaintiff Korngold is a U.S. citizen and resident, and is president and sole shareholder of CBS.

² Defendant C&W is a limited liability company organized and existing pursuant to the laws of the United Kingdom with its principal place of business located in London. It provides telecommunications services in and across countries throughout the world. In the British Virgin Islands, C&W operates through Defendant Cable and Wireless West Indies. C&W is also subject to the laws of the United States and the regulation and licensing of the Securities and Exchange Commission.

³ Defendant WI is a limited liability company organized pursuant to the laws of the United Kingdom with its principal place of business in Road Town, Tortola, in the British Virgin Islands. It provides local and long distance telephone services in the Caribbean. It benefits from commercial relationships with United States long distance telephone carriers.

⁴ Defendant CCC is a limited liability company organized pursuant to the laws of Montserrat, West Indies. CCC owns and operates an FM radio station on the island of Montserrat. CCC's corporate headquarters is located in Milwaukee, Wisconsin.

⁵ [Section 1](#) of the Sherman Antitrust 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 \(1982\)](#). [Section 2](#) of the Sherman Act supplements [section 1](#) by dealing with the end product of unreasonable restraints, namely, monopolization. [Section 2](#) declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." [15 U.S.C. § 2 \(1982\)](#).

⁶ Count 1 alleges that CCC disseminated false and misleading information about its radio network, in violation of Section 43(a) of the Lanham Trademark Act, [15 U.S.C. § 1124\(a\)](#).

This matter comes before the Court on Defendants' Motions to Dismiss⁷ for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, filed pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(1), (3), & (6).

[*4] II. Factual Background

Plaintiff CBS and the Defendants are telecommunications companies organized under the laws of the United Kingdom and operating in the Eastern Caribbean, outside the territorial limits of the United States. This lawsuit stems from Plaintiffs' attempt, back in 1984, to establish and develop television and radio broadcast stations in the British Virgin Islands. In an effort to raise revenues for that project, Plaintiffs attempted to sell advertising time to tobacco and liquor advertising markets covering the U.S. and British Virgin Islands and part of Puerto Rico. According to Plaintiffs, their efforts were thwarted by CCC's "(deceptive practices which created a substantial barrier to their entry into this market." Complaint at P 25. Specifically, Plaintiffs contend that CCC misrepresented the coverage and strength of radio GEM, a CCC-owned radio station. By so doing, Plaintiffs assert, Defendants established radio GEM as "the foremost vehicle by which U.S. companies advertise their goods in the Eastern Caribbean," thereby effectively eliminating the threat of competition from companies competing for the same advertising revenues. Complaint at P 30.

[*5] Plaintiffs further assert that when Defendant C&W purchased 27% of CCC in late 1986 or early 1987, C&W developed a direct interest in preserving CCC's monopoly power and excluding Plaintiffs from the relevant markets. To this end, Plaintiffs allege, Defendants "acted on a coordinated basis and engaged in a pattern of concerted action to protect Cable and Wireless' financial stake in CCC and maintain CCC's monopoly power." Complaint P 45. As a result of this pattern of concerted action, Plaintiffs contend that the commencement of their operations was delayed for three years.

Plaintiffs seek in this lawsuit to enjoin Defendants from continuing these practices and request treble damages for injuries suffered from Defendants' Sherman Act violations. Defendants argue, in their pending motions, that this Court is without subject matter jurisdiction and that dismissal is therefore required pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#).

III. Subject Matter Jurisdiction

HN1 [↑] In deciding a motion to dismiss for want of subject matter jurisdiction, "the allegations of the complaint should be construed favorably to the pleader." [Hohri v. U.S., 251 U.S. App. D.C. 145, 782 F.2d 227, 241 \(D.C. Cir. 1986\)](#). See also [Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 \(1974\)](#); [Walker v. Jones, 236 U.S. App. D.C. 92, 733 F.2d 923, 925-26 \(D.C. Cir. 1984\)](#).

HN2 [↑] In order to invoke the jurisdiction of this Court under the Sherman Antitrust Act, Plaintiffs must allege conduct ""involving trade or commerce" that has a "direct, substantial and reasonably foreseeable adverse effect [on U.S. trade and commerce]." ⁸ [15 U.S.C. § 6a\(1\)\(A\)](#). "An anti-competitive effect on United States commerce is

⁷ Although there are three Motions to Dismiss filed by three separate Defendants, this Court will only address the Motions to Dismiss filed by C&W and WI. These two motions are identical and have been consolidated for the purpose of opposition and reply. When referring to both Defendants, the Court will refer to them as "C&W." Judge Harold Greene's Order of December 22, 1993 mandated that "no opposition or reply directed to the pending motion to dismiss filed by CCC need be filed unless and until the Court, by further order entered after the Court's ruling on the motions of C&W and WI to dismiss the complaint, sets dates for such opposition and reply." (Order at 2). Therefore, Defendant CCC's alleged violation of the Lanham Act will not be considered herein.

⁸ Foreign Trade Antitrust Improvements Act of 1982, [15 U.S.C. § 6a](#), provides that the Sherman Act is inapplicable to conduct involving foreign commerce, except U.S. import commerce, unless the conduct has a "direct, substantial, and reasonably foreseeable" adverse effect on commerce in the U.S. or on the export commerce of U.S. businesses. See also [Matsushita Elec.](#)

required for jurisdictional nexus, regardless [of] whether there was anti-competitive conduct in the United States." *McElberry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1077 (S.D.N.Y. 1988).

[*7] Plaintiffs have not alleged necessary facts to substantiate a claim of adverse effect on U.S. commerce arising out of Defendants' alleged misconduct. The antitrust laws "were enacted for the protection of competition not competitors." *Association of Retail Travel Agents, Ltd. v. Air Transport Association of America*, 635 F. Supp. 534, 537 (D.D.C. 1986) (citations omitted). Plaintiffs' claims, however, relate to Defendants' alleged efforts to delay and disrupt the efforts of Plaintiff CBS to establish a radio station on Tortola Insofar as these acts harm Plaintiffs, they harm them in their status as potential participants, rather than current competitors, in the commercial broadcasting business. Plaintiffs have failed to present evidence demonstrating any detrimental effect upon competition among advertising media in the Eastern Caribbean. For example, the complaint is silent on the effect of the alleged conduct on pricing in the relevant markets. Moreover, the complaint does not suggest that prices or supply reached noncompetitive levels as a result of the alleged misconduct. The only harm Plaintiffs have alleged is harm to CBS itself. At most, this harm constitutes a basis for [*8] a commercial tort action.⁹

Further, **HN3**[↑] the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C. § 6a* "makes clear that the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers." Areeda and Hovenkamp, *Antitrust Law* 305 (1993 Supp.). See also *United States v. Western Electric Co.*, 604 F. Supp. 256, 261 n.3 (D.D.C. 1984), cert. denied, 480 U.S. 922 (1987) ("The antitrust laws do [*9] not apply to conduct involving trade or commerce with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect on commerce in the United States or on the export commerce of United States exporters.") (citations omitted); *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 89 L. Ed. 2d 538, 106 S. Ct. 1348 ("... American antitrust laws do not regulate the competitive conditions of other nations' economies").

Plaintiffs here are neither importers nor exporters of U.S. goods and services but are, rather, foreign sellers of a foreign product (namely, broadcast airtime on stations in Tortola). Further, Plaintiff CBS is a seller of media advertising (to tobacco and liquor advertisers), not a purchaser. Therefore it does not fall within the class of consumers that have allegedly been affected by anticompetitive conduct.¹⁰

[*10] Because there are no allegations that Defendants' alleged misconduct has had any kind of anticompetitive effect on U.S. advertisers or consumers, and there are no facts showing how U.S. commerce has been adversely affected, the antitrust claims must be dismissed for lack of subject matter jurisdiction, under *Fed. R. Civ. P. 12(b)(1)*.

IV. Failure To State A Claim For Which Relief May Be Granted Under Count XI Of The Complaint

HN4[↑] When considering a motion to dismiss, all factual allegations in the complaint must be presumed true and liberally construed in favor of the plaintiff. *Ramirez de Arellano v. Weinberger*, 240 U.S. App. D.C. 363, 745 F.2d 1500, 1506 (D.C. Cir. 1984). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *United States v. Western Electric Co.*, 604 F. Supp. 256, 261 n.23 (D.D.C. 1984).

⁹ An antitrust plaintiff must allege harm to competition, not just harm to itself as plaintiff; any other rule "would raise the specter of an antitrust action being used as a remedy for any tortious conduct during the course of competition." *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980); see also *Hunt v. Crumboch*, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945) (holding that the Sherman Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce).

¹⁰ Plaintiffs' only connection to U.S. commerce is that some of their broadcasts from Tortola are heard by some listeners in the U.S. and that some U.S. advertisers purchase time on their stations. Such a *de minimis* connection to U.S. commerce is not sufficient to justify jurisdiction.

Under Count XI of Plaintiff's Complaint, Plaintiffs allege that they were denied access to "essential facilities," which help communications entities enter relevant markets. The facilities in question here are (1) the local [*11] and long distance telephone system in the British Virgin Islands, and (2) the microwave relay system operating throughout the Eastern Caribbean. Plaintiffs claim that, as a result of the actions of the Defendants, CBS was excluded from the relevant markets and that, therefore, Defendants violated Section 2 of the Sherman Act, 15 U.S.C. § 2.

HN5[[↑]] In order to state a Sherman Act Section 2 violation for denial of use of essential facilities, a plaintiff must plead and 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), cert. denied, 464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983). Plaintiffs fail to plead a number of these elements.

First, Plaintiffs fail to allege sufficient facts to establish that Defendants denied them use of an essential facility. Plaintiffs claim that C&W and WI unreasonably denied CBS access to these facilities by submitting sham objections to the applications [*12] filed by CBS with the government of the British Virgin Islands and by publishing an erroneous telephone listing for CBS in the Tortola directory. Plaintiffs' complaint, however, never identifies any facility to which CBS was denied access nor a single instance in which access to a facility was actually requested or denied. Hence, Plaintiffs fail the third prong of the essential facilities test.

Second, **HN6**[[↑]] the holder of the essential facility must be in competition with the deprived party for the essential facilities doctrine to apply. Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976, 983 (9th Cir. 1988). Neither C&W nor WI was ever a competitor of Plaintiffs. Thus, Plaintiffs cannot substantiate an essential facilities claim.

Finally, Plaintiffs contend that, given CBS's attempt to compete with CCC, C&W's one-time purchase of a 27 percent minority interest in CCC is sufficient to substantiate an essential facilities claim. **HN7**[[↑]] A subsidiary's competition with a third person, however, does not confer a "competitor" status on the corporate parent unless the parent impermissibly controls the day-to-day affairs of the subsidiary. See United States v. Crocker Nat'l Corp., *13 656 F.2d 428, 450 (9th Cir. 1981), rev'd on other grounds sub nom. Bankamerica Corp. v. United States, 462 U.S. 122, 76 L. Ed. 2d 456, 103 S. Ct. 2266 (1983). C&W's minority ownership of stock alone is, therefore, insufficient to establish the requisite competition between Plaintiffs and Defendants C&W and WI to establish a Section 2 violation.

For the foregoing reasons, this Court finds that Count XI of the complaint must be dismissed under Fed. R. Civ. P. 12 (b)(6).

V. Standing As To Plaintiff Korngold

Plaintiff Korngold, the president and sole shareholder of Plaintiff CBS, seeks relief on behalf of CBS for the injuries allegedly sustained by CBS as a result of defendants' actions. Defendants contend that Korngold does not have standing as an individual to assert this cause of action on behalf of CBS. Rather, they assert, any claim arising out of injury to a corporation committed by a third party must be brought by the corporation itself. See American Airways Charters, Inc. v. Regan, 241 U.S. App. D.C. 132, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984).

Korngold responds that, because he operated CBS as a sole proprietorship prior to March 1989, and because much of [*14] the alleged conduct occurred prior to that date, he not only may, but must, assert these claims individually. The Court finds to the contrary.

While it is true that **HN8**[[↑]] a sole proprietor may bring suit based upon alleged violations of the antitrust laws, see, e.g., Eiberger v. Sony Corp. of America, 622 F.2d 1068, 1070 (2d Cir. 1980); Hays v. United Fireworks Mfg. Co., 420 F.2d 836, 837 (9th Cir. 1969), the complaint in this case contains no allegations that CBS was once a sole

proprietorship, or that Korngold was the sole proprietor, or even that CBS was later incorporated.¹¹ Plaintiffs cannot cure the deficiencies of the complaint as to Korngold's lack of standing by raising new and creative arguments in their Opposition to a Motion to Dismiss. This is especially true when the claims made in the Opposition are inconsistent with the allegations contained in the Complaint.¹²

[*15] Conclusion

For the foregoing reasons, the Court finds that Plaintiffs' entire complaint must be dismissed pursuant to [Fed R. Civ. P. 12\(b\)\(1\)](#) for lack of subject matter jurisdiction. Further, the Court finds that Count XI must be dismissed pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). Finally, the Court finds that Plaintiff Korngold's claims must be dismissed for lack of standing pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#). Defendants' Motion to Dismiss Counts 2 through 10 must therefore be granted.

Count 1 against CCC remains pursuant to Judge Greene's Order. Any appropriate dispositive motions relating to this Count must be filed by CCC within thirty days from the date of this Order.

12/21/95

Date

Gladys Kessler

U.S. District Court

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¹¹ Plaintiffs' reliance on the sole proprietorship of CBS was not asserted in the original complaint; rather, it was raised only by way of opposition to defendants' Motion to Dismiss.

¹² Despite the assertion in Plaintiff's Opposition that CBS did not exist until 1989 as an incorporated entity (Opposition at 37), the Complaint states that CBS, not Korngold, was the applicant for licensing in 1984. Complaint at P 35.